



REPUBLIC OF KENYA



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Bayusuf & 4 others v Marble Inn Developers Limited & 2 others & 2 others (Environment and Land Constitutional Petition E006 of 2023) [2023] KEELC 19835 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19835 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E006 OF 2023

SM KIBUNJA, J

SEPTEMBER 20, 2023

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 20(3)(A), 22, 23(3)(A)(B)(D), 24, 70, 165(3)(D), 258, 259(1)(A)(B)(C)(D) FOR VIOLATION OF ARTICLES 10, 35, 42 & 69 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INTERPRETATION OF SECTIONS 58 & 59 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999

BETWEEN

ABDULHAKIM AHMED BAYUSUF 1ST PETITIONER

SALIM HASSANALI BHALOO & SHEILA SALIM HASSANALI 2ND PETITIONER

JAMES MWATHETHE MULEWA 3RD PETITIONER

FARHIYA ABDI YUSSUF 4TH PETITIONER

ENGLISH POINT RESIDENCE LIMITED 5TH PETITIONER

AND

MARBLE INN DEVELOPERS LIMITED & 2 OTHERS 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY [NEMA] 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT



RULING

1st Respondent's Notice Of Preliminary Objection Dated The 19th April 2023

1. The Petitioners moved the court vide the petition dated the 8th March 2023 filed contemporaneously with the notice of motion of even date seeking for “conservatory orders in the form of a temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st Respondent, whether by itself, servant, agents, officers, contractors and or anyone claiming under her from proceeding with or carrying out deleterious or destructive activities particularly excavating or carrying out construction on property known as L.R. No. 7812/Section 1/Mombasa Mainland without prior compliance with Articles 10, 40, 42 and 69 of the Constitution of Kenya.” The application is premised on the sixteen (16) grounds on its face and supported by the affidavit of Abdulhakim Ahmed Bayusuf, the 1st Petitioner, sworn on the 8th March 2023. It is the Petitioners case that they are owners of L.R.Nos. MN/1/7813, MN/1/11164, MN/1/7817, MN/1/7818 and MN/1/7820 along Ludwig Von Graapf Road, Mkomani, Mombasa. That L.R No. 7812/ Section 1/ Mombasa Mainland, the suit property, is vested in the 1st Respondent and is adjacent to the property of the 1st Petitioner on the east side and that of the 2nd Petitioner to the west. That the suit property and others in the locality are subject to the special conditions that buildings shall be for one dwelling house occupying not more than half of the property. That contrary to the said conditions, the 1st Respondent has started erecting a nine floor development of 42 apartments and a penthouse, which development will fundamentally interfere with the Petitioners’ enjoyment and use of their properties. That the 1st Petitioner instructed MS. Oluga & Company Advocates to seek from the 3rd Respondent information whether any application for approval of change of user of the suit property and the development had been received and approval granted but no response has been forthcoming. That the Petitioners learnt from their advocate, Mr. Bryant, that the 3rd Respondent had by letter dated 7th August 2022 notified the 1st Respondent that it had approved their application dated 25th July 2022 for development on the suit property subject to the 1st Respondent inter alia undertaking adequate consultations with neighbours and neighbourhood; preparing, submitting to and obtaining the 2nd Respondent’s approval of an EIA project report, and registering the project with the National Construction Authority. That the 2nd and 3rd Respondents have colluded with the 1st Respondent and issued it with development approvals without ensuring that there was effective public participation and or failing to adequately brief the affected parties. That the Respondents have failed to enforce the applicable laws and regulations. That failure has resulted to the trampling of the petitioners’ rights under Articles 10, 40, 47, and 42 as read with Articles 69 and 70 of the Constitution.
2. The application is opposed by the 1st Respondent through the notice of preliminary objection dated the 19th April 2023 that raises six grounds that are about whether the court has no original jurisdiction to hear and or entertain the application and petition herein which deal with issues pertaining to issuance and compliance with the EIA license, which under section 129(1) of EMCA is a preserve of National Environment Tribunal [NET] and such matters can only come to this court on appeal.
3. The 1st Respondent also opposed the application through the replying affidavit of Nasir Ali Osman, a director, sworn on the 5th May 2023 in which he inter alia deposed that the Petitioners have failed to disclose the existence of a parallel litigation over the same subject matter and parties, being National Environment Tribunal Appeal No. 43 of 2022 filed on 7th November 2022. That the National Environment Tribunal matter has come up severally and vide a ruling delivered on the 13th April 2023, it upheld its jurisdiction in the appeal. That the Petitioners are therefore forum shopping and



the parallel litigation is likely to result to conflicting decisions over the same subject matter. That the Petitioners have also failed to disclose that they had on the 19th December 2022 filed ELC NO. 39 of 2022 which came up before Matheka J on the 24th January 2023, but they withdrew it after the Respondents filed preliminary objection and grounds of opposition. That the 1st Appellant in NET Appeal No. 43 of 2022 and Petitioner in ELC No. 39 of 2022 are father and son, and both claim that they reside on L.R No. 7812/Section 1/ Mombasa Mainland North. That the 1st, 2nd 4th petitioners in this matter are the 1st, 3rd, and 6th Appellants respectively in NET Appeal No. 43 of 2022 while the director of the 5th petitioner in this petition is the 2nd Appellant in the NET appeal. That Bryant's Law LLP Advocates is the same firm through which all the litigations detailed herein above were filed in different courts. That the 1st Petitioner has also failed to disclose that he has a five storey building on a plot that neighbours the suit property. That public participation was conducted as confirmed by the questionnaire that 1st Petitioner admits was left at his gate but did not fill. That the EIA report annexed by the petitioners confirms that public participation was carried out and that the development was for seven storey and not nine storey building as alleged. That the conservatory order issued has exposed the 1st Respondent to pay six million shillings per month to its contractor as charges for the suspension of the construction. That the issues pertaining to EIA license are a preserve of the NET and this court is without original jurisdiction in the matter. That to allow this petition to continue parallel to the NET appeal will hinder the 1st Respondent's right to a lawful, reasonable and fair administrative process. That the notice of motion and the petition should therefore be struck out to avert embarrassment and confusion by having two parallel matters running concurrently in two separate judicial processes with the live possibility of there being two different decisions.

4. That after hearing counsel for the parties on the 10th May 2023, directions were issued for the 1st Respondent's preliminary objection to be heard and determined first, through written submissions to be filed and exchanged within the timelines set. The learned counsel for the 1st Respondent, Petitioners and 3rd Respondent filed their submissions dated the 10th May 2023, 18th July 2023 and 24th July 2023 respectively. When the matter came up for highlighting of submissions on the 27th July 2023 at 10.45am only counsel for the 1st Respondent was present and he asked the court to fix a date for ruling.
5. The 1st Respondent submitted that it is within its right to raise the preliminary objection in accordance with the case of *Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd* [1969] EA 696. That this court established pursuant to Article 162 (2)(b) of the Constitution has no original capacity to deal with the issues in the application that pertains to issuance and compliance with the EIA license that is a preserve of the National Environment Tribunal [NET], under section 129 (1) of EMCA. The learned counsel cited the following decisions in support of their submissions that the court is without original jurisdiction and should strike out both the application and the petition;
 - a. *Samuel Kamau Macharia versus Kenya Commercial Bank & others* (2012) eKLR;
 - b. *Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd* [1989] eKLR;
 - c. *Benson Ambuti Atega & 2 Others versus Kibos Distillers Ltd & 5 Others* [2020] eKLR; and
 - d. *Kenya Ports Authority versus Modern Holdings* [2017] eKLR.
6. The learned counsel for the Petitioners submitted that the petition and prayers sought therein are not challenging the refusal to grant or transfer any license or any condition, limitation or restriction of a



license. That the “2nd Respondent has never revoked, suspended or varied any license relating to the suit property neither has the 2nd Respondent issued any restoration order or demanded any monies from the 2nd Respondent.” That what the Petitioners have sought in the petition is “protection of their fundamental rights to clean and health environment as provided under Article 42, the right to fair administration action as provided under Article 40 and an interpretation that the Respondent did not conduct effective public participation prior to the issuance of the EIA license as provided under Article 10 of the Constitution.” That therefore, the issues raised in the petition are not matters within section 129(1) of EMCA and the 1st Respondent’s preliminary objection is without merit and must fail. The counsel referred to Article 165(3) as read with 162(2) of the Constitution and section 3(3) of EMCA and submitted that it is this court, and not the NET, that has jurisdiction to deal with the issues under Articles 23 and 70 of the Constitution raised in the petition.

7. The learned counsel for the 3rd Respondent supported the 1st Respondent’s preliminary objection in their submissions. The counsel submitted that the court should down its tools and cited among others the cases of County Government of Migori versus I N B Management IT Consulting Ltd [2019] eKLR, Speaker of the National Assembly versus James Njenga Karume [1992] eKLR, and Bernard Murage versus Fine Serve Africa Ltd & 3 Others [2015] eKLR.
8. that from the notice of preliminary objection dated the 19th April 2023 by the 1st Respondent, and the submissions by the three learned counsel, the primary issue for the determination is whether the court has the original jurisdiction/capacity to hear and determine the issues in the application and petition herein. the second issue is which party bears the costs.
9. The court has carefully considered the preliminary objection, petition, notice of motion, submissions by the three learned counsel, superior courts decisions cited therein, provisions of the Constitution and statutes referred to and come to the following determinations;
 - a. That the 1st Respondent’s objection is on the ground that the court is without original jurisdiction to entertain and decide on the issues in the petition and application. That objection indeed raises a pure point of law, which if upheld will determine the application and or the petition. The court has noted that none of the parties has disputed that the question of jurisdiction is a pure point of law and the court therefore finds the ground satisfies the test in case of Mukhisa Biscuit Manufacturing Company Limited versus West End Distributors Limited (1969) EA 696.
 - b. The preliminary objection on jurisdiction should be determined first as was agreed by the learned counsel for the parties herein during the mention of 10th May 2023. This was the position taken in the cases of Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd [1989] KLR 1, [1989] eKLR] and County Government of Migori versus I N B Management IT Consulting Ltd [2019] eKLR, before moving to any other issue.
 - c. That a reading of prayers 3 and 4 of the notice of motion are similar in that they seek for the conservatory order to issue in the form of a temporary injunction to inter alia restrain the 1st Respondent from excavating or carrying out construction on the suit property without prior compliance with Articles 10, 40, 42, and 69 of the Constitution of Kenya. Articles 10, 40, 42 and 69 makes provisions for the national values and principles of governance, the protection of right to property, clean and healthy environment and obligations in respect to the environment respectively. The pleadings, especially at pages



5 and 6, starting with grounds (f) to (g) of the notice of motion is clear that the basis of the Petitioners complaints is in the EIA license issued to the 1st Respondent and the entire approval process of its application that was inter alia reportedly without effective public participation, and compliance with the applicable law and regulations.

- d. That the 1st and 3rd Respondents have submitted that the issues in the application and petition are matters related to the EIA license and this court is not the first port of call to seek redress from, in view of the provisions of section 129(1) of EMCA. The Petitioners disagree and hold the position that the prayers in the petition are for the protection of their fundamental rights to clean and healthy environment, right to a fair administrative action and determination whether the 1st Respondent conducted effective public participation which all fall outside the matters covered by section 129(1) of EMCA.

10. The four prayers in the petition are for a declaratory order of the petitioners right to clean and healthy environment that are being and likely to be violated by the 1st Respondent's development, injunction order directing 1st respondent to stop the development, a declaration that sections 58(1) & (2) and section 59(1) of EMCA are inconsistent with Articles 10, 35(1)(b), 35(2), 42 and 69(1)(d) of the Constitution and therefore null and void to the extent of the inconsistency, a declaration that sections 58 and 59 of EMCA gives the 2nd Respondent unfettered discretion to issue licenses without public participation and therefore infringes Articles 10(2) and 69(1)(d) and is not justified under Article 24 of the Constitution, and an order of mandamus for the 2nd Respondent to supervise public participation in respect to the development on the suit property that complies with section 59 of EMCA. The common thread in the superior courts decisions cited by the learned counsel in their respective submissions, including those by the Court of Appeal and the Supreme Court of Kenya, as I understand, is that where it is apparent the reason(s) behind a party or parties coming to a court of law is or are matters that could have been determined by the line ministerial entity or tribunal established by statute, the court shall be without the original jurisdiction, and it matters not that the litigation is framed in a way to include other questions that cannot be determined by such other entity. That is the essence of the doctrine of exhaustion and is exemplified succinctly by the Court of Appeal in the case of Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 others (2015) eKLR where the Court stated thus:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked”.

11. The Court of Appeal upheld the doctrine as a sound one and expressed the view that Courts ought to be fora of last resort and not the first ports of call any time that a dispute arises. The Respondents referred the court to the decision in the case of f C O D & another v Nairobi City Water & Sewerage Co. Ltd [2015] eKLR where what constitutes a constitutional issue was discussed before concluding that:

“The parties in this dispute are in agreement that the spectrum of the dispute before me revolves around a contract for supply of water to the Petitioners. In that regard, the Petitioners contend that they are entitled to supply of water since they have paid all their outstanding bills and that the alleged account with arrears does not belong to them in any way. In that context, where is the constitutional issue that the Court is called upon to determine?”



12. I have seen the Petitioners’ Petition which is premised under the provisions of Articles 26, 27, 28, 35, 43, 46, 47, 48 and 50 of the Constitution. As much as the Petitioners have alleged a violation of those rights it must be remembered that the crux of their case is based on a contract for supply of water which has allegedly been terminated. It has not been alleged in any way that the Respondent has refused to grant access to the Petitioners to clean and safe water. It is indeed admitted that the Petitioners had been connected and had not only access but supply of water before a dispute arose between the parties. The question then would be whether the Parties had performed their respective obligations under the contract to supply water. In my judgment, the court can do so but not through a constitutional petition.
13. The High Court in International Centre for Policy and Conflict and 5 Others –v- The Hon. Attorney-General & 4 Others [2013] eKLR observed as follows:
- “An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.”
14. The foregoing legal truism was restated by the Court in the case of Issa Ahmed & 15 others v Mohamed Al-Sawae [2021] eKLR as follows:
- “It is common ground that the issue at hand in this matter was about physical planning and execution of an existing development plan. The issues were purely matters of planning and development that are covered under the Physical Planning and Land Use Act. For the aforesaid reasons, I am persuaded that the Plaintiff ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical Planning and Land Use Act before engaging the Environment and Land court.”
15. And in the case of Kibos Distillers Ltd & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR, the Court of Appeal observed in part:
- “As aptly stated by the Supreme Court in Samuel Kamau Macharia and Another-v- Kenya Commercial Bank Ltd and 2 Others (*Supra*), jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleading to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute”.
- The court went further to state:
- “..... further, I observe that the jurisdiction of the ELC is appellate under Section 130 EMCA. The ELC also has appellate jurisdiction under Section 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.....”
16. The Supreme Court of Kenya added its voice on this issue in their decision in the appeal from the Court of Appeal in the case of Benson Ambuti Adega & 2 Others versus Kibos Distillers Limited & 5 Others



[2020] eKLR in which it inter alia held that the superior court should have reserved the issues that the tribunal did not have jurisdiction over, and await the outcome of the tribunal's decision over the matters it could handle, thereby affording any aggrieved party the opportunity to appeal to the court. The court would then determine any reserved issues, alongside any of the appeal filed, thereby ensuring the parties right to a fair hearing under Article 50 of the *Constitution* was protected. Further, in the case of *Speaker of National Assembly versus James Njenga Karume* [1992] KLR 21 the court held that;

“Where there is a clear procedure for redress of any particular ground prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”

17. That while the learned counsel for the Petitioners has made a good attempt at distinguishing the decisions of the Court of Appeal and Supreme Court of Kenya in the case of Benson Ambuti & 2 Others case [supra] from this petition, the fact remains that the most of the prayers in the petition herein fall within matters to do with the EIA License, and the processes leading to the approval of the 1st Respondent development application by the 2nd Respondent. Those are matters falling under the provisions of section 129(1) of *EMCA* and in which this court is without the original jurisdiction, and for that reason the 1st Respondent's preliminary objection is upheld.
18. The court has taken judicial notice of NET Appeal No. 43 of 2022 between the parties herein, that is reportedly pending determination. The tribunal vide the ruling of 13th April 2023 dismissed the preliminary objection on its jurisdiction raised by the 1st Respondent. The court is cautious not to express itself in a way that may appear to interfere with the appeal pending before the tribunal between the parties herein and I am cautious not to say more about it. It is however clear that the petitioners herein are also the appellants in the tribunal appeal, which when decided in whatever way, will most probably have an impact on most of the issues raised in this petition. It is therefore a waste of judicial time and resources to allow this petition to continue to hearing when the previously filed appeal between the parties, and over more or less the same issues is pending before the National Environment Tribunal [NET]. That in any case, the parties who will not be satisfied with the tribunal decision will have the right to come to this court on appeal.
19. The upshot of the foregoing findings is that the 1st Respondent has established its preliminary objection that this court is without the original jurisdiction to hear and determine the issues raised in the petition and the application dated the 8th March 2023 and filed on the 9th March 2023. The said preliminary objection dated the 19th April 2023 is hereby upheld with costs.
20. That as the Petitioners are the ones who filed this petition while well aware of the pending tribunal appeal, and as the 1st Respondent is successful in their preliminary objection, then the petitioners will pay the Respondents who opposed the petition and the application their costs.
21. Flowing from the foregoing determinations, the court finds and orders as follows;
 - a. That the 1st Respondent's preliminary objection on jurisdiction is hereby upheld, and the Petitioners application and petition dated the 8th March 2023 are hereby struck out.
 - b. That the Petitioners to pay the 1st and 3rd Respondents costs.
 - c. That the conservatory order of temporary injunction issued on the 10th March 2023 and severally extended is hereby vacated forthwith.



Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 20TH DAY OF SEPTEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

