



Okoti v Cabinet Secretary Industry Trade and Co-operatives & 2 others (Environment & Land Petition E052 of 2021) [2022] KEELC 3728 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E052 OF 2021
OA ANGOTE, J
JULY 28, 2022**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**CABINET SECRETARY INDUSTRY TRADE AND CO-
OPERATIVES 1ST RESPONDENT**

KENYA BUREAU OF STANDARDS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

Background

1. *Vide* a Notice of Preliminary Objection dated June 28, 2022, the 2nd Respondent states, *inter-alia* as follows:
 - i. The Petition and Application are fatally defective and an abuse of the court process.
 - ii. The Court is bereft of jurisdiction to determine the Petition herein.
 - iii. The Petition herein offends Articles 162(2)(b) and Article 165(3)(d) of the Constitution of Kenya, 2010.
 - iv. The Petition offends Section 11 of the Standards Act.
 - v. The Petition is a violation of Section 13 of the Environment and Land Court Act, 2011.
 - vi. This Petition violates Order 53, Rule 2 of the Civil Procedure Rules, 2010 considering the impugned rules were gazetted on 20th August, 2020.



2. The Preliminary Objection was canvassed *vide* oral submissions on June 26, 2022. Counsel for the 2nd Respondent submitted that the Preliminary Objection relates to the jurisdiction of the court and that this court has no jurisdiction as the dominant dispute in the Petition regards whether the Standards KS 1515 of 2019 is constitutional and as such the dispute ought to have been filed before the Constitutional Division of the High Court and not the ELC.
3. It was submitted that only the High Court has jurisdiction under Article 165(3) of the [Constitution](#) to determine the constitutionality of KS 1515 of 2019 Standards and that the ELC court can only deal with questions under Section 13 of the ELC Act. According to the Respondent, Section 11 of the [Standards Act](#) provides that any person aggrieved by the actions of the Respondent should approach the Standards Tribunal and that the correct forum should have been the Standards Tribunal.
4. In response, the Petitioner informed the court that the key question in the Petition is that of the emissions of the impugned motor vehicles; that the decision by KEBS (the 2nd Respondent) to issue the standards on emissions is an environmental question which this court is vested with jurisdiction to decide and that the Respondent raised an objection as to the jurisdiction of the High Court when the Petition was first filed in the High Court and that he withdrew the Petition from the High Court and filed it in this court.
5. It was submitted by the Petitioner that the Constitution excludes the Standards Tribunal from looking into the issues of emissions; that the Tribunal has no jurisdiction to deal with that which has already been gazetted and cannot quash notices which is the purview of this court and that the gazetting of the impugned standards was hidden from the public.
6. It was the argument of the Petitioner that the impugned standards will allow in the country vehicles that are using highly polluting engines; that looking at the precautionary principle and Article 70 of the [Constitution](#), this court is vested with jurisdiction to deal with the dispute herein and that a Petition is not governed by Order 53 of the [Civil Procedure Rules](#).
7. Counsel for the 3rd Respondent submitted that a notice of withdrawal had been filed in ELC Petition E528 of 2021; that he is not privy to the Petition filed in the High Court; that the Standards Tribunal has jurisdiction to set aside a decision of KEBS; that it is the High Court that can quash the gazette notice; that the dominant dispute herein is whether the standards are constitutional; that the issue of the environment is peripheral and that the standards of emission in Kenya are different from Europe.
8. Counsel for the 1st and 2nd Respondents admitted that they had filed a Preliminary Objection in the High Court leading to the withdrawal of a Petition that is similar to the present one.

Analysis & Determination

9. Upon considering the Preliminary Objection and the submissions in respect thereof, the sole issue for determination is whether this court has jurisdiction to determine the Petition.
10. The threshold of a preliminary objection was set out by the Court of Appeal in the *locus classicus* case of *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that:

“...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 point may 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.”

11. Sir Charles Newbold P. in the same case added at page 701 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.

12. In the present case, the Respondents dispute this court’s jurisdiction to entertain the application dated 3rd June, 2022 pending before it and the Petition in its entirety. As held by the Supreme Court in *Mary Wambui Munene v Peter Gichuki Kingara & 6 Others* [2014] eKLR, the question of jurisdiction constitutes a pure question of law.

13. It is trite that jurisdiction is everything. The significance of jurisdiction was succinctly captured by Nyarangi, J.A. in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* [1989] KLR 1:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

14. Similarly, the Court of Appeal in the case of *Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 others* [2013] eKLR had the following to say on the centrality of jurisdiction: -

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is 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 *cui-de-sac*. Courts, like nature, must not sit in vain.”

15. The Petitioner instituted the Petition dated December 9, 2021 seeking to impugn the Kenya Standards Order, 2020 (Legal Notice No 170 of 10th August, 2020), the Kenya Standards KS1515:2019 [Road Vehicles-Inspection of Road Vehicles-Code of Practice] and the exemption by the Cabinet Secretary- Ministry of Industry, Trade & Co-operation granted to all licensed motor-vehicle assemblers on 2019-12-20 from implementation of the Euro IV/4 Emission standards starting from September 1, 2019 – January 1, 2023.

16. According to the Petitioner, the Kenya Standards Order, 2020 (Legal Notice No 170) of August 10, 2020 which among others provides for Kenya’s mandatory standards under Sections 9 (2) of the *Standards Act* was voided by the regulation allowing the authority not to comply with Section 11(1) & (2) of the *Statutory Instruments Act* and Section 6 of the *Revision of the Laws Act*.

17. The Petitioner averred in the Petition that certain provisions of KS1515:2019 are vague, discriminatory and endanger the environment by allowing the local assembly/importation of new vehicles which conform to the inferior Euro 4 emissions while prohibiting the importation of used vehicles that conform with the superior Euro 5 emissions standards.



18. The Petitioner averred that he is aggrieved by Clause 6.1 of KS 1515:2019, which allows new vehicles to conform to the lower Euro emissions when read against clauses 4.7.1, 4.7.2, 4.7.3, and 4.7.4 of the Standard which impose unreasonable age limits on imported used vehicles.
19. According to the Petitioner, since 1992, concerned that air pollutant emissions from motorised transport are a significant contribution to the overall state of air quality in Europe, the European Union (EU) regulations have been imposed on new cars, with the aim of improving air quality, meaning that a car has to meet a certain Euro emissions standard when it is made.
20. The Petitioner has averred in the Petition that the standards are defined in a series of European Union directives staging the progressive introduction of increasingly stringent standards and that the aim of Euro emissions standards is to reduce the levels of harmful exhaust emissions, chiefly: Nitrogen oxides (NO_x), Carbon monoxide (CO), Hydrocarbons (HC) and Particulate matter (PM) 2.
21. It is the Petitioner's case that various constitutional provisions have been violated including Articles 10, 27, 40, 42(1), 47(1), 69(1)(g), 73(1)(a), 232(1)(f) of the Constitution with the publication of the new standards by the 2nd Respondent. The Petitioner has moved the court seeking to quash the public notice of implementation of KS:1515: 2019, the subject of the Petition.
22. The Respondent's objection to this suit is three-fold. First, that the orders sought can only be granted by the Constitutional Division of the High Court which has jurisdiction under Article 165(3) of the Constitution and not this court; secondly, that the Standards Tribunal is vested with jurisdiction to hear an appeal against the decision of KEBS and as such the application and the Petition contravene the doctrine of exhaustion and lastly, that the application offends the provisions of Order 53 Rule 2 of the Civil Procedure Rules.
23. The framework set out in Order 53 of the Civil Procedure Rules applies to Judicial Review proceedings. What is before this court is not a Judicial Review application but a Petition. As such, the rules governing Judicial Review applications are inapplicable in the circumstances of this case.
24. Article 165 (3) and (6) of the Constitution sets out the jurisdiction of the High Court as follows:
 - “(3) Subject to clause (5), the High Court shall have —
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any



law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.”

25. The Environment and Land Court is established by Article 162(2) and (3) of the *Constitution* which provides as follows: -

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) ...

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

26. The legislation contemplated under Article 162 (3) is the *Environment and Land Court Act*. Section 13 thereof outlines the Environment and Land Court’s jurisdiction as follows: -

“(1) The Court shall have original and appellate jurisdiction to hear and determine all dispute 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.



- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”

27. The question of whether this court can adjudicate and determine constitutional issues is now well settled. The Court in United States International University v Attorney General HCCP 170 of 2012 [2012] eKLR persuasively stated as follows:

“The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3) Section 12 of the *Industrial Court Act* 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the *Industrial Court Act*, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the constitution within the matter before it.”

28. The above rationale received the Court of Appeal’s approval in Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR, where the court stated as follows:

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamentals rights associated with the two subjects.”

29. In circumstances where a matter pertains to issues potentially falling within the jurisdiction of multiple courts, the question of which court is best suited to determine it is addressed by applying the predominant purpose test. The test was explained in the case of Suzanne Butler & 4 Others v Redbill Investments & Another [2017] eKLR as follows:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”



30. As aforesaid, the Petitioner is seeking to impugn the Kenya Standards Order, 2020, the Kenya Standard KS1515:2019 and the exemption granted by the Cabinet Secretary to all licensed motor vehicle assemblers on 2019-12-20 from implementation of Euro IV/4 Emission Standards from 2019-12-01 to 2023-01-01 for among others being void, vague, unreasonable, discriminatory and endangering the environment.
31. It is the Petitioner's contention that should the aforesaid standards be implemented; the result would be catastrophic to the environment as it would allow importation of vehicles which conform to the inferior Euro 4 Emissions standards which are harmful to the environment.
32. It is therefore clear that a determination of whether the Kenya Standards Order, 2020, Kenya Standards KS1515:2019 and the exemption by the Cabinet Secretary ought to be annulled will of necessity include not only an investigation into their propriety, but an investigation of the impact of allowing the importation of vehicles which conform to Euro 4 standards will have on the environment.
33. Article 42 of the *Constitution* guarantees every person the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and to have obligations relating to the environment fulfilled under Article 70. Indeed, this court's jurisdiction under this head cannot be in doubt in light of Section 13(3) of the ELC Act.
34. Considering that under Article 162 (2) (b) of the *Constitution* as read together with section 13 (3) of the *Environment and Land Court Act*, it is this court, and not the High Court, that has the requisite jurisdiction to deal with disputes relating to environmental protection and climate issues, which are the predominant issues herein, That has the jurisdiction to determine the Petition and the application.
35. The 2nd Respondent's third argument is founded on the doctrine of exhaustion which requires a party to exhaust any dispute resolution mechanism provided by statute and/or law before resorting to the courts. Indeed, it is now generally accepted that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in court as a matter of law. To this end, 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.”
36. 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 v 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...”

37. 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.”

38. According to the 2nd Respondent, the Petition and the application contravenes Section 11 of the [Standards Act](#) which provides as follows;

“Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal.”

39. The jurisdiction of the Standards Tribunal as per section 11 of the [Standards Act](#) is with respect to receiving complaints by persons aggrieved by the decision of the Bureau or the Council. Whereas the dispute herein arises from a decision of the Bureau, it is much wider than that.

40. In the current Petition, the court is dealing with the constitutional questions regarding the alleged threatened violation of the Constitution, and specifically the right to a clean and healthy environment. It is imperative at this juncture to reiterate the provisions of Section 13 (3) of the [Environment and Land Court Act](#), which provides as hereunder;

“(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the [Constitution](#).”

41. In view of the foregoing, the court finds that the application and the Petition do not offend the doctrine of exhaustion and the same are properly before this court. It is only this court, and not the Standards Tribunal, that has the mandate to enforce the right to a clean and healthy environment.



42. For those reasons, the Preliminary Objection dated June 28, 2022 fails and the same is dismissed with costs.

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

O. A. Angote

Judge

In the presence of;

Mr. Omtata for Petitioner

No appearance for Respondents

Mr. Kamau for Njagi for Attorney General

Court Assistant - June

