Borbor & 2 others v National Environment Management Authority (Environment and Land Judicial Review Case 2 of 2022) [2022] KEELC 3947 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3947 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2022

OA ANGOTE, J

JULY 28, 2022

IN THE MATTER OF AN APPLICATION BY WARIO AGAL BORBOR & 14 OTHERS FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND PROHIBITION AND IN THE MATTER OF A COURT ORDER TO CEASE OPERATION AND IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT & CO-ORDINATION ACT (CAP 387) LAWS OF KENYA

BETWEEN

WARIO AGAL BORBOR ..... 1ST EXPARTE

KOSE ISATU HIRBO ..... 2ND EXPARTE

BAFKADO NAGASA ..... 3RD EXPARTE

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .. RESPONDENT

RULING

1. The Ex Parte Applicants (the Applicants) filed a Chamber Summons Application dated February 10, 2022 seeking for the following reliefs:

    a. That the Ex-parte Applicants be granted leave to apply for an order of *Certiorari* to remove to this Honourable Court and quash the verbal and televised purported notice of eviction/ removal of the fifteen (15) slaughter houses from Kiamaiko since the Respondent acted in an arbitrary and oppressive manner.

    b. That the Ex-parte Applicants be granted leave to apply for an order of Prohibition restraining the Respondent from evicting and/or forcefully removing the Applicants from Kiamaiko abbatoirs on or before the March 1, 2022 as was verbally pronounced on three national televisions on January 30, 2022 at 7:00am and 9:00pm news anchor.

c. That this Honourable Court do find that the Respondent's unilateral directive without public participation is unlawful, unreasonable, illogical and actuated by malice since the Respondent failed to serve the Applicants with a written notice or order, if any.

d. That this Honourable Court do find that the Respondents' purported exercise of power under Section 90 of EMCA has been done ultra vires the statute since the Respondent did not serve the Applicants with a restoration order at all or any notice in writing.

e. That leave granted herein do operate as a stay of any malicious, forceful and intended unlawful eviction or removal of the Applicants from any of the slaughter houses located at Kiamaiko which is likely to be carried out on or before March 1, 2022 pending the hearing and determination of this Application.

f. That the costs of this Application be provided for.

2. The Application is supported by the Applicants' Statutory Statement and the Verifying Affidavit of Wario Agal Borbor, the 1st Applicant, sworn on his own behalf and on behalf of the other Applicants. In his Verifying Affidavit, the 1st Applicant deponed that on January 23, 2022, the Respondent through its officials, made a verbal pronouncement on the national news televisions giving the Applicants a verbal media notice to vacate from Kamaiko where they are operating their abattoirs to a new location on or before March 1, 2022.

3. The 1st Respondent deponed that no tangible reason was given as to why the Applicants should vacate the abattoirs that they have been operating for many years; that the verbal pronouncements came as a shock because on December 20, 2021, the Respondent had carried out audits on the individual abattoirs and acknowledged that all conditions were complied with and that further, the Nairobi City County which holds a complementary role under the Act and particularly in matters environment issued a single business permit to the Applicants commencing from 1st January to December 31, 2022.

4. According to the deponent, no reasons have been given for the haphazard eviction of the Applicants to a new place by the end of February, 2022; that the purported forceful evictions are contrary to the spirit of the Environment Management and Co-ordination Act which requires full participation, consultations and co-operation and that the Respondent's actions contravenes Section 12 (1) (2), 109 and 110 of the EMCA Act.

5. The Applicants finally averred that the Respondent has acted in an excessive and arbitrary nature contrary to the rules of natural justice; that their reckless directives endangers the Applicants' means of livelihood which has yet to recover from the Covid-19 pandemic; that the Respondent has further failed to serve an appropriate restoration order upon the Applicants in accordance with the EMCA and as such the Respondents decision is ultra-vires and that the Applicants ought to be granted the orders sought.

6. In response to the application, the Respondent through its Director deponed that the Respondent is the principle instrument of government established under Section 7 of the EMCA to exercise general supervision and co-ordination over all matters relating to the environment and that the subject Kiamaiko slaughterhouses are located in Huruma Area, Mathare Constituency adjacent to Nairobi River and densely populated with a mix of business and residential complexes.

7. It was deponed that the slaughter houses have been in operation since 1996; that the activities have progressed to the level of commercial slaughter houses and slabs by 2010 and that as the slaughter houses predate EMCA, the slaughter houses have submitted self-audit reports to the Authority over the years in accordance with the *1999 EMCA (Waste Management Regulations)2006*.

8. It was deponed that the Respondent has always been concerned that the Kiamaiko area in general is in danger of severe environmental, health and sanitation degradation and further to the self- audit reports, the Respondent has been monitoring their operations to ensure compliance with the set environmental standards and practices.

9. It was further deponed that the Respondent received a court decree in respect of ELC Petition 43 of 2010-*Isiah Ludando Oyaro & Others vs NEMA & Others* [2021] eKLR where the health of Nairobi-Athi-Galani-Sabaki River system was in issue and orders were made for the removal of encroaching and polluting facilities and that the Applicants' abattoirs fall within this category.

10. According to the Respondent's Director, on December 1, 2021, its environmental inspectors set out to investigate the Kiamaiko Slaughter Houses, which investigations concluded that the slaughter houses had made no headway towards compliance with Water Quality Regulations, 2006; that the slaughterhouses are a direct source of pollution of the aqua environment, particularly the Nairobi River and that there is little or no commitment by the Applicants to complete construction and operations at the new proposed slaughterhouse in Njiru.

11. The Respondent's case is that placing reliance on the precautionary principle, it was recommended that the Kiamaiko Slaughterhouses be closed and the proprietors be compelled to move to the new site; that on February 22, 2022, the Respondent issued to the Applicants a site restoration order pursuant to Section 108 of the EMCA, 1999 which order outlined the findings of the Inspection Report and that it is apparent that the Applicants moved this court while the said restoration order was under drafting.

12. Both the Applicants' and the Respondent's counsel filed submissions and authorities which I have considered.

Analysis & Determination

13. Having considered the pleadings and submissions made by the parties, the issues that arise for determination are;

    i. Whether this court has jurisdiction to entertain this suit?

    ii. Whether the Applicant should be granted leave to institute judicial review proceedings and if so, whether the leave should operate as stay?

14. Vide its Replying Affidavit, the Respondent objects to this court's jurisdiction to entertain this matter. The Respondent's objection is two pronged. First, that the matter is sub judice as there is a similar pending Petition before the National Assembly Department Committee on Environment and Natural Resources and secondly, that the application violates the doctrine of exhaustion as the Applicants have failed to pursue the remedy of Appeal open to them.

15. The centrality of jurisdiction in judicial proceedings is a well settled principle in law. A court without jurisdiction acts in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*[1989] KLR 1 stated thus;

> "I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without."

16. More recently, the Court of Appeal in *Kakuta Maimai Hamisi vsPeris Pesi Tobiko & 2 Others* [2013] eKLR stated thus;

> " So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cul-de-sac. Courts, like nature, must not sit in vain."

17. It is clear from the foregoing that the court is at the first instance mandated to determine the Respondent's objection to its jurisdiction and whether this suit is sub judice.

18. The term "sub-judice" is provided for under Section 6 of the *Civil Procedure Act* as follows:

> " 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."

19. The concept of sub judice acts to bar a court from trying a matter that is in one way or another before another court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing under the same title. Its rationale was well expressed by the Supreme Court in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties* [2020] eKLR who stated thus;

> " The term '*sub-judice*' is defined in *Black's Law Dictionary* 9th Edition as: "Before the Court or Judge for determination." 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 and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res *sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

20. As to whether the doctrine of sub judice is applicable in the circumstances of this, the court thinks not. Section 6 is clear that the doctrine applies with respect to matters pending in court. The National Assembly is not a court and as such any proceedings before it cannot be a proceeding for the purposes of section 6 of the Act.

21. The doctrine of exhaustion requires a party to exhaust any dispute resolution mechanism provided by a statute and/or law before resorting to the courts. The Court of Appeal first embodied the doctrine of exhaustion in *Speaker of National Assembly vs Karume* 1992 KLR where the court held that;

> "Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

22. As correctly cited by the Respondent, the Court of Appeal in the case of *Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others*[2015]eKLR observed as follows:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

23. The question of what invokes the doctrine of exhaustion before embarking on the court process was aptly discussed in the case of *William Odhiambo Ramogi & 3 others vs Attorney General & 4 Others: Muslims for Human Rights & 2 others(Interested parties)* [2020]eKLR by a five judge bench as follows:

> "The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

24. The Court went on to outline the exceptions to the rule as follows:

> "As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

> In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

25. Turning to the facts of this case, the Applicants are seeking leave to apply for judicial review orders of certiorari to quash the alleged verbal and televised notice of eviction and/or removal of 15 slaughterhouses from Kiamaiko and an order of prohibition restraining the Respondent from evicting the Applicants from Kiamaiko Abattoirs.

26. The Applicants assert that the Respondent's pronouncements aforesaid are tainted with illegality, irrationality and procedural impropriety as there was no prior written notice nor were the Applicants served with an Environmental Restoration Order nor given an opportunity to make presentations before the Respondent's verbal pronouncements were made.

27. The Respondent asserts that the Applicants have not exhausted the Appeal process as set out under Section 129 (1) & (2) of EMCA and neither have they written to the Respondent pursuant to Section 110 of EMCA asking them to give reasons as to why it should reconsider the Environmental Restoration Order.

28. In response, the Applicants states that they had not been served with the Environmental Restoration Order and as such, Section 129 is in-operative. The Respondent's answer to this is that they were in the process of drafting the Environmental Restoration Order and that the Application was filed prematurely.

29. It is uncontested that at the time of filing the present application, the Environmental Restoration Order had not been served on the Applicants. Indeed, Section 108 (1) of EMCA mandates the Respondent to issue and serve an Environmental Restoration Order on any person requiring them to among others restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order and to prevent the person on whom it is served from taking any action which would or is reasonably likely to cause harm to the environment.

30. Whereas the EMCA does not provide any timelines for the issuance of the Environmental Restoration Order, taking into account the nature of the document, it has not been sufficiently explained why the same was only served on the Applicants after the Respondent was served with the present application.

31. Further, the Applicants cannot be said to have acted prematurely as they moved the court under a certificate of urgency on the basis of the alleged verbal notices issued on January 23, 2022 asking them to vacate the premises on or before the March 1, 2022 before any written notice and/or restoration order was served upon them. This was well within their rights and in the circumstances, it is apparent that Section 110(1) and 129(1)(e) of EMCA are inoperative.

32. The question that lends itself from the foregoing is whether the entirety of Section 129 of EMCA which deals with Appeals to the Tribunal has been rendered in-operative by the failure to issue the restoration order.

33. Section 129 of the EMCA provides as follows:-

    (1) Any person who is aggrieved by:-

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder;

may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

34. Whereas Section 129(2) of the EMCA provides as follows:

> "Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose"

35. In the present case the Applicants are questioning the validity of the Respondent's verbal notice issued to them asking them to vacate the premises. Notwithstanding the fact that the notices were verbal, it is apparent and indeed admitted that they constitute a decision of the Respondent.

36. To that end, the Applicant being aggrieved by that decision was obligated to file an Appeal to the National Environment Tribunal pursuant to Section 129 (2) of the EMCA. The court is in this respect guided by the decision of the Court of Appeal in *National Environmental Tribunal vs Overlook Management Limited & 5 Others* [2019] eKLR which held as follows:

> "In our view and to reconcile the conflicting decisions, where a party considers itself aggrieved by the events stipulated in section 129 (1) (a)-(e) of the Act, such a party may as of right appeal to the appellant. Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd respondent, its Director-General or its committees, then such a party may lodge an appeal pursuant to sub-section 2 of that provision. .....This is in line with the expanded locus standi in the Act and gives effect to its legislative purpose."

37. While conceding that the Court of Appeal in *Republic vs NEMA* [2011] eKLR emphasized that the existence of an alternative remedy is not a bar to the commencement of judicial review proceedings by an aggrieved party, the court went on to further state as follows:

> "The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was

the real issue to be determined and whether the statutory appeal procedure was suitable to determine."

38. This sentiment was reiterated by the Court of Appeal in *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd* [2018] eKLR which held as follows:

> " What then, is the consequence, if any, of the respondent's failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial Review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Other*s[2017]eKLR and *Kenya Revenue Authority & 5 others v Keroche Industries Limited* CA No 2 of 2008. Perhaps that is why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that:
>
> "Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."
>
> "Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."

39. The court's reasoning in *Kenya Revenue Authority*(supra) captures the provisions of Section 9 (2) of the *Fair Administrative Action Act* which goes a step further to imply that in fact where there exist internal mechanisms for resolution of the dispute which, inevitably, would yield an alternative remedy, it is no longer a matter of the court's discretion to entertain, let alone grant, an application for judicial review. In that event, the court will not review the administrative action until the internal mechanism has been exhausted.

40. In the present circumstances, there was no evidence to show that the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court as opposed to the mechanism under the Act.

41. In any event, the Applicants have failed to explain exceptional circumstances that would entitle them to sidestep the internal dispute resolution mechanisms and invoke the jurisdiction of a judicial review court. The first pot of call by the Applicants in challenging the decision of the Respondent should have been to the Tribunal and not this court. In the circumstances, the Respondent's objection succeeds.

42. The application by the Applicants for leave to commence judicial review proceedings against the Respondent is declined. That being the case, the suit is struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF JULY, 2022.

O. A. Angote

Judge

In the presence of;

Mr. Sausi for Ex parte Applicants

Mr. Gitonga for Respondent

Court Assistant - June