



**Muregi & another v Palak Steel Mill Limited & 9 others (Environment & Land
Petition 14 of 2020) [2022] KEELC 12643 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION 14 OF 2020**

BM EBOSO, J

SEPTEMBER 19, 2022

QUIA ELIT QUO AUT O

BETWEEN

FRANCIS WAMAKIMA MUREGI 1ST PETITIONER

FEDELIS NJOKI MITUGO 2ND PETITIONER

AND

PALAK STEEL MILL LIMITED 1ST RESPONDENT

PALAK INTERNATIONAL LIMITED 2ND RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

**CABINET SECRETARY MINISTRY OF ENVIRONMENT, WATER AND
NATURAL RESOURCES 4TH RESPONDENT**

COUNTY GOVERNMENT OF KIAMBU 5TH RESPONDENT

MCA - LARI KIRENGA WARD 6TH RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY 7TH RESPONDENT

**CECM- WATER, ENVIRONMENT, ENERGY AND NATURAL RESOURCES ,
COUNTY GOVERNMENT OF KIAMBU 8TH RESPONDENT**

ATTORNEY GENERAL 9TH RESPONDENT

WATER RESOURCES AUTHORITY 10TH RESPONDENT



JUDGMENT

Introduction

1. The dominant issue in this petition is the question as to whether the steel milling plant that the 1st and 2nd respondents intend to operationalize at Uplands/Nyambari, Lari sub-county, Kiambu county, is a threat of infringement of the petitioners' right to a clean and healthy environment or guaranteed under article 42 of the *Constitution* of Kenya. The respondents have challenged the jurisdiction of this court to exercise primary jurisdiction over the issue, in the circumstances of this petition. Given the centrality of jurisdiction in our judicial system, I will first dispose the question of jurisdiction in tandem with the principle in *Owners of the Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.

The Petitioners' Case

2. Through a petition dated October 16, 2020, Prof Francis Wamakima Muregi and Dr Fedelis Njoki Mitugo contended that they were residents of Uplands/Nyambari Area, Lari sub-county, Kiambu county – a residential cum agricultural neighbourhood with fully fledged social amenities such as schools, hospitals and churches. They brought the petition on their own behalf and on behalf of Uplands/Nyambari Welfare Group. The petition was initially supported by an affidavit sworn on October 16, 2022 by Prof Francis Wamakima Muregi. Several other supporting affidavits were filed.
3. The gist of the petition was that Palak Steel Mill Limited [the 1st respondent] and Palak International Limited [the 2nd respondent] owned and operated a steel milling factory in Kikuyu – Nderi road area, within Kikuyu sub county. Residents of Kikuyu – Nderi road area had objected to the operations of the factory due to air pollution, noise pollution, and unsafe waste disposal by the factory. Owing to the objection, the 1st and 2nd respondents had decided to relocate their steel milling factory from Kikuyu-Nderi road area to Uplands/Nyambari area in Lari sub county, where they had constructed a steel milling plant on land title number Lari/Kirenga/1414. They faulted the county government of Kiambu for approving a change of user of the said land from agricultural to light industry without public participation. They alleged that the intended steel milling factory was a heavy industry plant and not a light industry one.
4. The petitioners further contended that the intended factory had been built on Rurii wetlands which was a water catchment area and the main source of water into Ruiru dam which is a source of clean water for the residents of Lari and the upper part of Nairobi. They alleged that the 6th respondent had drilled a borehole within the factory premises.
5. The petitioners faulted the 3rd, 4th, 5th, 7th, 8th and 10th respondents for granting approvals and licences for the construction of a steel milling factory in a residential cum agricultural area without public participation and in disregard of the harmful effects of the industrial operations of the factory. They contended that the 3rd respondent had flouted its mandate under the law by issuing an environmental impact assessment licence to the 1st and 2nd respondents without public participation.
6. It was the case of the petitioners that the actions and omissions of the respondents constituted threats of infringement of their right to a clean and healthy environment under articles 42 of the *Constitution*. They added that the 3rd respondent had contravened article 12 of the *International Covenant on Economic, Social and Cultural Rights* and article 24 of the *African Charter on Human and People's Rights*. They further contended that their right of access to information under article 35 had been violated.



7. The petitioners urged the court to grant them the following reliefs:
- i. A declaration that the petitioners' right to clean and healthy environment guaranteed under article 42 of the Constitution of Kenya, article 12(2)(b) of the International Covenant on Economic, Social and Cultural Rights (ICESR) and article 24 of the African Charter on Human and People's Rights (ACHPR) are under threat of infringement by the actions and omissions of the respondents.
 - ii. A declaration that the petitioners' right to the highest attainable standards of health and right to clean and safe water as guaranteed by article 43 (1) (a) and (d), article 12 (1) and (2)(a) of the International Covenant on Economic, Social and Cultural Rights(ICESR), article 24 of the Convention of the Rights of the Child (CRC) and article 16 of the African Charter on Human and People's Rights (ACHPR) are under threat of infringement by the actions and omissions of the respondents.
 - iii. An order do issue prohibiting relocation of the 1st and 2nd respondents' steel milling factory to Uplands/Nyambari area, Lari, within Kiambu county, erected on title number Lari/Kirenga/1414.
 - iv. An order of *mandamus* do issue compelling the 1st and 2nd respondents to demolish and/or pull down all the structures encroaching on water catchment area erected on title number Lari/Kirenga/1414 in Uplands/Nyambari area, Lari within Kiambu county.
 - v. Costs of this petition
 - vi. Any other relief that this honourable court may deem just to grant.

1st and 2nd Respondents' Case

8. The 1st and 2nd respondents opposed the petition through a replying affidavit sworn on November 17, 2020 by Rajesh Kumar Maganbhat Patel. He deposed that he was a director of the 1st and 2nd respondents. He added that the 1st and 2nd respondents' steel milling operations in Kikuyu – Nderi road area started in 2012 and had at all material times complied with the requisite laws and regulations. He contended that the respondents had at all times ensured sustenance of a healthy environment and had safeguarded the health interests and welfare of the residents of the neighbourhood.
9. Mr Patel added that the 3rd respondent had granted the 1st and 2nd respondents a licence to own and operate a waste treatment plant/disposal site. He further deposed that, in fulfillment of the requirements of sections 68 and 69 of the Environmental Management and Coordination Act [the EMCA], the 1st and 2nd respondents had consistently caused regular environmental audits to be carried out on their steel milling operations.
10. He added that due to limited space within their plant at Kikuyu - Nderi road area, the 1st and 2nd respondents acquired three parcels of land, namely, title numbers Lari/Kirenga/1414; 1415 and 1416, with a view to expanding their operations. It was the case of the 1st and 2nd respondents that the reason for their relocation to Lari was the need for more space, and not pollution or harmful effects on the health of the residents of Kikuyu/ Nderi road area as alleged by the petitioners.
11. Mr Patel deposed that upon acquiring the three parcels the land, the 1st and 2nd respondents applied for and obtained approval for change of user of the three parcels of land from agricultural to light industry [warehouse]. He contended that the prescribed procedures, including notification of the application through the print media, were adhered to prior to the county government granting the approval for change of user in February 2019. He further deposed that the 1st and 2nd respondents



- subsequently carried out an environmental impact assessment which culminated in the grant of EIA licence No 00558066, dated June 12, 2019, by the 3rd respondent, permitting the 1st and 2nd respondents to construct a commercial go-down on land parcel numbers Lari/Kirenga/1414 and 1415.
12. Mr Patel added that in October 2020, the 1st and 2nd respondents made an application for change of user of parcel numbers Lari/Kirenga/1414; 1415 and 1416 from light industry [go down] to heavy industry [steel milling]. Subsequent to that, all-inclusive public participation meetings were held on October 7, 2020 and November 5, 2022. He contended that the meeting of October 7, 2020 culminated in the signing of a consent form by members of the public.
 13. Mr Patel faulted the petitioners for failing to utilize the redress mechanism provided under section 129 of the *Environmental Management and Co-ordination Act* [the EMCA]. He urged the court to dismiss the petition.

3rd Respondent's Case

14. The 3rd respondent opposed the petition through a replying affidavit sworn on December 30, 2020 by Stephen W Kitunga, its county director of environment in charge of Kiambu county. He deposed that in relation to the steel milling plant at Kikuyu, the 2nd respondent had submitted an environmental audit report dated January 28, 2013 and had subsequently submitted periodic annual environmental audit reports for the years 2016, 2017, 2018 and 2019. He added that in 2015, the 3rd respondent issued to the 2nd respondent a licence to operate a waste treatment plant at its Kikuyu plant and it subsequently issued to the 2nd respondent an emission licence in relation to the same plant.
15. Mr Kitunga added that in or about August 2020, the 1st respondent applied for an environmental impact assessment licence [hereinafter referred to as "EIA licence"] for mini mill for steel products manufacturing from molten scrap project located on parcel numbers Lari/Karenga/ 1414 and 1415, Lari sub county, Kiambu county. In furtherance of its mandate, the 3rd respondent submitted an environmental impact assessment report [EIA report] to lead agencies, seeking their comments. The 3rd respondent similarly notified the 1st respondent to publish public notices inviting the public to submit oral and written comments on the EIA report. He added that the submitted report was "under screening and assessment for completeness pending the authority's approval of the application with conditions." It was the case of the 3rd respondent that it had complied with all the relevant laws, regulations and rules of procedure and that it had remained conscious of the statute and regulations in place. The 3rd respondent urged the court to dismiss the petition.
16. The 5th and 7th respondents responded to the petition through a replying affidavit sworn on November 17, 2020 by David Kuria, the Kiambu county executive committee member [CECM] in charge of water, environment, energy and national resources. He deposed that on August 18, 2020, he issued a notice of closure of the 1st and 2nd respondents' plant in Kikuyu township, following complaints by the public alleging pollution. Following the notice of closure, the 1st and 2nd respondents decided to relocate to Lari. He advised the governor of Kiambu county against attending a subsequent public participation meeting scheduled for October 7, 2020 on the ground that the 1st and 2nd respondents did not follow the proper procedure when embarking on the venture.
17. He added that the county government of Kiambu subsequently received an objection to the establishment of a steel milling factory at Uplands, Lari county. Following the objection, his department initiated a site visit to the plant and issued a status report in which it was observed, *inter alia*:
 - i. The industry had not assembled a furnace, which was a key requirement to address the environmental concerns.



- ii. The proposed plant was not yet connected to the main electric power supply.
 - iii. There was general incomplete construction and civil works.
 - iv. Their manual and contracted artisans were not provided with basic personal protective equipment.
 - v. The industry did not furnish the team with environmental compliance reports for the site as required by law.
18. He contended that he noted in the report that the 1st and 2nd respondents had given misleading information on the validity of setting up the factory amidst environmental concerns. He further deposed that his department requested the 1st and 2nd respondents to provide information relating to: (i) environment, safety and health impact assessment (EHSIA) study report; (ii) site specific environmental management plan [EMP]; (iii) construction safety management plan, including occupational safety and health management policy; (iv) hazard identification & risk assessment report, including fire prevention and control, noise and air pollution controls; and (v) provision of personal protective equipment and clothing. He added that the department further requested the 1st and 2nd respondents, to provide the requisite development approvals, change of user, and NCA approval.
19. Mr Kuria further deposed that on October 9, 2020, the county's department of land, housing, physical planning and municipal administration and urban development issued a notice to the 1st and 2nd respondents, stopping further developments on the property and requiring the 1st respondent to restore the land to its original status after it discovered that the 1st respondent did not have a construction permit. He added that the 1st respondent did not obtain a development permission as required under the *Physical and Land Use Planning Act*, 2019.
20. The 5th and 7th respondents contended that they had carried out their mandate within the ambit of the law, particularly article 69 of the *Constitution*.

8th Respondent's Case

21. The 8th respondent filed a replying affidavit sworn on March 30, 2021 by Stephen Mwilu, its compliance manager. He deposed that the 8th respondent received a letter dated September 28, 2020 from the petitioners, requesting for assistance with regard to concerns relating to the safety of the construction of a steel milling factory on a wetland at Uplands area. On September 29, 2020, the 8th respondent sent investigating officers to the site. The visit confirmed that the ongoing project of a proposed steel milling factory had not been registered with the 8th respondent. The 8th respondent suspended the construction works on the ground that the site was non-compliant. It was the case of the 8th respondent that the ongoing constructions were illegal and that it had not issued any compliance certificate in relation to the construction of the proposed steel milling factory. It contended that it had fulfilled its mandate under this *National Construction Authority Act*, No 41 of 2011.

10th Respondent's Case

22. The 10th respondent filed a replying affidavit sworn on March 19, 2021 by James Nyangweso, its sub-regional manager for Kiambu sub region. He deposed that, following the petitioners' complaint that the impugned project was being constructed on a wetland, a team from the 10th respondent's office visited the site on October 23, 2020 and prepared a report. It was the case of the 10th respondent that the report revealed that the land occupied by the 1st and 2nd respondents was neither part of the Lari swamp nor its riparian reserve; and that it was not part of a wetland as contended by the petitioners.



23. The 4th, 6th and 9th respondents did not file responses to the petition. They similarly did not file submissions.

Submissions

24. The petitioners filed written submissions dated July 7, 2021, through the firm of Bett, Njagi & Associates. Counsel for the petitioners identified the following as the key issues falling for determination in the petition: (i) Whether this court has jurisdictions to hear and determine the case; (ii) Whether the petitioners' rights to a clean and healthy environment is under threat of infringement; (iii) Whether the petition is merited under the circumstances; and (iv) Whether an order for costs can issue in public interest litigation.
25. The 1st and 2nd respondents filed written submissions dated November 30, 2021 through the firm of Tripple OK Law Advocates LLP. Counsel for the 1st and 2nd respondents identified the following as the three key issues that fall for determination in the petition: (i) Whether this court has the jurisdiction to hear and determine this petition; (ii) Whether the 1st and 2nd respondents' steel plant violates or threatens to violate the petitioner's right to a clean and healthy environment; and (iii) Which party should bear the costs of this suit.
26. The 5th and 7th respondents filed written submissions dated October 26, 2021 through Ms Sylvia Muchiri. Counsel identified the following as the two issues that fall for determination in this petition. (i) Whether the 5th and 7th respondents have breached and/or infringed the environmental rights of the residents herein (sic) as espoused in articles 42 and 69 of the Constitution; and (ii) What is the appropriate order regarding costs.
27. The 10th respondent filed written submissions dated March 19, 2021 through Ms Tacey Makori advocate. According to counsel for the 10th respondent, the issue to be determined in this petition is whether the 10th respondent performed its legal mandate in regard to the conservation of water resources.
28. For the reason that this court is required to first dispose the question of its jurisdiction, I have deliberately decided not to outline in details the parties' submissions on the other issues identified by their advocates in their respective submissions.

Analysis and Determination

29. I have considered the petition, the responses to the petition, and the parties' respective submissions. I have also considered the relevant constitutional and legal frameworks. Lastly, I have considered the prevailing jurisprudence on the key issues that fall for determination in the petition. Parties did not frame a common set of issues. Having considered the pleadings and the respective submissions of the parties, the following are the three key issues that fall for determination in the petition: (i) whether, in the circumstances of this petition, this court is the proper forum to adjudicate the dominant issue in this petition; (ii) whether the steel milling plant that the 1st and 2nd respondents intend to establish and operationalize at Uplands/Nyambari area in Lari sub county of Kiambu county is a threat of infringement of the petitioners' right to a clean and healthy environment under article 42 of the Constitution; (iii) What order should be made in relation to costs of this petition. I will first dispose the issue relating to jurisdiction of this court, in tandem with the following principle in Owners of the Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd [1989] eKLR.

“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.”

30. The 1st and 2nd respondents challenged this court’s jurisdiction contending that they ought to have sought redress within the framework provided under section 129 of the EMCA. The above challenge would probably not have carried much weight were it not for the subsequent developments in the dispute. In this regard, an interesting disclosure was made in paragraphs 25 and 26 of the petitioner’s written submissions. The petitioner’s submitted thus:

“25. Your ladyship, appreciating the unique jurisdiction of the National Environment Tribunal (NET) under sections 129 and 130 EMCA, on 2May 8, 2021, the petitioners indeed moved the said tribunal *vide* NET Tribunal appeal case No 8 of 2021 – Prof Francis Wamakima Muregi & another v director – general, NEMA & another wherein they are seeking cancellation of the EIA licence issued to the 1st and 2nd respondent on March 30, 2021. The case herein is not seeking cancellation of any licence, rather it is a petition for enforcement of the petitioners’ rights to a clean and healthy environment. Further, it is instructive to note that at the time of filing the petition herein, the 1st and 2nd respondents had not obtained a licence for the setting up of the factory, hence, there was nothing to challenge before the National Environmental Tribunal. It is only after the EIA licence was issued to the 1st and 2nd respondent on March 30, 2021 that the petitioners moved the said tribunal to challenged the issuance of that licence.

26. We submit that a claim for enforcement of bill of rights in the Constitution can only be made to a court of competent jurisdiction, and not to a tribunal or a committee. In our case, and by dint of articles 22, 23, 42, 69, 70 and 162 of the Constitution of Kenya, 2010 as well as section 13(3) of the Environment and Land Court Act, the High Court and the specialized courts including this honourable court have jurisdiction to hear and determine cases for enforcement of the bill of rights in the Constitution.”

31. The above disclosure changed the trajectory of this petition in relation to the jurisdiction of this court. The dominant issue in this petition is whether the steel milling plant that the 1st and 2nd respondents intend to establish and operationalize on their land at Uplands/Nyambari, Lari sub county, is a threat of infringement of the petitioners’ right to a clean and healthy environment. At the time this petition was lodged in October 2020, the National Environment Management Authority (the NEMA) had not made a decision on the 1st and 2nd respondents’ application for an EIA licence. It has now been disclosed in the petitioners’ written submissions that the NEMA subsequently issued an EIA licence to the 1st and 2nd respondents on March 30, 2021.

32. The jurisdiction of the National Environment Tribunal (the NET) to adjudicate a dispute under section 129 of the EMCA is triggered by a decision of the NEMA. Put differently, what would ordinarily be challenged at the NET is the decision made by NEMA. Unless and until a decision is made by the NEMA, the NET would not have jurisdiction to adjudicate any environmental dispute.

33. In so far as the intended steel milling plant at Uplands /Nyambari Area is concerned, the NEMA had not issued an EIA licence at the time this petition was lodged. The petitioners could therefore not be faulted for bringing a petition to forestall what they perceived as an imminent infringement of their right to a clean and healthy environment under article 42 of the Constitution. When NEMA



subsequently issued an EIA licence in March 2021, the petitioners properly invoked the jurisdiction of the NET under section 129 of the EMCA, with a view to annulling the EIA licence.

34. Can this court properly exercise primary jurisdiction over the dominant issue in this petition when the NET is seized of the same dominant issue? My answer to the above question is in the negative. My view is informed by the fact that the NEMA is the principal government agency in the implementation of all policies relating to the environment. It exercises general supervision and coordination over all matters relating to the environment. It is vested with the sole authority to interrogate environmental impact assessment reports and either grant or decline to issue EIA licences. The EIA licence is the thumb of approval that would allow the impugned steel milling plant to be actualized. If the EIA licence is annulled by the NET, the contemplated steel milling plant will not see the light of day.
35. Secondly, under the EMCA, the NET is the primary adjudicatory body in relation to decisions made by the NEMA. This court is expressly vested with appellate jurisdiction over adjudicatory decisions made by the NET in relation to environmental disputes.
36. Counsel for the petitioners submitted that, by dint of article 162 (2)(b) of the *Constitution*, and section 13 of the *Environment and Land Court Act*, this court is the only organ vested with exclusive jurisdiction to adjudicate disputes relating to the right to a clean and healthy environment under article 42 of the *Constitution*. I do not agree with that view. I say so because, if the framers of the *Constitution* of Kenya 2010 desired to vest in this court exclusive jurisdiction over disputes relating to the right to a clean and healthy environment, they could have expressly done so in the same way they vested in the Supreme Court exclusive jurisdiction to determine questions relating to validity of a presidential election.
37. Secondly, article 70 of the *Constitution* contemplates enforcement of the right to a clean and healthy environment through an application to a “court” but does not vest exclusive jurisdiction in this court. Thirdly, under article 169 of the *Constitution*, tribunals established through Acts of parliament are subordinate courts and properly fall within the meaning of “court” as contemplated under article 70.
38. That is not all. Not too long ago, the Court of Appeal pronounced itself on the question of jurisdiction of tribunals in relation to disputes relating to the right to a clean and healthy environment under article 42 of the *Constitution* in *Kibos Distillers Ltd & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR. The Court of Appeal rendered itself thus:
- “..... further, I observe that the jurisdiction of the ELC is appellate under section 130 EMCA. The ELC also has appellate jurisdiction under section 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.....”
39. The result is that, given that the petitioners have sought redress in the NET and the NET is expected to make a finding on the very issue that this court is invited to determine, the proper approach to take is to let the NET exercise primary jurisdiction over the issue. Any aggrieved party will be at liberty to invoke the appellate jurisdiction of this court under section 130 of the EMCA. Put differently, my finding is that, given the above circumstances, this court cannot exercise primary jurisdiction over the dominant issue in this petition because the NET is seized of the issue. I will in the circumstances down my tools without pronouncing myself on the substantive issue in this petition, in line with the principle in *Owners of the Motor Vessel Lillian “S” v Caltex Oil (Kenya) Ltd* [1989] eKLR.



40. I will, in the circumstances, strike out this petition and let the NET adjudicate the dispute. This being a public interest litigation, parties will bear their respective costs of the petition. Those are the disposal orders of this court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 19TH DAY OF SEPTEMBER 2022

B M EBOSO

JUDGE

In the presence of: -

Ms Njagi for the Petitioners

Mr Njuguna for the 1st and 2nd Respondents

Ms Sakami for the 3rd Respondent

Court Assistant: Sydney

THIKA ELC PETITION NO. 11 OF 2020 Page 4

