



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CONSTITUTIONAL PETITION NO. 127 OF 2016

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23 (3), 24, 27, 42, 47 (1), 70, 73 (1) (A) (I) – (IV) & 73 (2) (B) & (D) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

BETWEEN

MICHAEL MORAGIA NYACHAE 1ST PETITIONER

JITENDRA LILADHAR NAGDA 2ND PETITIONER

VERSUS

BUDDIES KISII LIMITED 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND RESPONDENT

KISII COUNTY GOVERNMENT 3RD RESPONDENT

RULING

1. Before me for determination is a preliminary objection taken by Mr. Begi Advocate on behalf of the 1st respondent, Buddies Kisii Limited to the effect that this court lacks jurisdiction to entertain the application by the petitioners dated 3rd March 2016 and the entire petition. The notice of preliminary objection dated 18th April 2016 was filed on the same date.

2. The petitioners have in the petition challenged the issue of a licence to the 1st respondent to operate a business under the name and style of **“Buddy’s Bar & Grill”** on LR No. **Kisii Municipality/Block III/198** by the 2nd and/or 3rd respondents on the grounds that the issue of the licence contravenes the **Environment Management and Co-ordination (Noise and Excessive Vibration Pollution Control)**

Regulations, 2009, the Environmental Management and Co-ordination Act No. 8 of 1999 and Article 42 of the Constitution 2010. The petitioners aver that unreasonably loud music and/or noise emanates from the 1st respondent's business premises and this has caused the petitioners loss and damage thus:-

- i. Inability to have meaningful/sufficient sleep and/or rest;**
- ii. Noise pollution;**
- iii. Violation of the right to a clean and healthy environment;**
- iv. Injury to comfort and repose.**

3. The petitioners' interalia seek a declaration that the issuance of the licence to the 1st respondent is in contravention of the applicable statutory legal provisions and the constitution aforesaid and constitute a violation of the petitioners' rights to a clean and healthy environment. The petitioners further seek an order revoking the permits, approvals and licences issued to the 1st respondent by the 2nd and 3rd respondents. The petitioners further by the chamber summons application seek the suspension of the license issued to the 1st respondent pending the hearing and determination of the substantive petition.

4. On 25th May 2016 the parties appeared before me for directions and as the 1st respondent's preliminary objection goes to challenge the court's jurisdiction to entertain the matter I directed that the preliminary objection be disposed of first. I further directed that the preliminary objection be argued by way of written submissions. The 1st respondent filed its submissions on 23rd June 2016 while the petitioners' submissions were filed on 30th June, 2016.

5. The 1st respondent submits that its preliminary objection is premised on the provisions of part XII of the **Environmental Management and Co-ordination Act (EMCA)** which establishes the National Environmental Tribunal (NET) and provides for the matters that the tribunal would have jurisdiction to handle. The National Environmental Tribunal is established under Section 125 of the **Environmental Management and Co-ordination Act** and its composition includes:-

- i. A chairperson nominated by the Judicial Service Commission who is a person qualified for appointment as a judge of the Environment and Land Court of Kenya,**
- ii. An advocate of the High Court of Kenya nominated by the Law Society of Kenya.**
- iii. A lawyer with professional qualification in environmental law appointed by the cabinet secretary; and**
- iv. Three persons with demonstrated competence in environment matters, including but not limited to land, energy, mining, water, forestry, wildlife and maritime affairs.**

6. The 1st respondent further submits in support of the preliminary objection that it is the National Environmental Tribunal that is seized with the original jurisdiction in a matter such as the instant matter and cites section 129 **Environmental Management and Co-ordination Act** to support its submissions arguing the dispute raised by the petitioners against the 1st respondent relates to the issuance and/or grant of the business licence by the 2nd and 3rd respondents to the 1st respondents for the operation of its business. Further the petitioners seeks the revocation, suspension or the vacation of the license issued to the 1st respondent which matters and issues the 1st respondent submits fall within the mandate of the National Environment Tribunal and thus this court lacks the jurisdiction to deal with the matter.

Section 129 **Environmental Management and Co-ordination Act** interalia provides thus:-

- 1. Any person who is aggrieved by-**

- a. A refusal to grant a licence or 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.
- e.

May within sixty days after the event against which he is dissatisfied appeal to the tribunal in such manner as may be prescribed by the Tribunal.

7. The 1st respondent asserts its preliminary objection is on a point of law and satisfies the criteria of what constitutes a preliminary objection as established in the case of **Mukisa Biscuits Co. Ltd –vs- West End Distributors Ltd [1969] E. A 696** where the court stated thus as per **Sir Charles Newbold, P:**

“...A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercised of judicial discretion.”

Law, J. A in the same **Mukisa Biscuits** case (supra) stated thus:

“...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.”

8. To the extent that the 1st respondent’s preliminary objection challenges the jurisdiction of the court to entertain the petition, it is properly taken and the court will have to determine whether indeed it is seized with jurisdiction. It is the 1st respondent’s submission that the jurisdiction conferred on this court under Article 162 (2) (b) of the Constitution and the **Environment and Land Court Act** Section 13 has to be exercised having regard to other statutory provisions which confer jurisdiction on other institutions such as the EMCA which has established the National Environment Tribunal (NET) to deal with matters and/or disputes that arise from the exercise by NEMA of its mandate under the provisions of the **Environment Management and Co-ordination Act**. The 1st respondent contends that a dispute such as the one the petitioners have brought before this court in the first instance lies to the National Environment Tribunal by way of an appeal by virtue of Section 129 (1) of the **Environmental Management and Co-ordination Act**. The 1st respondent argues that the petitioners ought to have appealed the grant of the licence to the 1st respondent, to the tribunal if they were aggrieved with its issue. The 1st respondent in support of its submission places reliance on the ruling by **Musinga, J.** (as he then was) in the case of **Kisii HCCC No. 8 of 2008 – Wakenya Pamoja Sacco Ltd –vs- Stephen Ogamba** where the judge in holding that the court has no original jurisdiction to deal with matters where there are other institutions that have been mandated by statute to deal with such matters placed reliance on the decision of the Court of Appeal in the case of **The Speaker of the National Assembly –vs- Hon. James Njenga Karume in Civil Application No. Nai. 92 of 1992** where the appellate judges held:-

“Where there is clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed.”

9. The petitioners submit that Article 162 (2) (b) of the Constitution as read with Section 13 of the **Environment and Land Court Act No. 19 of 2011** confer jurisdiction to this court in regard to disputes relating to environment and land. The petitioner argues that the 1st respondent's operation of its business on the premises is in contravention of Regulations 8 (1) and 16 (1) and (2) of the **Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) – (Control) Regulations, 2009** and specifically avers that the 1st respondent did not apply for and obtain a valid licence as required under Regulations 16 (1) and 16 (2) of the **Noise Control Regulations** to permit him to operate its business with the high level of noise that it was emitting or producing. Regulation 16 (1) and 16 (2) of the **Noise Control Regulations** provide that:-

16(1) Where a sound source is planned, installed or intended to be installed or modified by any person in such a manner that such source shall create or is likely to emit noise or excessive vibrations, or otherwise fail to comply with the provisions of these regulations, such person shall apply for a licence to the authority.

16(2) No person shall use any sound amplifying equipment in such a way that such equipment is or is likely to be heard outside of any building between 9.00pm and 7.30am of the next day, without a valid licence.

10. The petitioners submit that the 1st respondent has not demonstrated they obtained any licence as required under regulation 16 (1) and (2) of the **Noise Control Regulations** and further argue that without the issuance of such a licence under Section 129 (1) **Environmental Management and Co-ordination Act** the provision for appeal under the Section would have no application since it is only applicable where a licence or permit has been granted, refused or transferred under the Act or Regulations made thereunder. The petitioners maintain that the NEMA Tribunal only has jurisdiction to consider on appeal the merit or otherwise of the grant, refusal to grant or transfer of a licence or permit under the **Environmental Management and Co-ordination Act** or **Regulations** thereunder and cannot entertain claims on violations of Constitution provisions and/or give reliefs in the nature of declaration and/or award damages as this court has jurisdiction to do under Section 13 (7) of the **Environment and Land Court Act**. The petitioners contend it is only this court that can hear and determine claims of violations of constitutional rights under articles 42, 69 and 70 of the Constitution that the petitioners claim have been violated by the 1st respondent in the present petition.

11. The petitioners further contend the preliminary objection taken by the 1st respondent does not satisfy the test of what constitutes a preliminary objection as exemplified in the **Mukisa Biscuit** case (supra) as it does not involve a pure point of law but rather requires the court to undertake an extensive inquiry to establish the veracity of the facts and circumstances under which the 1st respondent is operating its business. To illustrate that this court has jurisdiction, the petitioners referred the court to the cases of **Rutongot Farm Limited –vs- Attorney General & 3 Others [2014] eKLR** and the case of **Gerick Kenya Limited –vs- National Environment Management Authority [2015] eKLR** where this court in the latter case held that by virtue of Section 13 (7) of the **Environment and Land Court Act** it had jurisdiction to hear a dispute respecting whether a grievance arising out of a licence issued by NEMA should not have been referred to the NEMA Tribunal rather than the court. In the matter however, the court was dealing with a judicial review application where the applicant sought to quash the decision by NEMA cancelling or revoking a licence issued to it. In the case the court properly held it had jurisdiction to entertain the suit.

12. The National Environment Management Authority (NEMA) established under Section 7 of the **Environmental Management and Co-ordination Act (EMCA)** is the agency that under the **Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution (control) Regulations** is mandated to issue or grant licences under the regulations in terms of Regulation 16. Section 101 of the **Environmental Management Co-ordination Act (EMCA)** sets the criteria for establishment of standards for noise control through the auspices of the Standards and Enforcement Review Committee established under the Act and Section 102 of **Environmental Management and Co-ordination Act** makes it an offence for any person to emit noise in excess of the noise emission standards

established under the Act.

13. Under Section 108 **Environmental Management and Co-ordination Act** the Authority (NEMA) is empowered to issue and serve on any person in respect of any matter relating to the management of the environment an environmental restoration order requiring the person to restore the environment to the state it was in or as near as possible to the state it was in before the taking of the action which is the subject of the restoration order. The restoration order may also prevent the person from taking any action that may reasonably cause harm to the environment amongst other terms as set out under Section 108 (4) of the Act. Section 117 of EMCA provides for the appointment of Environmental Inspectors whose duties under Section 117 (2) include **“to monitor compliance with the environmental standards established under this Act”**. Environmental Inspectors under Section 118 **Environmental Management and Co-ordination Act** have powers to prosecute in respect of any offences under the Act. Regulation 18 of the **Noise Control Regulations** provides how an application for a licence under the regulations is to be made and the factors that NEMA is required to consider in determining whether the licence should be issued.

14. I have made reference to the various provisions of **Environmental Management and Co-ordination Act** and the **Noise Control Regulations** to illustrate that there exists an elaborate legal framework under the **Environmental Management and Co-ordination Act** and the regulations made thereunder to deal with a situation such as in the present case where the petitioners claim the 1st respondent has contravened the **Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution (Control)) Regulations, 2009**. The broad objective and mandate of parliament in enacting the **Environmental Management and Co-ordination Act** (EMCA) is captured in the preamble to the Act and the object of the Act stated thus sums it well:-

“An Act of parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.”

15. My view is that NEMA as the agency mandated under EMCA to manage and ensure the environment is not degraded by any person or body has a primary duty of ensuring compliance with the Act and the Regulations made thereunder. It is on that basis NEMA must have visited the 1st respondent's premises and issued the letter dated 29th December 2015 annexed to the petitioners affidavit in support of the petition marked **“MM5”** which virtually permitted the 1st respondent to operate the business. The petitioners were aware of this decision by the 2nd respondent which in essence permitted the 1st respondent to operate the business that it had already set up. The petitioners' option in my view was to either challenge that decision before the standards and Enforcement Review Committee established under the Act or to prefer an appeal under Section 129 of **Environmental Management and Co-ordination Act**. The petitioners have strongly argued that since there was no licence issued to the 1st respondent no appeal can lie to the NEMA Tribunal as according to the petitioners a licence must either have been granted and/or refused for an appeal to lie to the Tribunal. This argument by the petitioners in my view ignores the provisions of Section 129 (2) of **Environmental Management and Co-ordination Act** which provides thus:-

129(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 matter.

16. The 2nd respondent's letter dated 29th December 2015 constituted such a decision and would thus be amenable to appeal to the Tribunal. NEMA and the committees established under the Act are comprised by persons with specialized expertise in their areas of specialization and equally the NEMA Tribunal is composed by persons with diverse competencies and no doubt would in the first instance be better suited to hear and determine matters of a technical nature as the matter now before the court. While Section 13(3) of the **Environment and Land Court Act** confers jurisdiction on this court to hear and determine

issues of infringement of, or threat to, rights of a fundamental nature under Articles 42, 69 and 70 of the Constitution such rights must be shown to have crystallized for them to be protected. The court further has jurisdiction under Section 13(7) **Environment and Land Court Act** to issue prerogative orders and to award damages and compensation. My view is that a statute such as **Environmental Management and Co-ordination Act, Physical Planning Act Cap 286 Laws of Kenya** and **Water Resources Management Act of 2009** which make provisions for specialized committees and/or tribunals must be permitted to exercise their mandate before the court can be seized with jurisdiction save for exceptional cases of judicial review in regard to which the court's intervention may be sought.

17. In the instant matter, it is my view that the **Environmental Management and Co-ordination Act** (EMCA) has prescribed a procedure for handling of grievances and/or disputes which arise from its application and/or the application of the regulations made under it. In the words of the Court of Appeal in the case of the **Speaker of the National Assembly –vs- The Hon. James Njenga Karume** (supra) the procedure set out thereunder should be strictly followed.

18. Thus in my view, the petitioners ought to have lodged an appeal before the NEMA Tribunal against the decision of the 2nd respondent permitting the 1st respondent to set up its business on parcel **Block III/198 Kisii Municipality**. I uphold the preliminary objection by the 1st respondent and the result is that the petitioners' application and the petition are struck out with costs to the 1st respondent.

Ruling dated, signed and delivered at Kisii this 29th day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Ochwangi for Nyamurongi for the petitioners

N/A for the 1st respondent

N/A for the 2nd respondent

N/A for the 3rd respondent

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE