



REPUBLIC OF KENYA



KENYA LAW
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**Chai & 12 others v China Communication Construction Company Limited & 2 others
(Constitutional Petition 2 of 2020) [2022] KEELC 98 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 98 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CONSTITUTIONAL PETITION 2 OF 2020**

JO OLOLA, J

JUNE 9, 2022

BETWEEN

SAID BADI CHAI 1ST PETITIONER
SIMON CHIPA 2ND PETITIONER
SIDI KENGA 3RD PETITIONER
MWANA MKUU 4TH PETITIONER
SIFA KATANA 5TH PETITIONER
KADZO KENGA BAYA 6TH PETITIONER
NGALA JEMBE 7TH PETITIONER
ZAINABU ZAWADI NGALA 8TH PETITIONER
TABU CHARO 9TH PETITIONER
WASHE MWAZONGA 10TH PETITIONER
MWALILI MUNGA 11TH PETITIONER
KACHE KARISA CHONDO 12TH PETITIONER
HARISON KAZUNGU 13TH PETITIONER

AND

**CHINA COMMUNICATION CONSTRUCTION COMPANY LIMITED 1ST
RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY
(NEMA) 2ND RESPONDENT**

COUNTY GOVERNMENT OF KILIFI 3RD RESPONDENT



RULING

1. By the Notice of Preliminary Objection dated 12th March, 2021 as filed herein on 15th March 2021, the County Government of Kilifi (the 3rd Respondent) objects to the Petition herein as well as the Petitioners' application dated 17th March, 2020 on the grounds that:
 1. The suit is an abuse of the Court process, incurably defective and cannot stand in law;
 2. This Court lacks jurisdiction to entertain this suit under Sections 69 and 129 of the *Environmental Management and Co-ordination Act* No. 8 of 1999;
 3. The suit is an affront to the doctrine of exhaustion;
 4. The Petition suffers from lack of precision and particularity;
 5. The suit is an Appeal against the License issued by the 1st Respondent disguised as a Petition;
 6. The suit as preferred violates mandatory provisions of law and laid down procedures and cannot sustain the prayers sought; and
 7. In light of the foregoing, it is clear that the suit herein has been filed prematurely and in any case without jurisdiction, and for this reason alone, the suit should be dismissed with costs.
2. Following directions given herein on 29th April, 2021 the parties agreed to have the Preliminary Objection disposed off by way of written submissions. I have accordingly carefully considered the pleadings filed herein as well as the rival submissions and authorities placed before me by the learned Advocates acting for the parties herein.
3. By their Petition herein dated 4th March, 2020, the 13 Petitioners pray for the following reliefs against the three Respondents jointly and severally:
 - (a) A declaration that the 1st Respondent has not complied with all the Constitutional and Statutory Regulatory requirements before construction of the jetty for berthing berge commenced at Kilifi County and that the activities being undertaken in the above mentioned area has infringed the Petitioners rights and those of the surrounding community;
 - (b) An order of certiorari do issue to bring into this Honourable Court for purposes of quashing any decision by the 2nd and 3rd Respondents to issue the 1st Respondent with any permit and/or license;
 - (c) An order of mandamus do issue compelling the 2nd and 3rd Respondents to ensure that all the Constitutional and Statutory Regulatory requirements are met by the 1st Respondent before any activities are conducted by the 1st Respondent at Mnarani area, Mnarani Ward within Kilifi County.
 - (d) An order that the Respondents do pay damages to the Petitioners;
 - (e) An order that the costs of the suit be borne by the Respondents; and
 - (f) Any other order that this Honourable Court may deem fit to issue in the interest of justice.



4. Those prayers arise from the Petitioners' contention that China Communications Construction Limited (the 1st Respondent) which is the proponent of the temporary jetty construction has failed to adhere to the prescription contained in the Environmental Impact Assessment (EIA) Report for the project in question which required that it will ensure that dust levels at the site are minimized through sprinkling water on graded access or tarmacking of the same.
5. The Petitioners accuse the National Environmental Management Authority (NEMA) (the 2nd Respondent) as well as the County Government of Kilifi (the 3rd Respondent) of failing to ensure that the 1st Respondent adheres to the requirements set out in the EIA Report.
6. But in a Replying Affidavit sworn on its behalf by its Operations Personnel Chen Shengye and filed herein on 23rd February 2021, the 1st Respondent denied that it has failed to adhere to any clause of the EIA Report as stated by the Petitioners.
7. The 1st Respondent avers that it has not only complied with the requirements of the EIA Report to minimize dust pollution on the road and the quarry zone but has also obtained all relevant permits from the 3rd Respondent and conducted the mandatory Annual Environmental Audit Reports as required by the 2nd Respondent in respect of the Project.
8. As it turned out, other than the subject Preliminary Objection, both the 2nd and the 3rd Respondents did not file any pleadings herein, and despite filing the Notice of Preliminary Objection, the 3rd Respondent did not file any submissions in support thereof as ordered by the Court.
9. The locus classicus on the subject of Preliminary Objections is the decision of the East African Court of Appeal in *Mukisa Biscuit Manufacturing Company Limited -vs - West End Distributors Limited* 1969) EA 696. Commenting on what would amount to a proper Preliminary Objection in that matter, Law J.A states as follows:

“So far as I am aware, a Preliminary Objection consists of a pure 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.”
10. Speaking on the same issue in the same *Mukisa Biscuits* case (supra) Newbold P added as follows:

“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 the 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 the exercise of judicial discretion.
11. In the matter before me, the 3rd Respondent has not filed any pleadings from which the seven (7) points raised in the Preliminary Objection can be derived. Nor did they canvass the same for when they were given a chance to file submission the 3rd Respondent did not file any.
12. That being the case, I did not find any support for the Notice of Preliminary Objection dated 12th March, 2021. The same is struck out with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 9TH DAY OF JUNE, 2022.

In the presence of:

No appearance for the Applicants



No appearance for the Respondents

Court assistant - Kendi

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J. O. OLOLA

JUDGE

