



Kiagi v National Environment Tribunal; Seifert & another (Interested Parties) (Suing as Chairman and Secretary respectively of the New Nyali Resident Association) (Environment & Land Petition 45 of 2021) [2022] KEELC 12622 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12622 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 45 OF 2021
NA MATHEKA, J
SEPTEMBER 27, 2022**

BETWEEN

PAUL ONYANGO KIAGI PETITIONER

AND

NATIONAL ENVIRONMENT TRIBUNAL RESPONDENT

AND

HERBET SEIFERT INTERESTED PARTY

ESTHER GATEMBU INTERESTED PARTY

**SUING AS CHAIRMAN AND SECRETARY RESPECTIVELY OF THE NEW
NYALI RESIDENT ASSOCIATION**

RULING

1. The interested parties herein raised a preliminary objection to the main petition and the notice of motion dated June 28, 2021 on the following grounds that this honourable court lacks jurisdiction to hear and determine the application and the main petition because the following reasons; that if at all the National Environmental Tribunal disregarded the petitioner's notice of preliminary objection then the petitioner can only challenge the tribunal's decision through an appeal lodged under section 130 of the *Environmental Management and Co-ordination Act*, 2019 and not through a constitutional petition. The question of whether two of the tribunal members are biased cannot be raised in this court in the first instance but on appeal. The decision of the tribunal to remind parties of section 129(4) of EMCA and to direct NEMA to enforce the directions can only be challenged through an appeal lodged under section 130 of the *Environmental Management and Co-ordination Act*, 2019 and not through a constitutional petition. The petition, to the extent that it challenges the decision of the tribunal made on made on May 6, 2021 is statute-barred as the issue was raised in this court outside 30 days from the



date the decision was made which is contrary to section 130 of the *Environmental Management and Co ordination Act*, 1999. This issues touching on the tribunal’s decision of May 6, 2021 are therefore statute-barred because this petition was filed on June 29, 2021, way beyond the 30 days allowed in law. The petition is barred by the doctrine of res subjudice because the issues raised therein are pending determination in the Environment and Land Court in ELC No 221 of 2020 and ELC No 227 of 2020. The petitioner has deliberately guised his appeal against the decision of the tribunal made on May 6, 2021 as a constitutional petition so as to circumvent the provisions of section 130 (1) of EMCA. This court cannot entertain a guised appeal which has been brought outside the 30-day period provided for in the law. The alleged biasness of two of the tribunal members was not raised and has never been raised in the tribunal. The issue cannot be raised in the first instance in the High Court which court in any event lacks jurisdiction to deal with the issue. The petitioner ought to have applied at the tribunal for the two members to recuse themselves and then appeal against the decision in the ELC and not in the High Court.

2. That this honourable court lacks jurisdiction to hear and determine the application and the main petition because the following reasons: If at all the National Environmental Tribunal disregarded the petitioner’s notice of preliminary objection, then the petitioner can only challenge the tribunal’s decision through an appeal lodged under section 130 of the *Environmental Management and Co-Ordination Act*, 2019 and not through a constitutional petition. The question of whether two of the tribunal members are biased cannot be raised in this court in the first instance but on appeal. The decision of the tribunal to remind parties of section 120(4) of EMCA and to direct NEMA to enforce the directions can only be challenged through an appeal lodged under section 130 of the *Environmental Management and Coordination Act* 2019 and not through a constitutional petition.
3. The petition, to the extent that it challenges the decision of the tribunal made on May 6, 2021 is statute-barred as the issue was raised in this court outside 30 days from the date the decision was made which is contrary to section 130 of the *Environmental Management and Co-ordination Act*, 1999. This issues touching on the tribunal decision of May 6, 2021 way beyond the 30 days allowed in law. The petition is barred by the doctrine of res subjudice because the issues raised therein are pending determination in the Environment and Land Court in ELC No 221 of 2020 and ELC No 227 of 2020. The petitioner has deliberately guised his appeal against the decision of the tribunal made on May 5, 2021 as a constitutional petition so as to circumvent sent the provisions of section 130 (1) of EMCA. This court cannot entertain a guided appeal which has been brought outside the 30-day period provided for in the laws. The interested parties herein pray that the entire petition and application dated June 28, 2021 be struck out and/or dismissed
4. This court has considered the preliminary objection and the submissions therein. The Interested parties filed a notice of preliminary objection to the main petition and application dated June 28, 2021 on the grounds that; the court lacks jurisdiction to hear the petition and that the only challenge that the petitioner can make to a decision of the respondent is through an appeal and not constitutional petition; that the petition is time barred as the decision of the respondent can only be challenged within 30 days of making the decision; that the petition is *res judicata* to ELC 221 of 2020 and ELC 227 of 2020; and that the petitioner ought to have made the application for recusal of the respondent’s members in the tribunal and not before this court.
5. The law on preliminary objection was settled in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where it was held 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.

6. The interested party has maintained that the petition is subjudice to two matters before this court, ELC 221 of 2020 and ELC 227 of 2020. The issue of *sub judice*, deals with a multiplicity of suits between the same parties or those claiming under them over the same subject matter. The principle of *sub judice* invites court to probe evidence as to which suit exists parallel to the current suit.
7. The Supreme Court settled the question of jurisdiction in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* (2012) eKLR wherein the court stated as follows:

“A court’s jurisdiction flows from either the constitution of 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. We agree with counsel for the first and second respondents in his submissions that 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.”
8. The preliminary objection essentially challenges the jurisdiction of this court to hear and determine the petition, on the ground that the petitioner ought to have challenged the decision of the National Environmental Tribunal through an appeal under section 130 of the *Environmental Management and Coordination Act* as opposed to a constitutional petition.
9. The case before this court is a constitutional petition, where the petitioner is alleging violation of his constitutional rights during the proceedings before the respondent in Tribunal Appeal No 51 of 2020. The petitioner claims that the respondent violated his right to fair trial when they failed to deal with his preliminary objection which raised various points of law. The petitioner claims that the respondent violated article 10, 27 and 50 of the Constitution and urges court to find that his fundamental constitutional rights were violated, prohibiting the continuance of the proceedings before the respondent and consequentially quashing the said proceedings as well as finding two of its members to have conflict of interest for being residents of Nyali.
10. Without going into the merits of the petition, I have carefully perused the petition and its supporting affidavit and it is evident that the main issue before the court are the proceedings of May 6, 2021 where the respondent conducted a virtual session. The petitioner argues that the respondent disregarded his preliminary objection and gave directions and a hearing notice. From the proceedings, which are marked POK-13, it is evident that the 2nd respondent was presented by Ms Apolot who was holding brief for Mr Gikandi. Ms Apolot did not object to Mr Oluga, who was on record for the interested party prayer to file responses to their preliminary objection, and further sought an adjournment.
11. From the pleadings it is evident that the issues raised herein on violation of rights are largely derived from the procedural conduct of the tribunal that would have been well addressed and articulated within the appeal at the National Environmental Tribunal. Though under article 162 (2) (b) of the Constitution and sections 4 and 13 of the *Environment and Land Court Act*, this court has the jurisdiction to hear constitutional petition relating to the environment and land, the National Environment Tribunal derives its jurisdiction from section 129 of the *Environmental Management and Coordination Act* to hear appeals the from anyone who is aggrieved by the grant of a license or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, or the imposition



of any condition, limitation or restriction on a licence, or the revocation, suspension or variation of a licence under the Act or regulations.

12. The Supreme Court settled the question of jurisdiction on petitions which are multifaceted with issues that can be determined by court and others by the tribunal in *Benson Ambuti Adegwa & 2 others v Kibos Distillers Limited & 5 others* (2020)eKLR, where it was stated that:

“It would therefore seem that the superior court, determined, quite incorrectly, that it had power or jurisdiction to hear and determine the petition, which although raised issues that were within its purview, were also intertwined with other issues which were rather obviously not within its jurisdiction, and which could have been effectively determined by another legislatively established tribunal, in this instance two bodies, the National Environmental Tribunal and the National Environmental Complaints Committee.

The Supreme Court found that;

“...where the interpretation or application of the *Constitution* has but only a limited bearing on the merits of the main cause, then the jurisdiction of this court may not be properly invoked.... Both superior courts in our view, therefore made determination primarily on an interrogation and adjudication of statutory provisions and minimal reference to the *constitution*. It cannot thus be said that the issues were determined in consideration and pursuant to the interpretation or application of the *constitution* to therefore warrant an appeal to this court.”

13. I find that this court does not have jurisdiction to entertain the matter. The party that will be aggrieved by the outcome of the appeal will have an opportunity to appeal to this court, which will make a determination. The decision of the Supreme Court binds this court.
14. It is also not disputed that there are three different suits proceeding in different forums over the same subject issue and involving the same parties. These suits are: Mombasa ELC suit No 221 of 2020 *Paul Onyango Kiagi v Bubert Seifer (sued on his own capacity and in his capacity as an aofficial of New Nyali Residents Association)* Mombasa ELC suit No 227 of 2020 *Benson Karomo & Hubert Seifert (Suing as Chairman and Secretary respectively of New Nyali Residents Association) v Paul Onyango Kiagi & the County Government of Mombasa*. National Environment Tribunal Appeal No 51 of 2020 *Hubert Seifert & Dr Esther Gatemu (suing as chairman and secretary respectively of the New Nyali Resident Association) v National Environment Management Authority & Paul Onyango Kiagi*. I find this matter is *sub judice* and an abuse of the court process. I find the preliminary objection is merited and I uphold the same. This matter is struck out with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

N.A. MATHEKA

JUDGE

