



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. E050 OF 2021

MONTESSORI LEARNING CENTRE (MLC).....APPELLANT

=VERSUS=

KIMANI MATHU, CHAIRMAN,

ATUL SHAH, VICE CHAIRPERSON AND

CHRIS NDEGWA, SECRETARY, ALL

SUING JOINTLY AND ON BEHALF OF

KYUNA RESIDENTS ASSOCIATION.....1ST RESPONDENT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

SENGHANI INTERIOR LIMITED.....2ND INTERESTED PARTY

THE DIRECTOR GENERAL,

NAIROBI METROPOLITAN SERVICES.....3RD INTERESTED PARTY

(Being an appeal from the whole of the order of the National Environment Tribunal (NET) at Nairobi, delivered by Hon. Chairperson - Mohammed Balala, Hon Vice-Chairperson - Mrs Christine Kipsang, Hon. Members Mr. Bahati Mwamuye, Mr. Waithaka Ngaruiya and Dr. Kariuki Muigua of NET on 19th July 2021 in Tribunal Appeal No.NET 10 of 2021.)

RULING

- 1. The Appellant filed the Notice of Motion application dated 23rd July 2021.**
- 2. It was brought under Section 1A &1B of the Civil Procedure Act, Order 42 Rule 1 & 6, Order 51 Rule 1 of the Civil Procedure Rules and Section 130 of the Environmental Management and Co-ordination Act.**
- 3. It sought orders:-**
 - a) Spent.**
 - b) Spent.**

c) Pending the hearing and determination of this Appeal, the orders issued by the Honourable Chairperson - Mohammed Balala, Hon Vice-Chairperson - Mrs Christine Kipsang, Hon. Members Mr. Bahati Mwamuye, Mr. Waithaka Ngaruiya and Dr. Kariuki Muigua of NET on 19th July 2021 in Tribunal Appeal No.NET 10 of 2021 be set aside.

d) Costs of this application be borne by the 1st Respondent.

4. The application was based on grounds stated on the face of the application. It was supported by the annexed affidavit sworn on 23rd July 2021 by Sahil Dodhia, the Appellant's project manager.

The Respondent's response

5. In response to the application, the Respondent filed the preliminary objection dated 11th November 2021 which is for determination before this court. The respondent raised the following grounds:-

a) That the proceedings in the application and the appeal herein are fatally and incurably defective and ought to fail for running a foul the legal doctrine and principle of subjudice; by virtue of brazenly seeking to verbatim re-litigate herein various issues and matters pending determination before the Honourable National Environment Tribunal under NET Appeal 10 of 2021; Kimani Matu, Atul Shah & Chris Ndegwa suing on behalf of Kyuna Neighbours Association V NEMA, Montessori learning Association & Nairobi Metropolitan Services, by virtue of a Notice of Preliminary objection dated 5th August 2021, which objection(though unmerited) is pending delivery of Ruling by the Honourable Tribunal.

b) The proceedings by the Appellant are fatally defective for failure to properly invoke the Hon Tribunal's jurisdiction as the substance hereof is verbatim the very substance of the pending proceedings before the National Environment Tribunal, in light of the holding of the Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested parties) [2020] eKLR which affirmed that; "The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process& diminish the chances of courts with competent jurisdiction, issuing conflicting decisions over the same subject matter."

c) The subject appeal and application are regrettable instances of blatant abuse of judicial & legal process & should therefore be dismissed in limine with costs on a full indemnity basis.

6. On the 15th November 2021 the court with the consent of parties directed that the preliminary objection and the notice of motion be heard together. The court also directed that the parties do file and exchange written submissions.

The Respondents' Submissions

7. They are dated 11th December 2021. Counsel for the Respondent addressed the following issues:-

a) Whether the Appeal and application before the Honourable Court are fatally defective for want of jurisdiction as the subject matter of the dispute before court runs a foul the legal principle of res-sub judice by virtue of the pending proceedings in NET Appeal 10 of 2021.

b) Whether the Appellant's motion dated 23rd July 2021 is merited.

8. Counsel submitted that this court is legally divested of jurisdiction to entertain the instant application and appeal for reasons that the pending proceedings in **NET Appeal 10 of 2021** are similar to those now urged in the instant proceedings.

9. He further submitted that in the earlier proceedings in the Tribunal, the Appellant has lodged its objection on subject matter, jurisdiction, time bar and also the propriety of the statutory stop order under Section 129 (4) of Environmental Management and Coordination Act, which are the same issues dressed up as new and pleaded “a fresh’ under the 6 grounds of Appeal but more clearly in the application which confirms the substantial similarity in the issues before this court and the Hon. Tribunal.

10. He submitted that the suit is sub judice as it offends Section 6 of the Civil Procedure Act. He relied on the decision in **Thika Min Hydro Co.Ltd v Josephat Karu Ndwiga [2013] e KLR** to submit that the substance of a suit determines whether a suit is sub-judice.

11. While conceding that the Appellant has a right to challenge the propriety of the appeal before the tribunal and even the orders sought, he submitted that it is an abuse of the court process to invite an appellate court to consider a similar issue pending before a trial court lodged by the same party.

12. On the issue of merit of the application, he submitted that since the Appellant is seeking an equitable relief, he is enjoined to approach the court in good faith by disclosing all material facts. He added that in the contrary, the Appellant failed to disclose that he had filed at the Tribunal the preliminary objections dated 5th August 2021 and 4th July 2021 yet the subsistence of the said objections though unmerited are material to the appeal and the application.

13. Counsel pointed out that the Appellant is also misleading this court on a material compliance question as it supposes that it undertook an Environmental Impact Assessment study whereas it did not submit an Environmental Impact Assessment study report to the 1st Interested Party whereas in its reply before the Tribunal it admitted that it undertook an EIA project Assessment and submitted an Environmental Impact Assessment Report to the 1st Interested Party.

14. On whether the statutory stop order provided under **Section 129(4), Environmental Management and Coordination Act 1999** applied by the Hon. Tribunal in **NET Appeal 10 of 2021** upon filing was lawful and regular, he submitted that the law decrees it under that provision and parliament has twice sought to repeal the provision but the operationalization of the amendments was suspended by the High Court in **HC Petition 251 of 2017** and **Hc Petition 268 of 2018** which are currently consolidated and bending before the High Court.

15. He added that in light of the conservatory orders suspending repealment of the provision, the Honourable Tribunal is bound to apply the binding decisions of the High Court and as such it applies the provision including in **NET Appeal 10 of 2021**. He submitted that the Honourable Tribunal should be allowed to consider this question of the mandatory order in its original jurisdiction.

The Appellant’s Submissions

16. They are dated 30th November 2021. Counsel for the Appellant submitted that this court is clothed with jurisdiction to grant the orders sought, and further that granting the said orders would not offend the principle of sub-judice as the issues raised in **NET Appeal 10 of 2021** are distinct and dissimilar to the issues raised in the Appeal in that the orders the Appellant seeks to set aside were a barefaced violation of the trite principles of natural justice, and a violation of the Appellant’s right to a fair hearing as they were issued ex –parte without affording the Appellant an opportunity to be heard.

17. He further submitted contrary to the assertions in the Respondent’s Preliminary objection, the Appellant does not seek to re-litigate any issues that are currently pending before the Tribunal but merely challenges the issuance of the automatic stop orders of 19th July 2021 which were based on an erroneous interpretation and application of Section 129(4) of the Environmental Management and Coordination Act .

18. The tribunal erroneously found that upon filing of an appeal, the Section automatically required status quo to be maintained, essentially stopping any activity on the subject property. It was his submission that

Section 129(4) did away with automatic status quo as it used to be, and it now grants the Tribunal the jurisdiction to issue status quo or stop orders upon an application by a party.

19. He also submitted that the appeal and application is anchored on the fact that the tribunal in issuing the automatic stop orders violated the Appellant's legitimate expectation under Environmental Management and Coordination Act to conclude its construction project given that the Appellant had obtained all the necessary approvals, permits and licenses from the requisite authorities.

20. He submitted that the dicta, "jurisdiction is everything" stated in the case of **Owner of the Motor Vessel Lilian 's' v Caltex Oil Kenya Ltd [1989] KLR** should guide this court to find that the stop orders issued in **NET Appeal 10 of 2021** were issued in excess of the Tribunal's jurisdiction under Section 129(3)(d) and 129(4) as no application was made to the Tribunal to warrant issuance of the stop orders.

21. He also submitted that **Section 130(1)** of Environmental Management and Coordination Act gives a person aggrieved by a decision/order of the Tribunal jurisdiction to appeal to this court and **Section 130(2)** stays any enforcement of an appealed decision and order of the Tribunal yet rather than adhere to the said provision, National Environment Management Authority in enforcing the stop orders issued in **NET Appeal 10 of 2021** wrote to the Appellant vide the letter dated 15th July 2021 illegally suspending the Appellant's Licence Ref. NEMA/EIA/PSL/10439& further directing the Appellant to immediately stop any further activity on the subject property until the appeal at the Tribunal was heard and determined. He added that while Section 130(3) provides for a limitation of Section 130 (2), the proviso did not apply to this case since the Appellant had a Licence issued by National Environment Management Authority thus in absence of new evidence demonstrating "serious injuries" to the environment, National Environment Management Authority would be estopped from invoking the proviso.

22. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the preliminary objection, the rival submissions and the authorities cited. The issues for determination are:-

(i) Whether the preliminary objection is merited?

(ii) Whether the notice of motion dated 23rd July 2021 is merited.

(iii) Who should pay costs of this application?

23. On the question of whether this is a pure point of law, reliance is placed on the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors [1969] EA 696** where it is held that as per Sir Charles Newbold (P)...

".....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 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 an exercise of judicial discretion".

Law JA proceeded to state 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 objection my 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".

24. It is the Respondent's contention that the proceedings are subjudice as there are pending proceedings before the National Environment Tribunal. Section 6 of the Civil Procedure Act provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

In the case of **Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Exparte Law Society of Kenya [2020] eKLR**. It was held that:-

“.....in determining whether or not subjudice applies, it is the substance of the claim that ought to be looked at rather than the prayers sought.”

25. It is on record that the Appellant filed a reply dated 14th July 2021 to the Appeal in National Environment Tribunal (Appeal 10 of 2021). It contended that the appeal was not properly before the Tribunal for want of jurisdiction. The Appellant herein also filed a notice of preliminary objection dated 5th August 2021 in National Environment Tribunal Appeal 10 of 2021 challenging the Tribunal’s jurisdiction to hear the appeal.

26. The substance of this appeal seeks to determine whether tribunal exceeded its jurisdiction in applying the statutory stop order under Section 129 (4) of Environmental Management and Coordination Act and whether it had jurisdiction to entertain the Appeal. Those same issues are pending before the Tribunal. They ought to be determined first in the Tribunal.

27. I agree with the Respondent’s submissions that the National Environment Tribunal ought to be allowed to consider the objection and gives its finding before the Appellant can approach this court. The Court of Appeal in the case of **Mutanga Tea & Coffee Company Ltd vs Shikara Ltd & Another [2015] eKLR** held that:-

“The central issue for determination in this appeal is whether a party aggrieved by a decision of the Director of Physical Planning under the Physical Planning Act Cap 286 Laws of Kenya (PPA) or the National Environment Management Authority (NEMA) under the Environment Management Coordination Act, Cap 387 (EMCA) may invoke the original jurisdiction of the High Court instead of the dispute resolution mechanism under those Acts”

28. Similarly, in the case of **Speaker of the National Assembly vs Karume [1992] KLR 21**. It was held 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 followed”

I therefore find merit in the preliminary objection and the same is upheld.

29. It is the Respondents’ contention that the complaint before National Environment Tribunal is against violation of Section 58(2) of the Environmental Management and Coordination Act, as read with Regulations 11, 16, 17 and 20 of the (Impact Assessment and Audit Regulations). That these violations are within the purview of the National Environment Tribunal under Section 125-129 of Environmental Management and Coordination Act.

30. **Section 129 (4)** of the Environmental Management and Coordination Act, cap 387 Laws of Kenya provides as follows:-

“Upon any appeal to the Tribunal under this section, the Tribunal may if satisfied:-

(a) Upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined.

(b) Upon application by any party, review any orders made under paragraph a”.

31. Going by the above provision I find that the Tribunal did not err in any way in granting the orders of status quo pending the hearing and determination of the Appeal before it.

32. I am of the view that the Appellant has not made out a good case for the grant of the orders sought in the notice of motion dated 23rd July 2021. The Appeal is properly brought before National Environment Tribunal.

33. The Appellant ought to exhaust the proceedings in the Tribunal. The orders sought herein can be canvassed before the Tribunal.

34. I find no merit in the application and the same is dismissed.

35. Each party do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Mwangi with Ms Otieno for the Appellant

Mr. Lusi for the 1st Respondent

No appearance for the Interested Parties.

Steve - Court Assistant