



**Nyauke v Homa-Bay Sub-County Administrator & 5 others (Environment & Land
Petition E001 of 2022) [2022] KEELC 13561 (KLR) (18 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13561 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND PETITION E001 OF 2022
GMA ONGONDO, J
OCTOBER 18, 2022**

BETWEEN

SAMUEL NYAUKE PETITIONER

AND

HOMA-BAY SUB-COUNTY ADMINISTRATOR 1ST RESPONDENT

**OFFICER COMMANDING POLICE DIVISION HOMA-BAY 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

EARNEST BIN AMITO 4TH RESPONDENT

JOINT BASE NAVA ENTERPRISES LTD 5TH RESPONDENT

**DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 6TH RESPONDENT**

RULING

1. This ruling is in respect of the 6th respondent's notice of preliminary objection dated March 1, 2022 and filed in court on even date (the preliminary objection herein). The 6th respondent is represented by Ngararu Maina, Advocate.
2. The gist of the preliminary objection is that this court lacks jurisdiction to hear and determine the petition since the petitioner has not approached the requisite avenues for resolution of the present dispute as provided for under the relevant statutes, namely the *Homa Bay County Alcoholic Drinks Control Act, 2015* and the *Environmental Management and Co-ordination Act, 1999* (the EMCA). That the petitioner should have approached the Homa Bay County Alcoholic Drinks Control Committee by way of appeal and/or review of the grant of the liquor license.



3. Further, it is the 6th respondent's contention that the petitioner ought to have first litigated the issue of issuance of Environmental Impact Assessment (EIA) license before the National Environment Tribunal (NET) as stipulated under section 129 (1) (a) of the EMCA. Thus, counsel has urged this court to strike out the instant petition for violation of the provisions of section 9 (2) (3) of the Fair Administrative Action Act, No 4 of 2015.
4. On May 31, 2022, the court delivered a ruling directing that the Preliminary Objection takes priority over any other matter in this petition and be heard by way of written submissions in the spirit of article 159 (2)(b) of the Constitution of Kenya, 2010 and the Court of Appeal decision in Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR.
5. Accordingly, learned counsel for the 5th respondent filed submissions dated June 9, 2022 on June 14, 2022 and relied on section 9 of the Fair Administrative Action Act (*supra*). Counsel submitted, *inter alia*, that the petitioner has not exhausted the laid down internal mechanisms for appeal or review. Counsel cited the Supreme Court decision in Petition No 3 of 2020 Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR. That thus, the instant petition should not be entertained and should be dismissed with costs to the 5th respondent.
6. The 6th respondent filed submissions dated June 22, 2022 on June 23, 2022. Counsel identified four issues for determination thus: whether this honourable court has jurisdiction to hear and determine the petition before this court; whether the current petition falls among matters contemplated as appeals that can be filed against the 6th respondent at NET as per the provisions of section 129 of the EMCA as well as Homa Bay County Alcoholic Drinks Control Act, 2015; whether the defendant's notice of preliminary objection dated March 1, 2022 has merit; and who should bear the costs of the suit?
7. In discussing the issues, counsel submitted that the petitioner has not exhausted internal mechanisms for appeal as envisaged under the law. Further, that the honourable court ought to allow the NET to exercise its powers as granted by section 129 of EMCA (*supra*) and Homa Bay County Alcoholic Drinks Control Act, 2015. Counsel urged the honourable court not to usurp the power of the NET and relied on various authorities including the Supreme Court decision in Benson Ambuti Adega case (*supra*), to fortify the submissions.
8. In his submissions dated May 4, 2022 and filed on even date, the petitioner contends that the law relied on in support of the preliminary objection does not place mandatory requirement on the petition. That he is not challenging the actions of the respondents but is petitioning the court for protection of his fundamental rights.
9. The petitioner filed further submissions in response to the Preliminary Objection dated July 25, 2022 on even date. He reiterated that the petition is based on alleged infringement of fundamental rights as conferred by the Constitution. That tribunals lack jurisdiction to hear and determine constitutional matters. That therefore, the Preliminary Objection is misguided. Counsel relied on article 162 (2)(b) and 165 of the Constitution of Kenya, 2010 as well as section 4 and section 13 (2) (a) to (e) of the Environment and Land Court Act, 2011.
10. It is noteworthy that, by a petition dated February 2, 2022 and filed herein on February 8, 2022, the petitioner, Samwel O Nyauke who appears in person, is seeking the following reliefs:
 - a. An order of declaration to be issued that any license so far issued by the 1st and 6th to the 5th respondents are illegal, null and void to the extent that such licenses, if any, contravene the conditions set under Environment Management and Coordination Act, Environment



Coordination (Noise and Excessive Vibration Pollution Control) Regulation, the Physical Planning Act, the Liquor Act and the Constitution of Kenya.

- b. A further declaration that whereas the 5th respondent is entitled to do lawful business of his choice, the current condition under which the 5th respondent is operating or under which the 1st, 2nd, 3rd, 4th and 6th respondents have allowed it to operate is unlawful and infringes the right of the petitioner to a peaceful enjoyment of the environment especially at night.
 - c. An order suspending the 5th respondent's license that allows the 5th respondent to operate a bar and play music in open field and to require the 5th respondent to comply with Regulations set under Noise and Excessive Vibration Control Regulation 2009 if the 5th respondent shall still be interested in doing the same business.
 - d. An order directed at the 4th and 5th respondent to compensate the petitioner in general damages for infringing the rights of the petitioner.
 - e. A further order directed at the 4th and 5th respondents to meet the costs that the petitioner shall have incurred in alternative accommodation at Toffee Resort Hotel at the cost of Kshs 6,500 as from January 7, 2022 until the date the nuisance complained of shall have been mitigated or stopped altogether.
 - f. A conservatory order directed at the 1st, 2nd, 3rd and 6th respondents to ensure that any order that shall have been issued by this honourable court pursuant to this petition is implemented and adhered to in full.
 - g. The honourable court be pleased to award the petitioner costs of this petition against the respondents jointly and severally as the petitioner tried all options to have the matter mitigated before resorting to this petition to no avail.
11. The petition was opposed by the 4th, 5th and 6th Respondents; the 4th respondent, through Robert Ochieng Advocates, filed a Replying Affidavit dated February 6, 2022 on February 9, 2022, the 5th respondent through Oluoch Ammon & Company Advocates, filed a Response dated February 17, 2022 on February 21, 2022, while the 6th respondent lodged the instant Notice of Preliminary Objection.
 12. The 1st, 2nd and 3rd respondents have neither entered appearance nor filed any responses to the petition.
 13. I have anxiously considered the Preliminary Objection, the petition alongside the 4th, 5th and 6th respondents' response therein and the parties' respective submissions. So, are the orders sought in the Preliminary Objection merited?
 14. This court is pretty aware of the provisions of the section 129 (1) (a) of the EMCA as well as sections 4, 5 and 11 of the Homa Bay County Alcoholic Drinks Control Act, 2015.
 15. In Benson Ambuti Adega case (*supra*) the court cited its decision in Republic v Karisa Chengo [2017] eKLR, in which it determined that;

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...



where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

16. The court further cited its decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* Application No 2 of 2011, where it held that;

“A Court’s jurisdiction flows from either the Constitution or 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.”

17. The instant Preliminary Objection does not challenge the Court’s mandate and powers as conferred upon it under articles 162 (2)(b) and 165 (supra) as well as Section 4 and Section 13 (2) (a) to (e) of the Environment and Land Court Act, 2011 but on whether it has the powers to adjudicate on the issues presented before it pursuant to the provisions of the EMCA and Homa Bay County Alcoholic Drinks Control Act, 2015.

18. In *Benson Ambuti Adega* case (*supra*) before the Court of Appeal, it was stated that:

“...To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”

19. The finding of the Court of Appeal was endorsed by the Supreme Court which went ahead to state thus:

“...The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance...” (Emphasis added).



20. In the foregone, I hereby refer this dispute to the NET and the Homa Bay County Alcoholic Drinks Control Committee for hearing and determination in the first instance. In the event that parties are dissatisfied with the outcome, then they can approach this court appropriately as noted in *Benson Ambuti Adega* case (*supra*) and the constitutional issues relating to the environment herein, are reserved accordingly.
21. This court cannot therefore, make a determination on the petition before all the avenues established by Statute for redress of the dispute are exhausted; see also *Geoffrey Muthiga Kabiru & 2 others v- Samwel Mungai Henry & 1750 others* [2015] eKLR.
22. To that end, I hereby order and direct thus:
 - a. The preliminary objection dated March 1, 2022, be and is hereby upheld.
 - b. Each party to bear own costs.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 18TH DAY OF OCTOBER, 2022.

G.M.A ONG'ONDO

JUDGE

Present

The petitioner, Mr. Nyauke

Mr. B. Mulisa, holding brief for Ammon Aluoch, learned counsel for the 5th respondent

