



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC PETITION NO 2 OF 2020

DANIEL KARIUKI MBUGUA.....1ST PETITIONER
ELIUD KINYANJUI WACHA2ND PETITIONER
JOHN KARANJA KINYANJUL.....3RD PETITIONER
SAMMY MBUGUA4TH PETITIONER
EUNICE NJAMBI MBUGUA.....5TH PETITIONER
LUCY NYAMBURI NDUNGU6TH PETITIONER
CECILIA WANJIKU WAWERU..... 7TH PETITIONER
MOSES NDICHU NJERI.....8TH PETITIONER
GEORGE GAKURU MBUGUA9TH PETITIONER

VERSUS

JOSEPH NJENGA WACHAIYU..... 1ST RESPONDENT
EATON TOWERS2ND RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY3RD RESPONDENT
KIAMBU COUNTY GOVERNMENT4TH RESPONDENT
COMMUNICATIONS AUTHORITY OF KENYA.....5TH RESPONDENT

RULING

1. The nine petitioners in this petition sought the following reliefs against the respondents:

- (a) *A declaration that the respondents have violated the petitioners' rights to a safe, clean and healthy environment.*
- (b) *A declaration that Articles 40 of the Constitution are under threat of violation by the respondents.*
- (c) *A declaration that the rights of Artists [sic] guaranteed under Articles 42, 43(1) and 69(1)(e), (f) & (g) of the Constitution are under threat of violation by the respondents.*
- (d) *An order compelling the 5th respondent to immediately suspend the operation of all base transceiver mast stations operated by the 2nd respondent pending the forensic audit on procedural issues surrounding the legality of the construction of those mobile telephone base transmission masts constructed and operated by the 2nd respondent.*
- (e) *An order that the 3rd and 5th respondents do sanction an independent public survey and study of the effects on the*

surrounding environment, of all mobile telephone base transmission masts constructed and operated within Kenya.

(f) An order cancelling all the licences respectively issued to the 2nd respondent by the 3rd, 4th and 5th respondents, namely an environmental impact assessment licence a telecommunications licence and a development permission for the illegal construction and erection of a mobile telephone base transmission mast on L.R No Dagoretti/Ruthimitu/833 owned by the 1st respondent and leased to the 2nd respondent.

(g) An order directing the 2nd respondent to immediately dismantle and bring down the illegally constructed mobile telephone base transmission mast including its foundation on L.R No Dagoretti/Ruthimitu/833 owned by the 1st respondent and leased to the 2nd respondent.

(h) An order for the payment of general damages by the respondents to the petitioners for violating their right to a safe, clean and healthy environment.

(i) Costs of this petition.

(j) Any other relief that this honourable court may deem fit and just to grant.

2. The case of the petitioners was that they were the beneficial owners of parcels of land neighbouring or adjacent to **Land Parcel Number Dagoretti/ Ruthimitu/833** on which the 2nd respondent had erected a telecommunications mast. They contended that they “**did not witness**” the requisite environment impact assessment being conducted prior to the erection of the mast. They added that in June 2018, representatives of the 2nd respondent went to homes of two residents and gave the two residents forms to fill and sign, “**so as to allow erection of a cell tower on Parcel Number 833.**” The two residents signed the forms without knowledge of what they were signing. The two residents subsequently demanded that the forms which they had signed be “revoked”. All the other residents did not sign the forms.

3. They contended that despite their objection and protest against the erection of the mast, the 2nd respondent disregarded their concerns. Consequently, they lodged a complaint with the 3rd respondent and sought the licensing details of the project. The 3rd respondent did not avail the details. Aggrieved, they filed **Thika ELC Petition No 17 of 2018** which this court [Gacheru J] subsequently transferred to the Magistrate Court at Kikuyu. Subsequently, the Magistrate Court at Kikuyu struck out the case on the ground that it lacked jurisdiction.

4. It was their case that no environmental impact assessment was done in relation to the project. They further contended that no approval of change of user of the parcel of land had been availed to them. They added that the project posed adverse health implications to the residents and there was evidence of emissions from the cell tower which were bound to cause terminal illness, worst of them cancer.

5. The 2nd respondent responded to the petition through a replying affidavit sworn on 1/12/2020 by **Mark Lavi**. The case of the 2nd respondent was that there was proper public participation during the process of environmental impact assessment, leading to the procurement of the environmental impact assessment licence (EIA Licence). The 2nd respondent further contended that there was public participation leading to approval of change of user of the land. It was the case of the 2nd respondent that the project was fully licensed in all aspects. The 2nd respondent exhibited the following documents to support their case: (i) *EIA Project Report*, (ii) *Lease Agreement*; (iii) *EIA Licence*; (iv) *Approval by Kenya Civil Aviation Authority KCAA*; (v) *Newspaper Notice relating to change/extension of user*; and (vi) *Approval relating to extension of user of the land*.

6. The 2nd respondent contended that they were not aware of any complaint lodged with the 3rd respondent in relation to the project. The 2nd respondent added that the petition was *res judicata* and an abuse of the process of the court.

7. Apart from the replying affidavit, the 2nd respondent filed a notice of preliminary objection dated 3/9/2020, through which they objected to this petition on two key grounds: (i) that the petition was *res judicata*; and (ii) that this court lacked jurisdiction to adjudicate the dispute, by dint of the provisions of **Section 129** of the Environmental Management and Co-ordination Act. The said preliminary objection is one of the two items falling for determination in this ruling.

8. On their part, the 4th respondent filed grounds of objection dated 1/4/2021, in which they objected to the petition on the ground that the petitioners had failed / neglected to pursue the available statutory dispute resolution mechanisms provided under the **Physical and Land Use Planning Act 2019**. They objected to the jurisdiction of this court at this point, contending that this court is only vested with appellate jurisdiction in relation to disputes under the said Act. They added that similarly, under **Section 129** of the **Environmental Management & Coordination Act (the EMCA)**, the appropriate primary dispute resolution body vested with jurisdiction to adjudicate disputes of this nature is the **National Environment Tribunal (the NET)**.

9. Together with the said grounds of objection, the 4th respondent filed a notice of preliminary objection dated 1/4/2021 in which it urged the court to dismiss this suit on the grounds that: (i) the petition herein raises issues relating to planning, use and development of land and the adjudicatory body vested with primary jurisdiction to adjudicate the dispute is the **County Physical and Land Use Planning Liaison Committee** established under the Physical and Land Use Planning Act, 2019; and (ii) this court is not the right adjudicatory body to hear and determine disputes relating to EIA licences issued by the 3rd respondent. The preliminary objection by the 4th respondent, dated 1/4/2021, is the second item falling for determination in this ruling.

10. The 2nd respondent’s preliminary objection was canvassed through written submissions dated 22/6/2021, filed by the firm of *Coulson Harney LLP*. Counsel itemized the following as the two issues falling for determination in the preliminary objection: (i) *Whether the filing of the petition herein is res judicata*; and (ii) *Whether this court has jurisdiction to hear and / or determine the dispute between the parties in this petition*.

11. On the objection anchored on the doctrine of *res judicata*, counsel for the 2nd respondent submitted that the petition herein is an abuse of

the court process because it seeks reliefs identical to those that were sought by the petitioners in **Kikuyu PMC E & L Case No 71 of 2018**. Counsel cited **Civil Appeal No 80 of 1988; Pop-In (Kenya) Ltd & 3 Others v Habib Bank Ali Zurich (1990) KLR 609** and contended that the doctrine of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation.

12. On the second identified issue, counsel cited **Section 129** of the **EMCA** and argued that the EIA Licence having been issued pursuant to the provisions of the EMCA, all grievances relating to the licence should at the first instance be adjudicated at the NET. Counsel urged the court to dismiss the petition.

13. On their part, the 4th respondent filed written submissions dated 26/7/2021 through **J J Cheserek, Legal Counsel**. Counsel identified the following as the four issues falling for determination in the preliminary objection dated 1/4/2021: (i) *Whether this honourable court has jurisdiction to hear and determine the suit.* (ii) *Whether the issues for determination before this court fall under the jurisdiction of the County Physical and Land Use Planning Liaison Committee;* (iii) *Whether the issues relating to environmental impact assessment (EIA) licence can be adjudicated by this honourable court;* and (iv) *Whether the petitioners are entitled to the prayers sought before this honourable court.*

14. On issue numbers (i) and (ii), counsel submitted that under **Section 61(3)** of the Physical and Land Use Planning Act, 2019 (the **PLUPA**), the County Physical and Land Use Planning Liaison Committee is the proper body to adjudicate the dispute in this suit. Counsel added that under **Section 61(4)** of the **PLUPA**, this court is vested with appellate jurisdiction in disputes relating to development approvals, land use, and physical planning. On whether issues relating to EIA licencing can be adjudicated by this honourable court, counsel cited **Section 129** of the **EMCA** and submitted that the NET was the proper body to adjudicate the dispute in this petition. On whether the petitioners are entitled to the reliefs sought in the petition, counsel submitted that because the petitioners have failed to exhaust the available dispute resolution mechanisms, they are not entitled to the reliefs sought in the petition.

15. The petitioners filed written submissions dated 9/11/2020, through the firm of *Owaga & Associates*. Counsel for the petitioners identified the following as the two issues falling for determination in the two preliminary objections: (i) *Whether this petition is res judicata;* and (ii) *Whether this court has jurisdiction to hear this petition pursuant to Section 129 of the EMCA.* On the first identified issue, counsel cited the **Court of Appeal** decision in **The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR** in which the Court of Appeal outlined the essential elements of *res judicata*. Counsel submitted that the 2nd respondent had misconstrued and misinterpreted the provisions of **Section 7** of the **Civil Procedure Act**. Counsel argued that the essential elements of *res judicata* do not exist in the circumstances of this suit.

16. On whether this court has jurisdiction to hear this suit pursuant to **Section 129** of the **EMCA**, counsel cited **Article 162(2)** of the Constitution and **Section 13** of the **Environment and Land Court Act** and submitted that because this petition raises questions relating to the right to a clean and healthy environment, it falls within the original jurisdiction of this court. Counsel cited the decision in **Ken Kasing'a v Daniel Kiplagat Kirui & 5 others [2015]eKLR** and urged the court to reject the preliminary objections.

17. I have considered the notice of preliminary objection dated 3/9/2020,

brought by the 2nd respondent; and the notice of preliminary objection dated 1/4/2021, brought by the 4th respondent. I have also considered the parties' submissions on the two preliminary objections, the relevant legal frameworks; and the prevailing jurisprudence on the key issues falling for determination in the two preliminary objections. Two issues fall for determination in the two preliminary objections. The first issue is whether this petition is barred under the doctrine of *res judicata*. The second issue is whether this court is the proper primary adjudicatory body to adjudicate the dispute in this petition. I will make brief sequential pronouncements on the two issues in the above order.

18. Objection on the ground of *res judicata* was raised by the 2nd respondent. They contended that the petitioners instituted **Kikuyu PMC E & L Case No 71 of 2018 [sic]; Daniel Kariuki Mbugua & 8 others v Joseph Njenga Wachaiyu & 4 others** in which they litigated over issues similar to the issues raised in this petition. They further contended that the Magistrate Court at Kikuyu rendered a ruling in which it held that it did not have jurisdiction to adjudicate the dispute and struck out the suit. It was the considered view of the 2nd respondent that under the above circumstances, this petition is barred by the doctrine of *res judicata*.

19. I do not agree with the view taken by the 2nd respondent. A copy of the ruling in **Kikuyu PMC E & L Case No 71 of 2018** is part of the 2nd respondent's exhibits. It is clear from the ruling that the Magistrate Court found that it lacked the requisite jurisdiction to adjudicate the issues in the suit. The Magistrate Court struck out the suit without determining the issues in the suit. It cannot therefore be said that the issues in this suit were heard and finally decided by the Kikuyu Principal Magistrate Court.

20. The tenor and import of the doctrine of *res judicata* is contained in **Section 7** of the **Civil Procedure Act** which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

21. My understanding of the above legal framework is that, for the doctrine of *res judicata* to be successfully invoked, the issues in the former suit ought to have been raised, heard and finally decided. In the preliminary objection under consideration, the issues were raised but they were neither heard nor decided. The court downed its tools for lack of jurisdiction and struck out the suit without deciding the issues.

22. The Court of Appeal in **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** outlined the essential elements of the doctrine of *res judicata* as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was incompetent to try the subsequent suit or the suit in which the issue is raised.”

23. For the above reasons, I do not find merit in the objection anchored on the doctrine of *res judicata*.

24. The second issue in the two preliminary objections relates to the question as to whether this court is the proper primary adjudicatory body to hear and determine the issues raised in the petition. The dispute in this petition was triggered by the erection of a telecommunication mast on Land Parcel Number **Dagoretti/Ruthimitu/833** by the 2nd respondent. That project is a development which requires requisite statutory approvals under various legal frameworks. With regard to the issues raised in this petition, there exist statutory frameworks which provide clear mechanisms on how grievances relating to developments such as the impugned project are to be ventilated and adjudicated.

25. With regard to disputes relating to environmental impact assessment reports and licensing, the EMCA vests in the 3rd respondent the mandate to grant or decline to grant EIA licences, based on appropriate EIA reports. Whenever one is aggrieved by a decision of the 3rd Respondent in this regard, **Section 129 of the EMCA** requires that those grievances be first ventilated at and adjudicated by the NET. Under Section 130 of the EMCA, this court is vested with appellate jurisdiction in relation to those disputes. In its wisdom, Parliament vested in this court final appellate jurisdiction in those disputes.

26. As regards disputes relating to physical planning, land use, and land development, **the PLUPA** vests in the County Executive Member the mandate to grant or decline to grant requisite approvals. Where there are grievances arising from an approval granted by the County Executive Committee Member, **Section 61(3) of the PLUPA** requires that those grievances be ventilated at and adjudicated by the **County Physical and Land Use Planning Liaison Committee**. **Section 61(4) of the PLUPA** vests in this court appellate jurisdiction in those disputes.

27. What therefore emerges from the materials presented to this court at this point is that the court has been invited to exercise original jurisdiction in disputes where Parliament has created primary adjudicatory bodies and has vested in this court appellate jurisdiction over decisions of those primary adjudicatory bodies.

28. While I agree that in appropriate circumstances, this court can properly invoke its original jurisdiction under **Article 162(2)(b)** of the Constitution and **Section 13** of the Environment and Land Court Act, those circumstances do not exist in the present petition. Those circumstances would be said to exist in a situation where, for instance, the relevant primary adjudicatory body is, for one reason or the other, not sitting. In the present petition, there is a functioning NET. There is also a functioning County Physical and Land Use Planning Liaison Committee. It would therefore be inappropriate for this court to invoke its original jurisdiction under the present circumstances.

29. Our courts have umpteen times stated that where Parliament has established primary dispute adjudication bodies and mechanisms, those mechanisms must be exhausted before the jurisdiction of our superior courts is invoked. The Court of Appeal emphasized this principle in **Speaker of the National Assembly v James Njenga Karume [1992] Civil Application No Nai 92 Of 1992 (Nai 40/92 UR) eKLR** in the following words:

“In our view, there is considerable merit in the submission 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.”

30. Not too long ago, the **Supreme Court of Kenya** in **Benard Murage v Fine Serve Africa Limited & 3 others [2015] eKLR** outlined this principle in the following words:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

31. Similarly, not too long ago, the **Court of Appeal** in **Kibos Distillers Limited & 4 others v Benson Ambuti & 3 others [2020] eKLR** laid down the following principle relevant to these objections:

“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 legitimately been mandated to hear and determine a dispute.”

32. For the above reasons, my finding on the second issue in the two preliminary objections is that this court is not the primary adjudicatory

body to hear and determine the issues in this petition. The result is that the court finds that the jurisdiction of this court in relation to the dispute in this petition has been invoked prematurely. Consequently, I uphold the two preliminary objections on that ground.

33. The Supreme Court of Kenya in **Benson Ambuti Atega v Kibos Distillers Ltd & 5 others [2020]eKLR** emphasized that, where appropriate, the superior courts should remit the dispute to the relevant bodies for adjudication. Since there may be need to apply for enlargement of time and file appropriate pleadings in the prescribed forms, I will not remit this petition to those bodies. I will leave it upon the petitioners to

decide how best to approach those bodies.

34. It is therefore my finding that the dispute in this petition revolves around questions of approvals under the Environmental Management and Co-ordination Act (the EMCA) and the Physical and Land Use Planning Act (the PLUPA). The primary dispute adjudicatory body mandated to adjudicate environmental impact assessment licensing disputes under the EMCA is the National Environment Tribunal (NET). This is by dint of the provisions of **Sections 125 and 129** of the EMCA. The primary dispute adjudication body mandated to adjudicate physical, land use, and development approval disputes under the Physical and Land Use Planning Act 2019 is the County Physical and Land Use Liaison Committee. This court is vested with appellate jurisdiction in those disputes. The result is that I uphold the objection anchored on the provisions of the EMCA and the PLUPA. I accordingly strike out the petition on the above basis. The petitioners will be at liberty to ventilate their grievances in the relevant primary dispute adjudicatory bodies in accordance with relevant procedures.

35. Lastly, because there was no evidence that all the approvals which the 2nd respondent exhibited in their response had been availed to the petitioners prior to the filing of this petition, there will be no award of costs.

36. Having come to the above finding on the two preliminary objections, I will down my tools without making any further pronouncements.

37. In the end, the court makes the following disposal orders in relation to the 2nd respondent's preliminary objection 3/9/2020 and the 4th respondent's preliminary objection 1/4/2021.

(a) The petition herein is struck out on the ground that the jurisdiction of this court has been invoked prematurely.

(b) Parties shall bear their respective costs of the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 19TH DAY OF JANUARY 2022

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MR NYAMOLO FOR THE PETITIONERS

MR KUYO FOR THE 2ND RESPONDENT

MR MBAJI FOR THE 5TH RESPONDENT

COURT ASSISTANT: PHYLLIS MWANGI