



REPUBLIC OF KENYA



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Mwaura & another v Rubis Energy Kenya PLC & another (Environment & Land Case 109 of 2021) [2022] KEELC 3448 (KLR) (17 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3448 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 109 OF 2021**

JG KEMEI, J

MAY 17, 2022

BETWEEN

KENNETH NGURE MWAURA 1ST PLAINTIFF

MARGARET WAMBUI MWAURA 2ND PLAINTIFF

AND

RUBIS ENERGY KENYA PLC 1ST DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
DEFENDANT**

RULING

1. The plaintiffs are husband and wife. They are retirees owning parcel No Ruiru East Block1/117 within Sunrise in Ruiru Township. On it they have developed a residential home as well as commercial spaces for rentals.
2. The 1st defendant has erected and operates a petrol station on parcel No Ruiru East Block 1/118 (the suit property) which is the immediate neighbor of the plaintiffs' property.
3. The properties are situated in an area designated for multi- dwelling residential cum commercial land use along the Eastern by-pass road. On it the 1st defendant has constructed a petrol station which construction was sanctioned by the 2nd defendant.
4. It is the plaintiff's case that the construction and operation of the petrol filling station on the suit land is a violation of their right to clean and healthy environment as provided for under section 3(1) of the *Environment Management and Coordination Act* (EMCA) and enshrined under art 42 of the *Constitution* of Kenya.
5. That the approvals and licenses to wit; EIAA permission Ap No, Nema/Ela/Psr/15394; EIA licence No Nema/EIA/Psi/9173 and change of user from vide Kiambu/county ref No CPD0941 issued to



the 1st defendant by the 2nd defendant were issued in clear breach of the law on the grounds that; there was no public participation, the pre-existing structure on the suit land roofed with asbestos tiles was removed without any EIA report and in contravention of regulation 10 (c) of the Environment (impact assessment and Audit) Regulations which classifies it as hazardous waste ; petrol station is constructed 3 meters from the wall of the plaintiffs home thus exposing them to environmental hazards; right to privacy has been violated by intrusion of thugs and 1st defendants employees through the broken fence; blocking access to their entry way – encroachment of the land in front of the plaintiffs premises; wall has blocked access to their business premises thus impeding on its economic viability.

6. The plaintiffs suit filed on the October 8, 2021 is premised on several grievances regarding the construction and operation of the petrol filling station on the suit land; the plaintiff has sought the following orders;
 - a. A declaration do issue to the effect that the plaintiffs rights to a clean and healthy environment has been violated by the defendants.
 - b. A declaration do issue to the fact that the decision of the 2nd defendant to grant an environment impact assessment licence No Nema/EIA/PSI/9173 for LR No Ruiru/Ruiru East Block1/118 to the 1st defendant was done illegally and therefore null and void.
 - c. A permanent injunction restraining the 1st defendant whether by themselves their agents employees servants or any other person acting at their behest from operating and or selling petroleum products in Rubis petrol station on the suit land.
 - d. There be immediate demolition of all the resultant constructions on the suit land at the cost of the defendants.
 - e. The defendants be compelled to undertake environmental restoration on the suit land to state it was in before the commencement of the construction.
 - f. An order directing the defendants to pay the plaintiffs the cost of repairs works for the damage to the residential house on the suit land
 - g. General damages to be assessed by this honourable court
 - h. Costs of the suit.
7. Simultaneously, the plaintiffs filed a notice of motion dated the September 10, 2021 and filed on the October 8, 2021. It is brought under section 3A of the [CPA](#), order 40 rule 1, 2 and 10, order 51 rule 1 of the [Civil Procedure Rules](#), articles 27(1), 47(1) and 50(1) of the [Constitution](#) of Kenya and section 13 of the [Environment & Land Act](#) No 19 of 2011.
8. The plaintiffs/applicants sought the following orders;
 - a. spent
 - b. applicants be granted leave to file this suit against the respondents
 - c. the applicants be exempted from being compelled to exhaust the remedies outlined under the [Environmental Management & Coordination Act](#).
 - d. spent
 - e. spent
 - f. spent



- g. that pending the hearing and determination of this suit, the court be pleased to issue an order of temporary injunction restraining the 1st respondent whether by themselves their agents employees servants or any person acting at their behest from operating and or selling petroleum products in Rubis petrol station on the suit land along the Eastern bypass.
- h. cost of the application
9. The application is premised on the grounds rehashed in the plaint and which have been set out in para 4-5 of this ruling. In addition, that the 2nd respondent has acted in breach of its public duty and oath of office in issuing the licenses and permits contrary to the law and the Constitution. That the actions of the 2nd respondent in so issuing the licenses was in bad faith and motivated by selfish interests with a view to circumventing the law to the detriment of the applicants and the public at large. That the structural integrity of their house and buildings have been compromised with resultant visible cracks on the walls emerging.
10. In support of the motion the 1st applicant swore an affidavit on the September 10, 2021 which to a large extent rehashed the contents of the plaint. He avowed that his inquiries and complaints on the construction of the petrol station from the NEMA authorities at Kiambu county on issues such as noise dust buildings vibration fell on deaf ears.
11. The 1st respondent opposed the application *vide* its notice of motion dated October 15, 2021 where it sought orders that the applicants suit and notice of motion be struck out of the court record and the suit dismissed and the 1st defendant be awarded costs.
12. The application is premised on the grounds annexed thereto and the supporting affidavit of Pius Kioko, the operations manager of the 1st respondent sworn on the February 3, 2022. He averred that the applicants had filed a previous suit ELC PET No 11 of 2020 -Kenneth Ngure Mwaura & Margaret Wambui Mwaura v Rubis Energy PLC & 3 others. Alongside the petition the applicants also filed a notice of motion dated the October 6, 2020 seeking similar orders of injunction as sought in the instant application.
13. That on a preliminary objection by the 1st respondent, the court held in its ruling delivered on the July 29, 2021 that it had no jurisdiction to hear and determine the petition in line with section 125, 129 and 130 of the EMCA Act. The court struck out the petition. The said ruling has not been set aside, vacated and or appealed.
14. That the issues raised in the application and the suit are identical to the issues raised in PET 11 of 2020 and therefore the suit herein is *resjudicata* and an abuse of the process of the court,
15. That the conduct of the applicants in concealing the petition and its ruling from this court disentitles of any orders of equitable nature such as injunction sought in the notice of motion dated the September 10, 2021. Further that the applicant's conduct is a gross abuse of the process of the court and the suit herein is frivolous, scandalous and vexatious.
16. That even if the application was to be considered on merit, the same would still fail on account that the construction of the petrol station on the suit land was complaint with the laws and regulations; change of user was lawfully obtained; construction of the petrol station and associated amenities are complete and operational; access to the premises was duly granted by Kenya urban roads as the premises are situate off Eastern bypass in Ruiru; NEMA licence was issued on the April 2, 2020; building construction plans were approved by Kiambu lands and housing and physical planning department on the March 20, 2020; construction permit was obtained on the February 27, 2020;



17. Further the deponent stated that the allegation that the licences issued to the 1st respondent were irregular and or illegal are baseless. He contended that the applicants have not tendered evidence to show that they live less than 4 meters from the premises so as to be legible to be invited to any hearings regarding the environmental impact of the construction of the premises. That public hearings were conducted and the project received favourable public reviews. That the structure standing on the premises was removed in strict compliance with the law.
18. In addition that the applicants have not shown how their right to clean and healthy environment has been violated neither have they established a *prima facie* case to warrant the granting of orders of injunction as sought in their application.
19. The 2nd respondent opposed the application and filed a preliminary objection dated the October 15, 2021 and raised the objections as follows;
 - a. That the court is divested with the requisite jurisdiction pursuant to section 129 of the *EMCA* and in light of the decision in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* (2020) EKLK
 - b. That this suit flies in the face of *subjudice* principle presented during the pendency of PET 11 of 2020 which relates to the decision that was made by the NEMA.
 - c. That the application dated the September 10, 2021 and filed herein is bad and an abuse of the process of the court.
20. In opposing the 1st respondents application dated the October 15, 2021, the 1st applicant *vide* a replying affidavit sworn on the November 1, 2021 admitted knowledge of PET 11 of 2020. Whilst discounting any concealment of the said suit, the applicant stated that the said suit was not heard and determined on its merits. Admitting the similarity of the parties in both suits, the applicant sought to urge the court that the issues are different. He urged the court to exercise its original and unlimited jurisdiction and hear and determine the instant suit on merits in line with art 22, 23 and 70 of the *Constitution* of Kenya and section 3 of *EMCA*.
21. On the November 11, 2021 parties elected to canvass the motions and the preliminary objection by way of written submissions. The applicants written submissions were filed by the firm of E M Wageita & Company Advocates on the February 15, 2022. The written submissions of the 1st respondent were filed by the law firm of Kaplan & Stratton Advocates. The 2nd respondent failed to file written submissions in line with the directions of the court.
22. I have read and considered the written submissions.
23. Having read and considered the plaint, the applications, the preliminary objection and the rival written submissions together with all the material placed before me, the key issues for determination are; whether the suit is *resjudicata*; whether the suit is an abuse of the process of the court; whether the court has jurisdiction to hear and determine the suit;
24. In Kenya, jurisdiction of a court or tribunal is donated by the *Constitution* or by a statute. So serious is jurisdiction that the moment a court is satisfied that it has none, it must down its tools. Jurisdiction is everything so much so that a court cannot arrogate itself Jurisdiction by the art of judicial novelty or artistry or by consent of the parties. In the case of *Samuel Macharia Kamau v KCB & others* (2012) eKLR the court held that;

“ A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus a court can only exercise jurisdiction as conferred by the *constitution* or other written laws. it cannot



arrogate to itself jurisdiction exceeding that which is confirmed upon it by law. The court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.”

25. Article 162(2) (b) of the Constitution empowered parliament to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. In this regard and pursuant to article 162(3) or the Constitution, parliament enacted the Environment and Land Court Act, Act No 19 of 2011.
26. Section 13 of the Environment and Land Court Act outlines the jurisdiction of the Environment and Land Courts as follows:-
 1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under article 162 (2)(b) of the Constitution, the court shall have power to hear and determine disputes-
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
27. Parliament has also established tribunals such as the National Environmental Tribunal established under section 125 of the EMCA. Its mandate is to hear and determine any dispute by a party aggrieved by a decision of the 2nd respondent as provided for under section 129 of the EMCA Act. This court in turn enjoys appellate jurisdiction in that regard in addition to the jurisdiction of the court set out in section 13 of the ELC Act which gives the court original and unlimited jurisdiction to hear and determine matters relating to environmental planning and protection, climate issues *inter alia*.
28. It is our law that where there is a clear procedure for the redress of a particular grievance prescribed by the constitution or an act of parliament that procedure should be strictly followed. See the case of The Speaker of the National Assembly v Karume (1992) KLR 22.
29. In the case of Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR the Supreme Court pronounced itself at length on the doctrine of judicial abstention. The court was of the considered view that 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 licenses were fully processed. It went further to determine that the competent organ in the dispute with original jurisdiction to hear and determine the dispute was the tribunal or the NEEC and not the ELC Court.
30. On judicial abstention, as with judicial restraint, the court stated that:-

“It is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a court, though it may be vested



with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in *Railroad Commission of Texas v Pullman Co*, 312 US 496 61 S Ct 643, 85 L Ed 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *England v Louisiana State Board of Medical Examiners*, 375 US 411 (1964) also noted that a state court determination would indeed bind the federal court. The proper procedure, the court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the state court makes a ruling on the issue.”

31. I have perused the pleadings in PET 11 of 2020 together with the application and the objection that were raised. I find that the applicants in both the petition and in this instant suit are challenging the manner in which the NEMA licences were issued, change of user was obtained, the removal and demolition of the old structure on the land said to have had an asbestos roof, the restriction of access to their premises and the alleged violation of the right to clean and healthy environment as a result of the construction and operation of the petrol station on the suit land. In this case the applicants have proceeded by way of a normal civil suit while previously moved the court by way of a petition. I find the issues for determination were similar in all respects.
32. In paying fidelity to the doctrine of precedent as set out in the Supreme Court case above, this court in its ruling delivered on the July 29, 2021 pronounced itself on the issue of jurisdiction and the importance of the exhaustion mechanisms provided in law with respect to dispute resolution. The court held;

‘If the petitioners were dissatisfied or aggrieved by the approval granted to the 1st respondent by the 3rd respondent they ought to have appealed to the NET within 60 days in accordance with the above provisions of section 129(1) of EMCA. Instead the petitioners invoked the jurisdiction of this court prematurely without exhausting the alternative remedies of dispute resolution provided for the statute.’
33. The court rightly struck out the suit. I find that the suit and the application therefore run afoul the doctrine of *resjudicata* and the same regrettably has met the same fate.
34. Is this suit an abuse of the process of the court? The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. In the case of *Republic v Paul Kibara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya* [2020] eKLR the court defined abuse to include the following situations:-
 - a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.



- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
 - c. Where two similar processes are used in respect of the exercise of the same right.
 - d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
 - e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
 - f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
 - g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first.
35. In filing this suit while being aware that the same issues were determined in PET 11 of 2020 by way of striking out, I find that the plaintiffs were involved in an abuse of the process of the court. This court has inherent powers to prevent its processes from abuse.
36. In the end the objection is upheld. The suit and the application dated February 10, 2021 be and are hereby struck out in their entirety.
37. The costs shall be payable in favour of the respondents.
38. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muhota for 1st and 2nd Plaintiff

Ms. Onyango for 1st Defendant

Ms. Sakami for 2nd Defendant

Court Assistant - Phyllis

