Mutugi v Manji Kara t/a Hari Krushna Impex & 3 others; Patel & 2 others (Interested Parties) (Environment and Land Constitutional Petition E03 of 2021) [2022] KEELC 3880 (KLR) (13 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3880 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E03 OF 2021

EC CHERONO, J

MAY 13, 2022

N THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) & 258 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 19, 20, 21, 22, 27, 35, 40, 42, AND 43 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(5), (6), 6, 10, 60, 64, 69, 70, 73, 174, 175, 176, 183, 189, 232, 258, AND 259 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

MICHAEL MUTUGI .... PETITIONER

AND

MANJI KARA T/A HARI KRUSHNA IMPEX .... 1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA .... 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3RD RESPONDENT

ATTORNEY GENERAL .... 4TH RESPONDENT

AND

PRABHABEN SHANTILAL PATEL .... INTERESTED PARTY

MITAL MANJI KARA .... INTERESTED PARTY

HASHMITA LALJI KERAI .... INTERESTED PARTY

RULING

1. The petitioners herein filed this petition contemporaneously with a notice of motion under certificate of urgency dated 14, October 2021. In the said notice of motion, the applicants/petitioner is seeking the following orders:-

    1. (spent)

    2. That an order for temporary injunction be issued restraining the respondent and their agents from further constructing or undertaking any activity on the project site to wit; ''Prabhaben Shantilal, NEMA/KRG/5/2/1278, NCA/42884/6/0818'' the project herein pending the hearing and determination of this application.

    3. That an order for temporary injunction be issued restraining the respondent and their agents from further constructing or undertaking any activity on the project site to wit; Prahaben Shantilal. NEMA 1/PR/KRG/5/2/1278, NCA/42884/6/0818''the project herein pending the hearing and determination of the substantive petition herein.

    4. Cost of this application be provided for.

2. The first respondent appointed the firm of Mogeni & Co Advocates who filed a notice of appointment and a replying affidavit sworn on April 7, 2021.

3. The said supporting affidavit is further supported by numerous annexures thereto. Through a notice of appointment dated March 23, 2021 and filed on April 8, 2021, the 3rd respondent appointed Emma Lizanza Advocate to act for her.

4. The said Emma Lizanza also filed a notice of preliminary objection on same grounds that this honourable court lack jurisdiction to entertain this suit under section 129 of the *Environmental Management and Co-ordination Act*.

5. The honourable attorney general on the other hand appointed Oscar Eredi, Chief State Counsel to act for her in this case.

6. By a notice of preliminary objection dated April 28, 2021, the 4th Respondent intimated her intention to raise an objection to the petition and the application herein on grounds that this honourable court lacks jurisdiction to determine the dispute pursuant to the provisions of section 129(1) & (2) and 130 (1) of the *Environmental Management and Co-ordination Act*, cap 387.

7. Before directions on the said application would be taken, two persons namely Prabhaben Shantilal Patel and Hasmita Lalji Kerai applied to be joined as interested parties vide a notice of motion dated April 21, 2021. By consent of the parties, the said application was allowed on June 10, 2021.

8. Upon being joined as interested parties, the said Prabhaben Shantilal Patel and Hasmita Lalji Kerai through the firm of Mogeni & Co advocates filed yet another notice of preliminary objection dated July 2, 2021 to the effect that this honourable court lack jurisdiction as the Physical Planning Act establishes a mechanism for resolving such disputes pursuant to section 7 of the said *Act*. On July 5, 2021 the parties agreed to canvass the three notices of preliminary objection dated March 23, 2021, April 28, 2021, and July 2, 2021 by way of written submissions.

3[Rd] Respondents Submissions

9. The 3rd respondent through her counsel, Emma Lisanza filed her submissions dated August 13, 2021 on August 16, 2021. She raised three issues of a preliminary nature. First, she posed whether this honourable court is seized with the requisite jurisdiction to entertain this suit. On that issue, she contends that the matter before this court is pegged on the issuance of EIA licence NEMA/EIA/PSL/10000 that was issued on February 11, 2021 by the 3rd respondent. She submitted that section 129 confers jurisdiction upon the National Environment Tribunal to adjudicate over any dispute arising from the issuance of an EIA licence by the 3rd respondent. She cited the Supreme Court of Kenya case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others*, Civil Appl No 2 of 2011 (U/R). The learned counsel also argued that to entertain this suit without exhausting the mechanisms provided in statute regarding jurisdiction therefore would be an expansion of jurisdiction through judicial craft or innovation.

10. The second issue/question posed by the 3rd respondent is the whether this suit relates to a decision that was made by the National Environmental Authority. On this, the counsel submitted that section 125 of *EMCA* establishes the Tribunal whose mandate is to hear disputes arising from decisions of the National Environment Management Authority on issuance, denial or revocation of licences. She submitted that the National Environmental Authority issued the licence that the petitioner is aggrieved by and which is now the subject of this suit.

11. The third issue is whether the decision by the 3rd Respondent ought to be heard and determined by the National Environment Tribunal at the first instance. The 3rd respondent submitted that the jurisdiction of the tribunal is specific and limited to appeals emanating from the decisions of NEMA as enumerated in section 129(1). Section 129(2) of the *Act* empowers the tribunal to entertain appeals against the decision of the Director General NEMA and the Committees established under the Act. Indeed, an appeal against the decision of NEMA to grant or refuse to grant a licence or permit, to impose any condition or limitation on a licence or to revoke or suspend a licence can be made to the National Environment Tribunal as the court of first instance and cited section 129(3) which provides the reliefs that the National Environment Tribunal can grant. The learned counsel further cited section 13(4) of the *Environment and Land Court Act* which gives appellate jurisdiction over the decisions of the subordinate courts or Local tribunals in respect of matters falling within the ambit of article 42 of the *Constitution* to be within the jurisdiction of the Environment and Land Court.

12. The 4th and last issue raised is whether the application dated October 19, 2021 is bad in law, defective and an abuse of the court process. The learned counsel submitted that the application is bad in law to the extent that it rips the National Environmental Tribunal of its original jurisdiction, defective in as much as it disregards patent *Civil Procedure Rules* and an ostensible abuse of court process and resources.

1st Respondent and Interested Partys' Submissions

13. The 1st and interested party through the firm of Mogeni & Company Advocates submitted that this honourable court has no jurisdiction as per the *Physical Planning Act*, which establishes a mechanism for resolving such disputes as per section 7 of the *Act*. He further submitted that the substantive issue in this suit concerns a planning permission that allowed a change of user of the suit property and the issuance of a licence which are both covered by the National Environment Tribunal and the Physical Planning Liaison Committee as outlined in section 129 of the *Environment Management and Co-ordination Act, 1999*. He submitted that their objection is to the effect that the petitioner's application offends the provisions of section 13 of the *Physical Planning Act* which provides that

a person aggrieved by a decision concerning any development plan has a right of appeal within 60 days to the respective Physical Planning Liaison Committee. They submitted that the applicant has neither submitted nor filed any documents with the Physical Planning Liaison Committee that proves that the project is responsible directly or indirectly for unmitigated pollution and environmental unsustainability contrary to the Environmental Impact Assessment Report drafted by one Caroline Mathenge (expert No 7998) and thereafter duly authorised by the 3rd respondent, NEMA. They further submitted that section 15 of the *Physical Planning Act* provides that any person aggrieved by a decision of a liaison committee may, within sixty (60) days of receipt by him of the notice of such decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed. They argued that section 7 of the *Physical Planning Act* establishes the Physical Planning Liaison Committee which provides the procedure for dispute resolution at the first instance where a party is aggrieved by the decision of the Director Physical Planning concerning any physical development plan or matters connected therewith it is then evident that should this court grant the orders as prayed by the petitioners, this court would have acted *ultra vires* High Court and also usurped the functions of the National Environmental Tribunal and the Physical Planning Liaison Committee by allowing the petitioners to circumvent, ignore and disregard statutory provisions on available dispute resolution mechanisms.

14. They further submitted that the Liaison Committee has complete jurisdiction over the dispute herein vis-à-vis the functions itemized in section 10 of the Physical Planning Act, 2012 as does the National Environmental Tribunal hence the objection herein fits the description of the preliminary objection as prescribed in the Mukisa Biscuits case (supra). That the High court only has appellate jurisdiction.

15. It was also submitted that despite the 1st defendant and the interested party being acutely aware of the position that a plaintiff/petitioner is dominus litis, and can sue whomever he or she thinks will obtain relief from, the 1st defendant has no direct or remote interest in the matter and was wrongly joined into this petition.

16. It was further submitted that the crux of the dispute is the alleged Environmental side effects or degradation on the premises known as LR Inoi/Kamondo/862 measuring 1.62 Ha. which is subject of the petition herein and thus plaintiff's claim should have been addressed to the interested parties by virtue of being the developer and registered proprietor of the suit property together with Mital Manji Kara and Hashmita Lalji Mita Keraiof and not to the 1st respondent. They argued that the 1st respondent Manji Naran Kara owns an adjacent property known as LR No Inoi/Kamondo/1426 measuring 0.067 Ha. but which is not part of the development project of the petition. They also submitted that before commencing of the project "Prababen Shantiala, NEMA1/PR/KRG/5/2/1278, NCA/42884/6/0818", the interested parties via Metro Planning Consultants to initiate and make an application for change of user from agriculture to godowns. The interested parties then proceeded to place an advertisement of the application for change of user in the dailies and further a board was placed conspicuously on the property for neighbouring residents to undertake not only the process but meaningful public participation. The said advertisement called for any objections to be made within 14 days. That the petitioners failed to write to the interested parties to make a formal objection to the proposed change of user despite being given sufficient time to do so,

17. The 1st respondent and interested parties further submitted that the County Technical Committee, which is the body within the County Government of Kirinyaga that reviews development applications, met and approved the application for change of user subject to submission of building plans. That the building plans and the application for change of user was formally approved and thus the allegations that the buildings are located or seated on the alleged Highway Extension Reserve Zone are untrue.

18. That the interested parties also applied for approval of the National Construction Authority which was granted as well as an approval from the 2nd respondent's Physical Planning Department and Public Health Department. It was submitted that the construction of the project is now complete and the property has already been handed over to Shree Hari Plaza who have been licenced to occupy the premises as a large agricultural producer, processor, dealer and exporter.

19. In conclusion, the 1st respondent and the interested parties urged that this petition and the supporting affidavit do not in any way show any semblance of a constitutional petition pleading breach of known constitutional provisions, violation of and/or infringement of rights and fundamental freedoms. That what can be discerned from the petition and the supporting affidavit is an alleged breach capable of redress through either the Physical Planning Liaison Committee or the National Environmental Tribunal.

4th Respondent's Submissions

20. The 4th respondent through M/S Mwihaki Ndundu Senior State Counsel submitted on the following two issues;

    1. Whether the application meets the requirements of a preliminary objection

    2. Whether the court has jurisdiction to determine this matter.

21. On the first issue, the learned counsel submitted that this honourable court lacks jurisdiction to entertain this dispute on grounds that the first avenue of solving the dispute was the National Environmental Tribunal as per section 129(1) and (2) of the *Environmental Management and Co-ordination Act*. She cited the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR.

22. As regards the 2nd issue, the learned counsel submitted that this honourable court lacks jurisdiction to determine this matter and it only has appellate jurisdiction as per article 165(3) (c) of the Kenya *Constitution* and section 130 (1) of *EMCA*. She also submitted that the petitioner failed to exhaust all the local remedies available in section 129 (1) and (2) of *EMCA* and ought not to benefit from his wilful neglect to rely on the provisions of the law. In conclusion, the learned counsel submitted that this court may not be used as a court of first instance whereby a statute has expressly provided for another avenue. She cited the following cases in support:-

    1. *Owners of the Motor Vessel ''Lilian'S' v Caltex Oil (Kenya) Ltd* [1989] KLR 1.

    2. *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR

    3. *Mutanga Tea & Coffee Company Ltd v Shikara Ltd & another* [2015] eKLR.

    4. *Samuel Kamau & Another v Kenya Commercial Bank & 2 others* – Sup Ct Civil Application No 2 of 2011 (UR).

Petitioner's/Applicant's Written Submissions

23. The petitioner through the firm of Macharia Wambui & Company Advocates filed their submissions on October 29, 2021 in opposition to the preliminary objections. According to him, this court has jurisdiction to hear this matter as it comprises a hybrid of constitutional and statutory procedural issues.

24. As regards the interested parties' preliminary objection, the petitioner submitted that the same is based on the *Physical Planning Act* cap 295 which was repealed by the *Physical and Land use Planning Act*

No 13 of 2019 which came into force on August 5, 2019 before the commencement of the subject project or even its Development Planning permission application were submitted on August 26, 2019.

25. He further submitted that section 93 of the *Physical and Land use Planning Act* No 13 of 2019 as read with articles 162(2) (b) of the *Constitution* are the specific statutory and constitutional provisions which confer jurisdiction upon this honourable court. He argued that the subject project of this petition was commenced by submission of Development Planning permissions applications (change of user application dated August 3, 2019) and submitted on the August 26, 2019 and was granted on September 12, 2019. In summary, the petitioner submitted that at all material times relevant to issues in this petition are regulated by the *Physical and Land use Planning Act* No 13 of 2019 which came into force on August 5, 2019 and not the P*hysical Planning Act* cap 295 which had been repealed.

26. As to whether the dispute ought to have been lodged before the National Environment Tribunal under section 129 of the National Environment Management and Co-ordination Act, 2015, the Petitioner contends that this petition being of hybrid issue based, the said tribunal is not the proper forum. He cited the following cases in support-;

    1. *Cohens v Virginia*-; 37 19 US 264 (1821) 38
    2. *Owners of the Motor Vessel ''Lillian v Caltex Oil Kenya Limited* [1989] KLR 1
    3. *Republic v Karisa Chengo & 2 others* [2017] eKLR
    4. *John Kabukuru Kibicho & anor v County Government of Nakuru & 2 others* [2016] eKLR.

Legal Analysis and Decision

27. I have considered the notices of preliminary objection and the rival submissions. I have also looked at the petition and the responses as well as the applicable law. From my reading of the petition and the notice of motion filed contemporaneously, the complaint by the petitioner is that the project proponent described as ''Prabhaben Shantilal, Nema1/PR/KRG/5/2/1278, NCA/42884/6/0818'' who are the respondents and the interested parties herein have designed and implemented the same in a manner that violates statutory and constitutional principles and values among them sustainable development, transparency, public participation, accountability and specifically applicants and neighbouring residents constitutional rights to a clean and health Environment, economic and property rights as well as right to information,

29. Before delving into the objections, the following issues are not in dispute-;

    1. The National Environment Management Authority issued the proponent an environmental impact assessment licence No NEMA/EIA/PSL/10000 on 11/02/2021.
    2. The proponent of the subject project engaged the services of an expert, one Caroline Mathenge (expert No 7998) to undertake an EIA which was subsequently presented and cleared by the 3rd respondent herein.
    3. The proponent also applied to the National Construction Authority (NCA) for approval and were duly awarded a certificate of compliance dated April 4, 2019.

30. It is now settled that a preliminary objection is a pure point of law which if properly taken will determine the entire suit. It is raised on the assumption that all the facts are correct. The first preliminary point raised by the 4th respondent is challenging the jurisdiction of this honourable court to handle the dispute pursuant to the provisions of section 129 (1) & (2) and 130 (1) of the *Environment Management and Co-ordination Act*, cap 387 laws of Kenya.

Section 129 (1) (a) of *EMCA* states as follows-;

> “ Any person who is aggrieved by the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations; may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the tribunal in such manner as may be prescribed by the tribunal”.’

30. The petitioner at paragraph 7 of his petition is complaining of a flawed Environmental Impact Assessment, Environmental Social and Economic Impact assessment licenses issued in contravention of requisite Environmental statutes. From my understanding of section 129 (1) (a) of *EMCA*, the statute confers jurisdiction upon the National Environment Tribunal to adjudicate over any dispute(s) arising from the issuance of an EIA Licence by the 3rd respondent. I agree with the 4th respondent that the first port of entry as regards any dispute relating to the issuance of EIA is the National Environment Tribunal and not the ELC Court. In the case of *Samuel Kamau Macharia V Kenya Commercial Bank & 2 others*, Civil Appl No 2 of 2011, the Supreme Court of Kenya was faced with a similar question and held as follows-;

> "A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law......the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings....where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

31. I totally agree with the finding of the superior court which is also binding on me. It is only when he is dissatisfied with the decision by the National Environment Tribunal that the petitioner could move to this honourable court on a second appeal under section 130 of the same *Act*. Owing to the foregoing, I find the preliminary objection by the 4th respondent dated April 28, 2021 merited.

32. The second preliminary objection dated July 2, 2021 is also challenging the jurisdiction of this honourable court to the effect that section 7 of the Physical Planning Act establishes the Physical Planning Liaison Committee which provides for the procedure for dispute resolution at the instance where a party is aggrieved by the decision of the Director, Physical Planning concerning any Physical Development Plan or matters connected therewith. The petitioner through the firm of Macharia Wambui & Company Advocates submitted in opposition thereto that the *Physical Planning Act, 1996* was not applicable after it was repealed and the *Physical and Land Use Planning Act* No 13 of 2019 came into force/commencement on August 5, 2019.

33. Section 92 & 93 of the *Physical and Land use Planning Act* No 13 of 2019 provides as follows:-

> 92. Transitional provision
>
> (1) Any approval for development granted in accordance with the provisions of any written law in force immediately prior to the commencement of this Act shall be deemed to be a development permission granted under this Act.
>
> (2) Despite the provisions of sub-section (1), if a development for which approval was granted under the provisions of any written

law in force immediately before the commencement of this Act shall not have been commenced within twenty-four months of the commencement of this Act that development approval shall lapse.

(3) Where an application for development had been made under the provisions of any written law prior to the commencement of this Act and approval has not been granted, that application shall be deemed to be an application for development permission under this Act and shall be deemed to have been made on the date of the commencement of this Act.

93. Pending disputes

All disputes relating to Physical and land use planning, before establishment of the National and County Physical and land use Planning Liaison Committees shall be heard and determined by the Environment and Land Court.

34. From the affidavit evidence and the annexures thereto as well as the submissions by the counsels, it is clear that before commencing the project in dispute described as ''Prabhaben Shantilal, NEMA1/PR/KRG/5/2/1278, NCA/42884/6/0818", the proponent had appointed Metro Planning Consultants, registered Physical planning and land development consultants to initiate and have the user of the land/property changed from agriculture to go-downs. The proposals were presented to the Department of Physical Planning at the County Government of Kirinyaga which was duly approved as shown vide an exhibit marked ''PSP2" in the replying affidavit of Prabhaben Shantilal Patel sworn on April 7, 2021. The proponent also appointed an architect and engineers to prepare a design for the go-downs which were also presented and approved as shown in the annexure marked ''PSP3".These applications and approvals were done under the *Physical Planning Act*, cap 286 which has since been repealed. The applicable law in respect of this dispute therefore is the *Physical and Land use Planning Act*, No 13 of 2019.

35. Section 76 of the said *Act* provides the establishment of County Physical and land use Planning Liaison Committees for each County whose functions are-;

(a) Hear and determine complaints and claims made in respect to applications submitted to the planning authority in the County.

(b) Hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the County.

(c) Advise the County Executive Committee member on broad physical and land use planning policies, strategies and standard; and

(d) hear appeals with respect to enforcement notices.

36. The petitioner did not lodge any complaint or appeal before the County Physical and Land use Planning Liaison Committee in Kirinyaga County in respect of the issues he is raising before this court. What I get from the petition and the supporting affidavit is an alleged breach capable of redress through either the County Physical and Land use Planning Liaison Committee or the National Environment Tribunal.

Conclusion And Decision

37. In view of the matters aforesaid, I find the preliminary objections well taken and the same are upheld. The upshot of my finding is that the petition dated October 14, 2020 and the notice of motion of even date are hereby struck out. This being a public interest litigation, I order each party to bear their own costs. It is so ordered.

RULING READ,DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 13TH DAY OF MAY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr Macharia Wambui for the petitioner.

2. Respondents/advocate – absent.

3. Kabuta – Court Assistant.