



Skyship Company Limited & 3 others v Kenya Civil Aviation Authority; National Environment Management Authority & 2 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2023] KEELC 22433 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND PETITION E001 OF 2023
CG MBOGO, J
DECEMBER 19, 2023**

BETWEEN

**SKYSHIP COMPANY LIMITED 1ST PETITIONER
AFRO ECO-ADVENTURES LIMITED 2ND PETITIONER
ADVENTURES ALOFT KENYA LIMITED 3RD PETITIONER
BALLOON SAFARIS LIMITED 4TH PETITIONER**

AND

KENYA CIVIL AVIATION AUTHORITY RESPONDENT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY
NAROK COUNTY GOVERNMENT INTERESTED PARTY
ISHARA AIR BALLON SAFARIS LIMITED INTERESTED PARTY**

RULING

1. On 26th September, 2023, the 3rd interested party filed a Notice of Preliminary Objection dated 25th September, 2023 challenging the application on points of law on grounds that: -
 - a. The petition is not properly before the court as the petitioners/applicants have not exhausted the available remedies provided under Section 69 as read together with Section 70 and 77 of the *Civil Aviation Act*, 2013.
 - b. The suit is an abuse of the court process.



- c. The suit be struck out with costs to the 3rd interested party.
2. The petitioners filed grounds of opposition dated 27th September, 2023 in opposition thereto on the grounds that: -
 1. The subject preliminary objection is an affront to Articles 2 and 70 (1) of *the Constitution* of Kenya, 2010 in as far as it suggests that Section 69 as read together with Sections 70 and 77 of the *Civil Aviation Act*, 2013 is superior to the former.
 3. The Notice of Preliminary Objection was canvassed by way of written submissions. On the 26th October, 2023 the 3rd interested party filed its written submissions on even date. The 3rd interested party began by giving the background of facts and stated that on 18th May, 2023, the respondent issued the 3rd interested party with Air Service License to operate Hot Air Ballon at Olkiombo area for a period of one year. The 3rd interested party added that the said Air Service License was granted to the 3rd interested party after it obtained Environmental Impact Assessment License from the 1st interested party.
 4. The 3rd interested party submitted that this court, does not have jurisdiction to hear and determine the issues raised in the petition and the application for the reason that the petitioners have prematurely invoked the jurisdiction of the court before exhausting the mandatory statutory dispute resolution mechanisms contrary to the mandatory provisions of Section 69 of the *Civil Aviation Act*, 2013 and Section 9 of the Fair Administrative Act, 2015. Further, that there is established under Section 66 of the Act, the National Civil Aviation Administrative Review Tribunal to hear and determine complaints or appeals arising from any exercise of powers to make decisions granted to the respondent under the *Civil Aviation Act* or regulations made thereunder.
 5. The 3rd interested party further submitted that it is not in dispute that the petition stems from the respondent's decision granting the 3rd interested party license to operate Hot Air Balloon at Olkiombo area within the Maasai Mara National Reserve and that it is not also in dispute that the license was issued by the respondent in exercise of its powers under Section 7 of the Act. They submitted that the petitioners were under mandatory statutory obligation to first submit their grievance or complaint to the Review Tribunal. Further, that the jurisdiction of this court can only be invoked as an appellate court pursuant to Section 77 (1) of the Act if the petitioners are dissatisfied with the decision of the Tribunal.
 6. It was further submitted that the petitioners are seeking this court to exercise its review powers to quash the respondent's decision to issue the 3rd interested party with Air Service License, issued by the respondent in exercise of its administrative powers under Section 7 of the *Civil Aviation Act*. Further, that the jurisdiction of the court to determine the petition is only triggered once the petitioners have exhausted the available remedies. The 3rd interested party relied on the cases of Speaker of National Assembly versus Karume [1992] KECA 42 (KLR), Kibos Distillers Limited & 4 Others versus Benson Ambuti Adegga & 3 Others [2020] eKLR, Benard Murage versus Fine Serve Africa Limited & 3 Others [2015] eKLR, Francis Gitau Parsimei & 2 Others versus National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012, Shree Haree Builders Limited versus Baraza Alex Tabulo & Another [2016] eKLR and Republic versus Kenya Revenue Authority exparte Interactive Gaming and Lotteries Limited [2016] eKLR.
 7. On the 25th October, 2023 the petitioners filed their written submissions of even date. The petitioners submitted that by publishing its decision granting an Air Service License for one year with effect from 18th May, 2023 to the 3rd interested party, the respondent has endangered the petitioner's as well as the general public right to a clean and healthy environment which is reserved by Article 42 of *the Constitution*. Further, that the decision was made



- a. Without consideration and incorporation of the prescriptions set out in the Masai Mara National Reserve Management Plan as expressly required by law;
 - b. Without coordination with the relevant government agencies like the 1st and 2nd interested parties yet the 1st interested party, for example, is under the law the “principle instrument of government in the implementation of all policies relating to the environment.”
 - c. Without consideration of representations from industry players like the petitioners herein; and
 - d. Despite the glaring environmental concerns raised by the relevant sector players including but not limited to the 2nd interested party herein hence in ignorance of the law.
8. The petitioners submitted that any act or omission in contravention of *the Constitution* is invalid by operation of Article 2 (4) of *the Constitution*. Further, that Articles 41, 69 and 70 of *the Constitution* secure the right of every person to a clean and healthy environment. Further, that it is their belief that the 3rd interested party’s preliminary objection in claiming that there is a requirement to exhaust the remedies under Section 69,70 and 77 of the *Civil Aviation Act* falls squarely in the cross hairs of Article 70 of *the Constitution* and cannot stand.
 9. On the 1st November, 2023 the petitioners filed their supplementary submissions dated 30th October, 2023 where they raised issues which they felt compelled to highlight. The petitioners submitted that the interested party’s submissions, is an attempt to introduce evidence via submissions as it did not file any pleading supporting the contention that it was granted an Environment Impact Assessment License by the 1st interested party. They went on to submit that the 3rd interested party has deliberately chosen not to address the question as to whether the *Civil Aviation Act* is superior to Articles 2 and 70 (1) of *the Constitution* of Kenya. In conclusion, that this court is urged to sever the issues relating to the petitioners’ right to clean and healthy environment from other issues it has identified that can be dealt with at the Tribunal. The petitioners relied on the cases of Agatha Cheruto Kimaswai versus Attorney General & 3 Others [2021] eKLR and Dominic G Nganga & Another versus Director General National Environment Management Authority & 4 Others [2020] eKLR.
 10. On 10th November, 2023, the 2nd interested party filed its written submissions dated 31st October, 2023 where it raised three issues for determination as listed below: -
 1. Whether the preliminary objection is sustainable in law.
 2. Whether the court is barred by the doctrine of exhaustion.
 3. Whether there are any constitutional issues raised.
 11. On the first issue and while relying on the cases of Vincent Mwanthi Kioko versus Edward Sigei & 4 Others [2021] eKLR, Kenya Civil Aviation Authority versus National Land Commission & 3 Others; Kenya Commercial Bank Limited (Interested Party) [2021] eKLR, Jeremiah Memba Ocharo versus Evangeline Njoka & 3 Others [2022] eKLR and Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 Others [2013]eKLR, the 2nd interested party submitted that a court’s jurisdiction is derived from *the Constitution*, an Act of parliament or both. It was submitted that the petitioners moved this court seeking redress for the violation of fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution* and as such, this court has jurisdiction pursuant to Articles 162 (2) and (3) of *the Constitution* as well as Section 13 of the *Environment and Land Court Act*.
 12. On the second and third issues, the 2nd interested party submitted that assuming the 3rd interested party properly invoked the enforcement of Section 69 of the *Civil Aviation Act*, the same would still fail



for the reason that the issues raised by the petitioners constitute constitutional violation including the protection of the right to clean and healthy environment, glaring environmental concerns and consideration of the Maasai Mara National Reserve Management Plan. To buttress its submission, the 2nd interested party relied on Mombasa Civil Appeal No. 166 of 2018 Kenya Ports Authority versus William Odhiambo Ramogi & 8 Others [2019] eKLR and Okoiti versus Cabinet Secretary Industry Trade and Cooperatives & 2 Others (Environment & Land Petition E052 of 2021) (2022) KEELC 3728 (KLR) 28th July, 2022.

13. In conclusion, the 2nd interested party submitted that the petition and the application do not offend the doctrine of exhaustion and the same are properly before the court.
14. On 15th November, 2023, the 3rd interested party filed its supplementary written submissions dated 10th November, 2023. The 3rd interested party submitted that the authority in Agatha Jeruto Kimaswai versus Attorney General & 3 Others [2021] eKLR is inconsistent with the superior courts' decisions in Kibos Distillers Limited & 4 Others versus Benson Ambuti Atega & 3 Others [2020] eKLR and Benard Murage versus Fine Serve Africa Limited & 3 Others [2015] eKLR.
15. The 3rd interested party further submitted that although the petition raises constitutional issues, the dispute revolves around questions of approval and licensing under the [Civil Aviation Act](#) and that the primary dispute is centered on the decision of the respondent to issue the 3rd interested party with Air Service License but has been given a constitutional facemask. The 3rd interested party relied on the cases of Board of Management Murang'a High School (Suing on behalf of Murang'a High School) versus Water Regulatory Board & 2 Others; James Muchoki Muthoni (Interested Party) [2020] eKLR and Daniel Mwangi Nkonge versus Flamingo Horticulture Limited [2021] eKLR.
16. The 3rd interested party further submitted that the subject of the petition herein concerns the issuance of Air Service License which falls under the domain of [Civil Aviation Act](#) and as such, this court has no jurisdiction in the first instance. Reliance was placed in the case of James Mungai Munene (Chairman) & Another versus Joseph Githinji Kamau & 3 Others [2022] eKLR.
17. I have considered the preliminary objection and the rival submissions as well as the authorities cited by the parties and, in my view, the issue for determination is whether this court has jurisdiction to hear and determine the application and the instant petition.
18. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696 to mean: -

Per Law, JA

“So far as I am 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. Examples are an objection to 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”.

Further Sir Charles Nebbold, P stated that: -

“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”.

19. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the court held 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.”

20. It is also this court’s opinion that in determining a preliminary objection, the court will also consider that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where the court held thus: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

21. Before I embark on determining the merits of the preliminary objection, this court has to first determine whether what has been raised herein satisfy the ingredients of a preliminary objection. As the court determines whether what the 3rd interested party has filed amounts to a preliminary objection or not, the court will also be persuaded by the findings in the case of *Oraro versus Mbaja* (2005) 1KLR 141, where it was held thus: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

22. From the description above, I am satisfied that the preliminary objection before this court raises a pure point of law as it challenges the jurisdiction of this court to hear and determine the instant petition and application.

23. The petitioners herein filed the Notice of Motion Application dated 18th July, 2023 seeking conservatory orders against the respondent, by way of staying the decision of the respondent to grant the 3rd interested party an Air Service License for one year as was published in the Kenya Gazette Notice No. 6959 of 22nd May, 2023. The gist of the application and the petition is that following a public hearing on 13th January, 2023, for purposes of determining the application by the 3rd interested party for the grant of Air Service License, the 1st interested party wrote a letter to the stakeholders of Maasai Mara National Reserve that it had not granted any approvals and/or license to the 3rd interested party. Further that it was within public knowledge that the respondent opted to defer its decision on the issuance of the Air Service License and, without any communication, the respondent published its decision granting the 3rd interested party with the Air Service License for one year with effect from 18th May, 2023. According to the petitioners, the respondent disregarded the dictates of zonation and visitor user scheme as provided for in the Maasai Mara National Reserve Management Plan 2023 to 2032 that sets out details for balloon operations. Further, that in granting the license, the respondent contravened Regulation 19 (1)(c) of the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations 2018 and Regulation 19 of the Civil Aviation (Rules of Air) Regulations 2018.



24. The petitioners contended that the respondent ignored clear directives from the 1st and 2nd interested parties requiring the operators of hot air balloon to scale down their activities due to overcrowding and potential of adverse effects to the environment.
25. Section 13 of the *Environment and Land Court Act*, provides as follows:
- “(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2) (b) of *the constitution*, the court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
26. Article 42 of *the Constitution* states;
- “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”.
27. A further perusal of the petition shows that the respondent in arriving at its decision to grant the 3rd interested party with the Air Service License, may have violated *the Constitution* and fundamental rights and freedoms enshrined under Articles 10, 69, 35,47 and 70 (3) of *the Constitution*. My analysis of the above is that whereas there may exist other claims as regards the licensing which this court cannot delve into at this stage as it would be combing through the evidence, the application and petition are properly before this court. It is well settled in law that a court without jurisdiction should put its pen down and proceed no further. This was the holding in the renowned Case of Motor Vessel Lilian ‘S’ versus Caltex Oil(K) Limited [1989] eKLR.
28. Article 70 of *the Constitution* provides that any person who alleges that a right to a clean and healthy environment has been breached or is likely to be denied, violated or infringed may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter.
29. Section 3(3) of the Environmental Management and Coordination Act No. 8 of 1999, gives any party who alleges that his right to a clean and healthy environment has been or is likely to be violated to apply to the Environment and Land court for redress.



30. Arising from the above, I find no merit in the notice of preliminary objection dated 25th September, 2023 and it is hereby dismissed. I make no orders as to costs. Further mention on 20th February, 2024. For further directions. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 19TH DAY OF DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE

