



**Ideal Namelok Residents Association v County Government of Kajiado & 2 others
(Petition E005 of 2023) [2023] KEELC 21525 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
PETITION E005 OF 2023
MN GICHERU, J
NOVEMBER 15, 2023**

BETWEEN

IDEAL NAMELOK RESIDENTS ASSOCIATION PETITIONER

AND

COUNTY GOVERNMENT OF KAJIADO 1ST RESPONDENT

DR. SALESIO NYAMU KAMWARA 2ND RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 3RD
RESPONDENT**

RULING

1. This ruling is on the 2nd Respondent's notice of preliminary objection dated 27/9/2013. The objection is based on the following grounds.
 - a. This court lacks jurisdiction to hear and determine the instant suit since the court has not been invoked properly in accordance with Section 130 of the [Co-ordination Act](#) (No 8 of 1999) on Appeals to the Environment and Land Court.
 - b. The instant suit violates the doctrine of res judicata as similar facts and issues were raised before the National Environmental Tribunal (NET) and the same was dispensed with vide a ruling delivered on 13/4/2023. The Applicant has not appealed against the decision of the Tribunal in accordance with Section 130 of the [Environmental Management and Co-ordination Act](#) (Act No 8 of 1999).
 - c. This suit relates to a decision that was made by the National Environmental Management Authority (NEMA) and as such should be heard and determined by the National Environmental Tribunal (NET) at the first instance in accordance with Section 129 of [EMCA](#) (Act No 8 of 1999).



- d. The petitioner's notice of motion and Petition dated 5/9/2023 filed herein are thus bad in law, an abuse of the court process and the same fail from the threshold.
2. The undisputed facts upon which the preliminary objection is anchored are as follows. The petitioner is an association of a community of residents living in a low density residential estate along Namelok Road. The 2nd respondent owns LR Kajiado/Kaputiei-84266 and 84267, suit land, within the same estate. In September 2021, the Petitioner received information that the 2nd Respondent, a developer, had applied for change of use and approval for construction of a medical clinic on the suit land. On 16/9/2021, the Petitioner objected to the second Respondent's application to the County Director Physical Land Use and Urban Development. The basis of the objection was that the estate was zoned and the project about to be undertaken by the second respondent contravened the zoning regulations. Despite the Petitioner's objection, the second respondent's project was approved and upgraded from a medical clinic to a level 5 hospital.
3. The Petitioners later learnt that there would be an Environment Impact Assessment Program taking place in their area on 8/1/2022. There was no prior communication. On learning about this, they objected to the proposed project to NEMA, Kajiado Office. Despite their protest, NEMA issued the EIA licence to the second Respondent. Dissatisfied with the action by NEMA, the Petitioner lodged an appeal with the National Environment Tribunal. The petitioners' appeal was dismissed for having been filed outside the 60 days allowed by the law.
4. In opposing the preliminary objection, the petitioner has filed a replying affidavit sworn by Ronald Kipramoi, its chairperson, dated 5/10/2022 in which he raises the following issues. Firstly, he contends that the petition presents the constitutional rights of members of the Petitioner against the actions of the respondent and this court has power to entertain it. Secondly, the National Environmental Tribunal did not hear the petitioners' appeal on merit having dismissed it under Section 129(1) of the *Environmental Management and Co-ordination Act*. Finally, the Petition does not just raise the issues dealt with by NEMA but other rights of the members of the Petitioner in opposition to the development of a hospital in their estate.
5. In addition to the replying affidavit, the Petitioner's counsel filed written submissions dated 5/10/2023 in which he says that the second respondent's response does not meet the threshold of a preliminary objection for the following reasons. Firstly, the issue of re judicata cannot be raised in a preliminary objection as this would be inviting the court to deal with factual inquiries and to call evidence from the parties. Secondly, the petition and the application before the court are multifaceted and raise more issues than those dealt with by NEMA. Thirdly, instead of calling for the striking out of the petition, the second respondent ought to have called for the striking out of NEMA as a party. Finally, the National Environmental Tribunal did not determine the Petitioners' appeal on merit hence the need to hear the petitioner in this petition.
6. In his written submissions dated 6/10/2023, the second Respondent's counsel identified only one issue for determination namely, whether this court has jurisdiction to hear and determine the petition and the application dated 5/9/2023.



7. I have carefully considered the preliminary objection in its entirety including the four (4) grounds, the undisputed facts, the issues raised in the affidavit by the petitioners' chairman, the issues identified by learned counsel for the parties, the submissions by both counsel and the law cited therein and the entire petition and the material filed by both sides and I make the following findings.
8. On the issue of the petition being re judicata, I am not certain that it is. I say so because I have not seen any decision by NEMA, NET or the Kajiado County Physical and Planning Land Use Planning Liaison Committee or any other Authority exhaustively dealing with the issues that the petitioner has raised in the petition dated 6/9/2023. If such a decision exists it has not been filed in these proceedings.
9. Secondly, I find that petition is multifaceted because it raises both environmental and planning issues. This is why it is averred at paragraph 15 that there was a meeting between the representatives of the petitioner and the 2nd respondent to consider the objection to the proposed change of use of the suit land. I believe that this is the reason why the County Government of Kajiado is a party in this petition.
10. Thirdly, I find the undisputed facts of this case provide sufficient anchor to the preliminary objection raised by the second respondent. As can be seen from paragraph 2 of this ruling, it is admitted by the petitioner that it has appeared before NEMA, NET and County Director of Physical Planning Kajiado over the second Respondent's project.

Secondly, the second respondent in the replying affidavit dated 6/10/2023 has annexed the application for change of user and a newspaper advertisement made on 31/8/2021, a copy of the Environmental Impact Assessment License dated 22/7/2022, a copy of appeal and the notice of motion dated 27/1/2023, a copy of notice of preliminary objection dated 24/3/2023 and a copy of the ruling delivered on 13/4/2023. The court needs look no further than that. The above material is sufficient.

11. Coming to the crucial question of jurisdiction, I find that both the [*Environmental Management and Co-ordination Act*](#) (Act No 8 of 1999) and [*Physical and Land Use Planning Act*](#) provide the procedure through which to approach this court in disputes concerning the environment and planning, use, regulation and development of land and related matters. These two Acts of Parliament oust the original jurisdiction of this court in these two areas. Such jurisdiction is conferred exclusively in the bodies created by the two statutes. Where a party has already appeared before the bodied created by the two statutes, the only avenue left open to such a party is through an appeal, to this court. There is no other option provided by the two statutes.
12. Section 130 of [*EMCA*](#)(Act No 8 of 1999) provides as follows.

1. " Any person aggrieved by a decision or order of the Tribunal may, within 30 days of such decision or order, appeal against such decision or order to the Environment and Land Court".

Section 61(3) and (4) of the [*Physical and Land Use Planning Act*](#) (Act No 13 of 2019) provides as follows.

- (3) "An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed".



- (4) “An applicant or an interested party who files an appeal under subsection (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court”.

From the above provision of statute, I am convinced by the argument put forth by the second respondent’s counsel that this court has no jurisdiction to deal with the issues raised in the petition except by way of appeal. Since the petitioner has not invoked the appellate jurisdiction of this court, I find the petition and the notice of motion dated 6/9/2023 are improperly before the court.

I uphold the preliminary objection dated 27/9/2023 thereby striking out the said petition and motion.

No order as to costs.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 15TH DAY OF NOVEMBER, 2023.

M.N. GICHERU

JUDGE

