



**Onyancha & 2 others v Angata Sugar Mills Limited & another (Environment & Land  
Petition E026 of 2023) [2023] KEELC 20922 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20922 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E026 OF 2023  
EK WABWOTO, J  
OCTOBER 19, 2023**

**BETWEEN**

**FRED NYANGARES ONYANCHA ..... 1<sup>ST</sup> PETITIONER  
WILFRED KOIKAI MUSERE ..... 2<sup>ND</sup> PETITIONER  
PAUL MARIPEI KIYIAPI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ANGATA SUGAR MILLS LIMITED ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. This ruling is in respect to three applications. The applications dated 30<sup>th</sup> May 2023, 5<sup>th</sup> June 2023, 20<sup>th</sup> June 2023 and a Preliminary Objection dated 21<sup>st</sup> June 2023.
2. The Petition was premised on the background that the 1<sup>st</sup> Respondent proposed to set up a sugar factory at Angata area of Transmara in Kilgoris. The 1<sup>st</sup> Respondent, towards compliance with provisions of the *Environmental Management and Coordination Act*, (EMCA) commissioned an Environmental Impact Assessment Study Report to be compiled and submitted to the 2<sup>nd</sup> Respondent.
3. Upon receipt of the Study Report, the 2<sup>nd</sup> Respondent published an advertisement in the local dailies inviting comments from members of the Public and proposed to issue a licence to the 1<sup>st</sup> Respondent for purposes of sugar milling. The Petitioners were aggrieved and consequently filed the Petition and a Notice of Motion dated 30<sup>th</sup> May, 2023 seeking prohibitory injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.



4. The 1<sup>st</sup> Respondent raised a Notice of Preliminary Objection by dated 21<sup>st</sup> June 2023. The Preliminary Objection was premised on the following grounds: -
  - i. This Honourable Court lacks the requisite jurisdiction to hear and determine the Notice of Motion dated 30<sup>th</sup> May, 2023 by operation of Regulation 22 as read with Regulation 23 of the *Environment Management (Impact Assessment & Audit) Regulations*,
  - ii. This Honourable Court lacks geographical jurisdiction to entertain the instant Petition by operation of Rules 3 and 8 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013.
  - iii. The exclusive jurisdiction to review the legal validity of the Environmental Impact Assessment Study Report submitted by the 1<sup>st</sup> Respondent vests in the National Environment Management Agency (hereinafter referred to as “the Authority”) together with its Committees.
  - iv. This honourable court exercises appellate jurisdiction over decisions of the National Environment Tribunal pursuant to section 130 of the *EMCA*.
  - v. The institution of the instant proceedings in this honourable court is an affront to the doctrine of exhaustion of remedies and the provisions of article 159(2)(c) of the *Constitution* of Kenya, 2010
5. The Petitioners also filed an application dated 20<sup>th</sup> June 2023 seeking to cite the Respondents for contempt.
6. On 27<sup>th</sup> July 2023, the Court granted leave to the parties to file submissions with respect to all pending applications upon which the court would render its ruling.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed written submissions dated 13<sup>th</sup> September 2023 and 21<sup>st</sup> September 2023 respectively. It was submitted that since the 2<sup>nd</sup> Respondent had suspended the EIA license-NEMA/EIA/PSL/26123 that had been granted on 7<sup>th</sup> June 2023, it was sufficient proof that they had acted on good faith and could not be found to be in contempt of the Court’s orders.
8. The 2<sup>nd</sup> Respondent also filed a Reply to the Notice of Motion dated 20<sup>th</sup> June 2023 in which it was submitted that suspension of the license is sufficient and there is no need for cancellation as the same would only be done with directions of the Court. Cancellation of the license prematurely would be strenuous to both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and if in the event that the Court rules in its favour, it would have to apply for a new license and go through the entire process again. It was submitted that the application dated 20<sup>th</sup> June 2023 for Contempt Orders ought to be dismissed and that this Petition be transferred for consolidation and determination with Kilgoris ELC JR E003 of 2023.
9. Having considered the submissions, rival affidavits and supporting documents, it is evident that the issues for determination before this Court are;
  - i. Whether the Court has jurisdiction to hear and determine the applications and Petition?
  - ii. If in the affirmative for (i) above, whether in light of doctrine of exhaustion and judicial restraint, the Court should grant the orders sought?



10. It is a well-established principle that jurisdiction is the foundation of any suit. This is echoed in the landmark case of *Owners of Motor Vessel "Lillians" v Caltex Oil Kenya Ltd* (1989) KLR I where it was held;
- “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 held the opinion that it is without jurisdiction.”
11. This Court is primarily guided by the provisions of Article 162 (2) (b), as read with Articles 165 (5) (b) of the *Constitution*, 2010, and Section 13 of *Environment and Land Court Act* No. 19 of 2011 which confers unlimited original and appellate jurisdiction in disputes relating to “the environment and the use and occupation of, and title to land.”
12. With regards to territorial jurisdiction, the Court is further guided by the provisions under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practise and Procedure Rules* 2013. Rule 8 provides that:
- “(1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.
- (2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.
13. This Court has further considered the Gazette Notice No.5178 dated 25th July 2014 where under Note 14:
- “14. All new cases relating to the environment and the use and occupation of, and title to land not falling under paragraph 8 above, shall be filed in the nearest Environment and Land Court for hearing and determination by the said court and must be within the purview of the jurisdiction conferred upon the Environment and Land Court with particular regard to the jurisdictional limitation set under Article 262 (2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act* No.19 of 2011.”
14. In my interpretation of the Rules, the onus to ensure proper filing is upon the Petitioner and if the said action is deemed to be erroneous, the Court is at liberty to step in or grant leave for either party to correct its error. In this instance, the 1<sup>st</sup> Respondent argued that the 2<sup>nd</sup> respondent will prefer to file its substantive response to the issues in both petitions, in the correct Petition and place and save on precious time
15. The Court has considered the claim of an existing suit on the same subject matter being Judicial Review Application 003 of 2023 pending determination in ELC Kilgoris. It is most consequential that the Petitioner did not controvert the existence of the ongoing suit. In so far as the preliminary territorial jurisdiction is concerned, the Court must ensure resources are utilized prudently and that justice is dispensed in an expeditious and timely manner. In the case of *Chrispinus Munyane Papa & Another v National Environment Management Authority & Another* [2018] eKLR, it was stated:
- “...The *Practice and Procedure Rules* 2013 are subordinate to the *Constitution*, they do not limit the Court’s Jurisdiction to deal with the issues raised in the Petition but



provide guidance on where matters should be filed for the Court's good governance and operations..."

16. In my view, the mere finding that the court may have jurisdiction to entertain a constitutional petition, does not automatically imply that the court should proceed and determine the petition as it is, the doctrine of exhaustion and judicial restraint dictates otherwise. While the court's jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute before approaching the court, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of *Dawda K. Jawara v Gambia* ACmHPR 147/95-149/96- decision of the African Commission of Human and Peoples' Rights it was held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

17. Under Section 129 (1) of the *Environmental Management and Co-ordination Act* provides for a dispute resolution mechanism under the National Environmental Tribunal (NET). The Petitioner claims that at the time of filing the suit, the Tribunal was not sitting since their term had expired. This argument is neutralized by the fact that the Tribunal is fully constituted thus offering a proper mechanism in accordance to statutory requirements. In view of the foregoing, the 1<sup>st</sup> Respondent's objection succeeds only to the extent that the Petition is deemed to have been filed prematurely.

18. Consequently, this Court makes the following disposal orders: -

- a. The Notice of Motion applications dated 30<sup>th</sup> May 2023, 5<sup>th</sup> June 2023 and 20<sup>th</sup> June 2023 are unmerited and hereby dismissed.
- b. The Petition dated 30<sup>th</sup> May 2023 is hereby struck out.
- c. Each party shall bear own costs of the proceedings.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Mr. Orende for the Petitioners

Mr. Nyamurongi for the 1<sup>st</sup> Respondent.

N/A for the 2<sup>nd</sup> Respondent.

