



REPUBLIC OF KENYA



KENYA LAW
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Malindi Residents Development Group & another v County Government of Kilifi & 4 others; Hagemann & 5 others (Interested Parties) (Petition 6 of 2022) [2023] KEELC 22602 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22602 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION 6 OF 2022

MAO ODENY, J

NOVEMBER 24, 2023

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS

UNDER THE ARTICLES 2, 10, 19, 20, 22, 35, 42, 43, 46,

69, 70 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND

COORDINATION (AMENDMENT) ACT, 2015 AND

THE ENVIRONMENTAL MANAGEMENT AND

COORDINATION ACT, 1999

AND

IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION OF

KENYA AND CONTRAVENTION OF THE RIGHT TO

A CLEAN AND HEALTHY ENVIRONMENT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

BETWEEN

MALINDI RESIDENTS DEVELOPMENT GROUP 1ST PETITIONER

PROGRESS WELFARE ASSOCIATION OF MALINDI 2ND PETITIONER



AND

COUNTY GOVERNMENT OF KILIFI 1ST RESPONDENT
KILIFI COUNTY CECM FOR WATER, ENVIRONMENT AND NATURAL
RESOURCES 2ND RESPONDENT
KILIFI COUNTY CECM FOR LAND, ENERGY, HOUSING, PHYSICAL
PLANNING AND URBAN DEVELOPMENT 3RD RESPONDENT
BOARD OF THE MUNICIPAL COUNCIL OF MALINDI 4TH RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 5TH
RESPONDENT

AND

KARIM HAGEMANN INTERESTED PARTY
SHUKRAN ROBERT INTERESTED PARTY
DANIEL S CHARO INTERESTED PARTY
JACKSON M MWAKAZI INTERESTED PARTY
IRENE GODWIN INTERESTED PARTY
LEGAL ADVICE CENTRE (T/A KITUO CHA SHERIA) ... INTERESTED PARTY

RULING

1. This ruling is in respect of a Notice of a Preliminary Objection dated 10th June 2022 by the 1st Respondent on the following grounds:-
 - a. That this honourable court lacks jurisdiction to hear and determine the subject suit.
 - b. That the suit is therefore premature, frivolous and untenable.
 - c. That the Petitioners herein have failed and or neglected to exhaust the alternative means of dispute resolution as provided by section 32, 126 and 130 of the *Environmental Management and Co-ordination Act* No. 8 of 1999 (Rev 2019).
 - d. That where *the Constitution* or an Act of Parliament has provided for a procedure for resolving a dispute before approaching the court, it must be exhausted first as was held in the case of Republic v Council of Legal Education ex parte Desmond Tutu Owuoth [2019] eKLR.
 - e. That this suit is defective and bad in law.
 - f. That the suit is misconceived and an abuse of the court process and the same should be dismissed with costs to the Respondents.
2. Parties agreed to canvass the Preliminary Objection by way of written submissions, which were duly filed.



1st To 4th Respondents' submissions**

3. Counsel for the 1st Respondent submitted that the dispute preferred to this court ought to be handled within the ambits of the dispute resolution mechanism provided under the *Environmental Management and Co-ordination Act* No. 8 of 1999 [EMCA]. She further stated that Sections 31 and 32 of the said Act establishes the National Environmental Complaints Committee (NECC) and gives the Committee jurisdiction to entertain such issues as those in this Petition.
4. It was Ms. Mulewa's submission that the same Act establishes the National Environment Tribunal under Section 125, and proceedings thereon guided by Section 126 and 129 of the same Act. She added that the present Petition is premature, as the dispute ought to have first been adjudicated upon by the Tribunal or NECC before being brought to this court as envisaged under Section 130 of the said Act. Counsel relied on the cases of *Kibos Distillers Limited and 4 others v Benson Ambuti Adegwa and 3 others* [2020] eKLR.
5. Ms. Mulewa argued that where a dispute resolution mechanism exists, the same should be exhausted before invoking the jurisdiction of the court and relied on the cases of *Geoffrey Muthinja Kabiru and 2 others v Samuel Munga Henry and 1756 others* [2015] eKLR; *Speaker of National Assembly v The Hon James Njenga Karume* [1992] eKLR; *Anchor Limited v Sports Kenya* [2017] eKLR; *Republic v Council for Legal Education Exparte Desmond Tutu Owuoth* [2019] eKLR, and urged the court to dismiss the Petition with costs.

Petitioners' submissions**

6. Mr. Chesoli, counsel for the Petitioners submitted that the questions of enforcement of fundamental rights and freedoms were a preserve of this court and the doctrine of exhaustion would not apply in this case.
7. It was counsel's submission that the petition concerns violation of fundamental rights which is an issue to be addressed by this court as envisaged under Article 23, 165 and 162 (2) of *the Constitution* of Kenya and relied on the case of *Catherine Mwhaki Ngambi v International Leadership University* [2022] eKLR.
8. Counsel also cited the provisions of Article 70 as read with Articles 159 (1) and 162 (2) (b) of *the Constitution* and part 1 of the *Environment and Land Court Act*, and submitted that this court is empowered with jurisdiction to hear and determine any questions regarding the environment.
9. Further, that since the Petition raises a question under the bill of rights, (Article 42), the proper forum is the Environment and Land Court and relied on the cases of *Paolo Di Maria and 5 others v Alice M. Kuria and 5 others* [2021] eKLR; and *Ken Kasinga v David Kiplagat Kirui and 5 others* [2014] eKLR.
10. On whether the Petitioners failed to exhaust alternative means of dispute resolution, counsel submitted that the Petitioners' attempts to have the Respondents intervene and settle the dispute herein failed, prompting the present Petition.

Analysis And Determination

11. The principles to be applied in preliminary objections are now well settled as was discussed in the case of *Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd.* [1969] E.A. as follows:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. Similarly in the case of *Oraro –v- Mbaja* (2005) eKLR, the Court held that:-

“As already remarked, anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

13. A Preliminary Objection raises pure points of law, which stems from the pleadings filed by the parties. Courts have also severally held that a Preliminary Objection should be capable of disposing of the matter preliminarily without having to resort to ascertaining facts from everywhere as was held in the case of *Quick Enterprises Ltd –v- Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999 [2019] eKLR, that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

14. The Respondents have collectively argued that this court lacks jurisdiction to hear the case as filed by the Petitioners as a Court of 1st instance and may only hear the issues raised on Appeal, against a decision from the National Environmental Tribunal. It follows that the objection is on the jurisdiction of the court, which is a pure point of law, which has to be disposed of first.

15. The jurisdiction of a court to hear and determine a matter is everything and it has to be determined first. In the case of *The Owners of the Motor Vessel ‘Lillian S’ –v- Caltex Oil (Kenya) Ltd* [1989] eKLR, where the Court held that: -

“.... 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”.

16. A Court of law can only exercise jurisdiction as conferred to it by *the constitution* or other written law. The Respondents alleged that this Court has no jurisdiction because there is a process, which the Petitioners were required to follow as per the Environmental Management and Coordination Act (EMCA). The Respondents argued that since the Petition is on the inaction of the Respondents to prevent the burning of solid waste, the Petitioners ought to first have taken their grievances to the National Environmental Tribunal (NET) or the National Environmental Complaints Committee (NECC).

17. The Petitioners sought the following reliefs:

- a. That there be a declaration that their rights to a clean and healthy Environment has been infringed upon;
- b. A declaration that failure of the Respondents to develop and maintain a safe solid waste management system in Malindi is a violation to the Petitioners’ right to reasonable standard of sanitation;



- c. A declaration that the 2nd and 3rd Respondents have personally contravened and threatened further violation of the Petitioners' right to access publishing and publication of all information concerning the purchase of land for garbage collection.
18. The Petitioners also want this court to direct the 1st -4th Respondents to file a written report to this court on the progress made regarding the issues raised in the Petition. The Petitioners' case was that the 1st and 4th Respondents have continued to use open trucks to ferry rotting solid waste from various dumpsters within Malindi Town to a main dumpsite for burning, thus spreading smell and noxious fumes endangering the environment.
19. The Petitioners averred that despite various correspondence addressed to the 1st Respondent and seeking the intervention from the other Respondents, their grievances are yet to be addressed. Further that on 30th January 2021, the 5th Respondent issued a notice to the 1st Respondent to stop burning toxic waste at the said dumpsite but the order was ignored without any further intervention from the 5th Respondent.
20. As rightly submitted by the Respondents, EMCA establishes NET under Section 125. Section 129 further sets out the jurisdiction of NET as follows:
- (1) Any person who is aggrieved by—
 - (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
 - (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
 - (d) the amount of money required to paid as a fee under this Act or its regulations;
 - (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
21. Section 32 of EMCA provides for the duties of the National Environmental Complaints Committee established under section 31 as follows;-
- 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, to make a report of its findings together with its recommendations thereon to the Cabinet Secretary;
 - (b) to prepare and submit to the Cabinet Secretary, periodic reports of its activities which report shall form part of the annual report on the state of the environment under section 9(3);



- (bb) undertake public interest litigation on behalf of the citizens in environmental matters; and
 - (c) to perform such other functions and exercise such powers as may be assigned to it by the Cabinet Secretary
22. Section 130 of the EMCA further makes provision for appeals to the Environment and Land Court in the event that a party is aggrieved by the decision of the Tribunal. The Tribunal does not have the mandate to hear violations as provided for in the bill of rights.
23. The Petitioners seek for declaration of violation of rights under the bill of rights and states that the respondents have violated their right to a clean and healthy environment. Article 42 states as follows:
- Every person has the right to a clean and healthy environment, which includes the right—
- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
 - (b) to have obligations relating to the environment fulfilled under Article 70.
24. In the case of *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR the court held as follows:
- “ 50. So as to further safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured by Article 42, Article 70 of *the constitution* provides that if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury.
51. Provisions similar to those at Article 42 are found at Section 3 of the *Environmental Management and Co-ordination Act*, 1999 (EMCA). Under Section 3 (3) of EMCA, if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to this court and this court may make such orders, among others, to prevent, stop or discontinue any act or omission deleterious to the environment; to compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses.”
25. It is trite that the court has jurisdiction to hear and determine the Petition as it is about infringement of a right to a clean and healthy environment as provided for in the bill of rights. The court handle Petitions involving denial or violation of rights and not the Tribunal or the Complaints Committee.



26. Similarly in the case of African Centre for Rights And Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR the court observed that:

“....It is vital that all persons be vigilant about the protection of the environment and any person litigating for the sustainability of the environment deserves applause. Of course, each case must be considered in light of the facts tabled and the applicable law.

17. The petitioners grime is in the manner in which the respondent has managed a dumpsite in Naivasha. The petitioners are of the view that this dumpsite is not well managed and it poses a risk to the environment. They thus claim that the respondent has violated their right to a clean and healthy environment.”

27. The Respondent claimed that the Petitioners have not exhausted the laid down procedures for dispute resolution before approaching court. I find that the issue of exhaustion does not arise in this case as the Petitioners are in the right forum to seek redress for violation of their right to a clean and healthy environment.

28. I have considered the pleadings, the submissions by counsel and come to the conclusion that the Preliminary Objection by the 1st Respondent lacks merit and is therefore dismissed with costs to the Petitioners.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF NOVEMBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

