



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC PETITION NO. 7 OF 2021**

**IN THE MATTER OF ARTICLES 40, 42, 69 & 60 OF THE CONSTITUTION OF KENYA 2010;**

**AND**

**IN THE MATTER OF SECTION 58 & 59 OF THE ENVIRONMENTAL MANAGEMENT**

**AND COORDINATION ACT CAP 387 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 41, 56, 57 AND 58 OF THE PHYSICAL PLANNING ACT NO. 13 OF 2019**

**SALAT ADEN MOHAMED.....1<sup>ST</sup> PETITIONER/APPLICANT**

**MOHAMMED SALAT ADEN.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**NOOR ADEN ABDULLAHI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ABDIWELI ADEN ANDULLAHI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ATC KENYA OPERATIONS LIMITED.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF GARISSA.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. **Salat Aden Mohammed & Mohammed Salat Aden** (*the petitioners herein*) filed petition dated 22<sup>nd</sup> November 2021 seeking a declaration that the Respondents have violated their right to safe and healthy environment. They equally sought Orders for the cancellation of Environmental Impact Assessment license and development permit issued to the Respondents for the construction erection of a base transmitter tower on the property owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent by the 3<sup>rd</sup> Respondent and Orders directing the 4<sup>th</sup> and 5<sup>th</sup> Respondent to suspend and stop the 3<sup>rd</sup> Respondent from constructing the base trans receiver mast station pending the forensic audit on the procedural issues surrounding the legality of the construction of the base trans receiver station.

2. Contemporaneous with the petition, the petitioners filed Notice of motion dated and filed the same date seeking the following orders;

- a) Spent
- b) Spent
- c) Spent

d) Spent

e) That the court be pleased to issue a permanent injunction restraining the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by either themselves/ agents and/or servants from constructing of the base trans receiver stations tower at 1<sup>st</sup> and 2<sup>nd</sup> Respondents' property pending the hearing and determination of this suit.

f) That the Court be pleased to issue an Order compelling the 3<sup>rd</sup> Respondent to immediately suspend any operation and activities of the base transceiver mast station/tower pending the hearing and determination of this suit.

g) That the Ocs Garissa to ensure compliance of the Order granted by this Honourable Court.

h) That the Honourable Court be pleased to make such further or other Orders as it may deem just and expedient in the circumstances of the case.

i) Cost of the application be provided for.

3. The application is supported by grounds on the face of the application and the Supporting Affidavit sworn by the 1<sup>st</sup> Petitioner. He averred that he is the owner of the property Known as LR No. GSA/GSA/1838 and currently living on the said property which is 20 meters from the property owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and which has been leased out by the 3<sup>rd</sup> Respondent to carry out the construction of the said base transceiver station.

4. That on 13<sup>th</sup> November 2021, he learnt from a neighbor that a "telephone mast" was being constructed in their neighbourhood. On 15<sup>th</sup> November 2021, he noticed property belonging to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was hoarded off and construction materials were being dumped on the site together with 2 administration police officers.

5. That he sought audience from the 1<sup>st</sup> Respondent who informed him that he had leased out the property to the 3<sup>rd</sup> Respondent to construct a "telephone mast". On enquiry why he had not informed him and the other neighbours, the 1<sup>st</sup> Respondent reverted that the property was his and he could do with it as he wished.

6. The petitioner further averred that he went to the offices of the 4<sup>th</sup> Respondent who informed him that the 3<sup>rd</sup> Respondent had lodged an Environment Impact Assessment Report with the hope of getting a license to construct a base trans receiver station on the property. That the 4<sup>th</sup> Respondent proceeded to show him public participation forms lodged by the 3<sup>rd</sup> Respondent in its EIA Report which showed that he purportedly signed a no objection letter to the project.

7. He stated that he had never been invited to any public participation by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents and the signature on the public participation forms were forged and obtained without his consent. He reported the falsification to Garissa Police station and was issued Police OB No. 40/18/11/2021. He further averred that he proceeded to the Physical and planning approval department of the County Government of Garissa to inquire whether a change of user had been carried out on the property and whether they had approved the construction of the base trans receiver. However, the officials of the 5<sup>th</sup> Respondent informed him that they were not aware of the construction, and that no approvals had been given and no change of user had been done for the particular site.

8. That he implored the 4<sup>th</sup> and 5<sup>th</sup> Respondents to stop the construction but the fast has been in turn fast tracked.

9. The 4<sup>th</sup> Respondent issued a notice of Preliminary Objection dated and filed on 10<sup>th</sup> December 2021 raising the following grounds;

a. *That the jurisdiction of this Honourable Court has not been invoked properly by dint of Section 125, 126 and 129 of the Environment Management and Coordination Act.*

b. *This suit relates to a decision that was made by the National Environment Management Authority (herein after referred to as "NEMA") and as such, it should be heard and determined by the National Environment Tribunal at the first instance. This in now well established by the Court of appeal in **Kibos Sugar Ltd and Others vs Benson Ambuti Atega and Others (2020) eklr.***

c. *That the application dated 22<sup>nd</sup> November 2021 and filed herein is thus bad in law, defective, an abuse of the court process and the same ought to be dismissed with costs.*

10. The 3<sup>rd</sup> Respondent also filed grounds of opposition on 13<sup>th</sup> December 2021 raising the following grounds;

a. *That the petitioner has not demonstrated the principles of **Giella versus Cassman Brown.***

b. *That the said application is vexatious, malicious and intended to scuttle the operations and project of the 3<sup>rd</sup> Respondent.*

c. *That the application is devoid of material particulars and therefore lacks merit.*

d. *That the application is otherwise a gross abuse of the court process thus should be dismissed with costs.*

11. On 14/12/2021, this Honourable Court with the consent of the directed that the application herein canvassed by way of written submissions to be filed seven days from the date of the direction and seven days from the date of service thereof.

12. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants submitted that the 4<sup>th</sup> Respondent did not issue a license hence there was no determination emanating from the 4<sup>th</sup> Respondent for it to invoke the jurisdiction of the National Environment Tribunal. That the petition raises constitutional issues which is outside the mandate and jurisdiction of the tribunal. The applicants cited the provisions of Section 13 of the Environment and Land Court Act, Section 7, 9 and 58 of the Environment Management and Coordination Act (EMCA) and the following authorities i.e. **Mohammed Said vs County Council of Nandi (2013) ekr**, **Taib Investments Limited v Fahim Salim Said & 5 Others [2016] ekr**, **West Kenya Sugar Co. Limited vs Busia Sugar Industries Limited & 2 Others [2017] ekr**.

13. In support of the application the applicant submitted that the court should abide by the provisions of **Article 70 of the Constitution** and take the precautionary approach. He also submitted that there was no Public Participation and that the 3<sup>rd</sup> Respondent did not obtain a change of user permit as required under Sections 41 (3) as read with Section 52 of the Physical Planning Act. In this regard, he cited the case of **National Environment Tribunal Appeal No. Net 10 of 2019 Residents of New Valley Kitengela versus Director General Nema and Safaricom Limited, John Kabukuru Kibicho & Another v County Government of Nakuru & 2 Others (2016) ekr**, **Ken Masinga vs Daniel Kiplagat & 5 others, Nakuru Elc Constitutional Petition No. 50 of 2013, Douglas Onyancha Omboga & 3 Others v Joseph Karanja Wamugi & 4 Others [2019] ekr**

14. The 3<sup>rd</sup> Respondent submitted that the petitioners are aggrieved by the decision of the 4<sup>th</sup> Respondent hence instead of prematurely invoking the Court's Jurisdiction, they ought to have commenced an appeal before the National Environment Tribunal within 60 days after the occurrence of the event. That the petition is premature because the petitioner did not exhaust the remedies available and the Tribunal has jurisdiction to issue the reliefs sought under the provisions of Section 129 of EMCA. He cited the following cases i.e **Kibos Distillers Limited & 4 Others versus Benson Ambuti Atega & 3 Others [2020] ekr**, **Owner do Motor Vessel Lillian S vs Caltex Oil (Kenya) Ltd, Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others, Civil Appl No. 2 of 2011, Re Continental Credit Finance Ltd Nairobi (Milimani) HCC No. 29 of 1986 [2003] 2 EA 399, Josephat Muchiri Muiruri & Another vs Yusuf Abdi Adan Civil Appeal No. 715 of 2006.**

15. The 4<sup>th</sup> Respondent submitted that the motion application is in relation to the EIA License applied by and granted to the 3<sup>rd</sup> Respondent by the 4<sup>th</sup> Respondent and thus this matter is placed under the jurisdiction of the tribunal by dint of Section 129 of the EMCA. He cited the case of **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] ekr** among others which I have duly considered.

#### **Analysis and Determination**

16. The preliminary objection brings into fore the jurisdiction of the National Environment Tribunal vis-a-vis the jurisdiction of this Honourable Court. Critical to this is the question as to when a party can invoke the jurisdiction of the National Environmental Tribunal?

17. The petitioner herein alleges that the 3<sup>rd</sup> Respondent is constructing a base transmitter mass station prior to public participation and without a valid license. The 3<sup>rd</sup> and 4<sup>th</sup> Respondent contend that the issues raised are best dealt with at the National Environment Tribunal as the petitioner seeks to dispute the issuance of a license by the 4<sup>th</sup> Respondent.

18. I must state at this stage that neither the license nor the Environmental Impact Assessment has been attached by the 3<sup>rd</sup> and 4<sup>th</sup> Respondent.

19. **Section 31 of the Environmental Management and Coordination Act (EMCA)** establishes the **Public Complaints Committee**. **Section 32 of the EMCA** provides as follows;

**32. Functions of the Complaints Committee 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,**

20. The Jurisdiction of the National Environment Tribunal is provided under **Section 129** of the **EMCA**. The same provides as follows;

#### **129. Appeals to the Tribunal**

**(1) Any person who is aggrieved by—**

**(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;**

**(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;**

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

21. In *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* [2020] eKLR the Court held as follows;

“To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 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.

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

In addition, Section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider the prayer Nos. 1, 7, 8, 9 and 10 in the petition. It was never the intention of the Constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court.

In this matter, the key dispute in the petition before the trial court was whether the three appellants were polluting the environment and whether the three appellants EIA Licences were lawfully procured. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal or the NECC. To this extent, I find that the learned judge erred in usurping the jurisdiction of the Tribunal and or the NECC. I further find that the trial judge in usurping the jurisdiction of the Tribunal negated and rendered otiose the legal effect of Section 130 (5) of EMCA which makes the decisions of the ELC on appeal to be final. Having erred in exercising original jurisdiction in this matter, the learned judge erred in rendering superfluous and ineffectual the provisions of Section 130 (5) of EMCA.

22. In this case, despite there being no license issued by the 4<sup>th</sup> Respondent, the petitioners ought to have first filed a formal complaint with the Public Complaints Committee before instituting this petition. The same is yet to be done. The petitioner only admit having approaching the 4<sup>th</sup> Respondent to investigate the issues raised but there is no evidence of a formal complaint. The mandate of the Complaints Committee is wide as it encompasses “...any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya;..”.

23. I am Guided by the decision of **Kibos Distillers Limited** (surpa) that this court cannot usurp the jurisdiction of the National Environmental Complaints Committee and the National Environmental Tribunal. The petitioner has to exhaust the remedies available to him before invoking the jurisdiction of this Honourable Court.

24. It is this Court's Finding that the Preliminary Objection dated 10<sup>th</sup> December 2021 is merited and upheld. Consequently, the petition filed herein is premature and the same is hereby dismissed with cost to the respondents. It is so ordered.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT GARISSA THIS 28TH JANUARY,2022**

.....

**HON. E.C CHERONO**

**ELC JUDGE**

**In the presence of:**

**1. MR. ABDI FOR THE 1ST AND 2ND APPLICANTS/PETITIONERS**

**2. MR. NDOLO FOR THE 1ST, ,2ND AND 3RD RESPONDENTS AND HOLDING BRIEF GITONGA FOR THE 4TH RESPONDENT**

**3. IJABO: COURT ASSISTANT**