



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ragen (Suing on his own capacity and on behalf of residents of Parklands off 6th Parklands Avenue) v National Environment Management Authority & another (Environment & Land Petition E012 of 2022) [2022] KEELC 15510 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15510 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND PETITION E012 OF 2022**

**LC KOMINGOI, J**

**NOVEMBER 24, 2022**

**IN THE MATTER OF: ARTICLES 22, 70 AND 258 OF THE CONSTITUTION OF  
KENYA**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLE 22, 35, 42 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 2(1)(2)  
(4)10(1),2(A)(B)(C)(D), 69(1)(D)(G) AND 75 OF THE  
CONSTITUTION OF KENYA 2010**

**BETWEEN**

**INEA RAGEN (SUING ON HIS OWN CAPACITY AND ON BEHALF OF  
RESIDENTS OF PARKLANDS OFF 6TH PARKLANDS AVENUE) . APPLICANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT**

**AMEEY HOMES LIMITED (YUSUF ASKAR MOHAMED) .... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioner herein, Ainea Ragen suing in his capacity and on behalf of the residents of Parklands off 6<sup>th</sup> Parklands Avenue, filed this petition dated April 4, 2022 seeking several reliefs. The main relief sought is for a declaration that the respondents contravened the 2010 Constitution of Kenya and



violated the fundamental rights and freedoms of the residents of Parklands as enshrined in the 2010 [Constitution](#), [EMCA](#) and EIA Regulations 2003.

2. Together with the petition, he has filed a notice of motion dated April 4, 2022 seeking orders:-

' That pending the hearing and determination of this petition this honourable court be pleased to issue an injunction restraining the respondents jointly and severally, whether by themselves or by their agents or their staff or any private individual not mentioned in this suit from building, constructing and excavation activities on Plot LR NO 209/1617/2 located off Parklands Avenue in Parklands Area in Nairobi County.'

3. In response, the 1<sup>st</sup> respondent filed a notice of preliminary objection dated May 20, 2022. The grounds are:-

1. That this honourable court lacks the requisite jurisdiction pursuant to section 129 of [Environmental Management and Coordination Act](#) (EMCA) and in light of the Court of Appeal decision in Civil Appeal No 153 of 2019 [Kibos Distillers Limited & 4 Others vs Benson Ambuti Adega & 3 Others](#) [2020] e KLR Court of Appeal.
2. The petition and application is frivolous, vexatious and an abuse of the court process.
3. Consequently the petition should be dismissed with costs to the 1<sup>st</sup> respondent.

4. On the June 14, 2022, the court with the consent of parties directed that the preliminary objection be heard first. This court also directed that the preliminary objection be canvassed by written submissions.

### **The 1<sup>st</sup> Respondent's submissions**

5. They are dated June 15, 2022. Counsel submitted that the substance of this petition falls under section 129 of EMCA. The subject is the EIA License No NEMA/NRB/PR/5/1/16679 for LR NO 209/1617/2 Parklands. The 1<sup>st</sup> respondent submits that the matter falls within tribunal as established under section 125 of the EMCA.
6. Counsel further submits that this court has no jurisdiction to hear and determine matters raised in this petition in view of the existence of the National Environment Tribunal (NET). She has put forward the case of [Joseph Owino & Another vs NEMA & Another](#) [2014] e KLR; [Isaac Ngugi vs Nairobi Hospital & Another](#) [2013] e KLR; [Rich Productions Ltd vs Kenya Pipeline Ltd & Another](#) [2014] e KLR; [The Speaker of the National Assembly vs James Njenga Karume; Civil Appeal No 92 of 1992 \(Nairobi\); Benson Ambuti Adega & 2 Others vs Kibos Distillers Ltd & 5 Others \[2020\] Eklr.](#)
7. From the foregoing decision it is submitted that the petitioner is mandated to lodge any grievance arising out of a decision by the 1<sup>st</sup> respondent to the tribunal. This court only retains appellate jurisdiction to hear any decision of the tribunal in tune with the provisions of EMCA, 1999.
8. Counsel further submitted that where clear procedure for the redress of any particular grievance is prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed. She has put forward the case of [Mutanga Tea & Coffee Company Limited vs Shikara Limited & Another \[2015\] e KLR.](#)



9. It is submitted that the dispute herein falls within the purview of the tribunal and any grievance by the petitioner ought to have been lodged at the tribunal.
10. It is 1<sup>st</sup> respondent's prayers that the petition be struck out for want of jurisdiction as per the holding in *Owners of the Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Ltd.*

### **The Petitioner's Submissions**

11. They are dated June 14, 2022 and June 17, 2022. He submitted that this court has original jurisdiction to hear and determine all disputes relating to the environment pursuant to section 13(2) of the *ELC Act*. It is further submitted that the *EMCA* has not empowered the NET to hear and determine environmental rights and violations under the Bill of Rights of the 2010 *Constitution*. He further submitted that the petitioner is not the initiator nor the developer of the project and therefore cannot be held liable for the failure of the 2<sup>nd</sup> respondent to engage the residents through public participation process as anchored in law.
12. It is the petitioner's submissions that he could not approach NET because of threats and intimidation by the developer and that the redress can only be by this court.
13. I have considered the preliminary objections, together with the written submissions and the authorities cited. The issue for determination is whether the preliminary objections are merited.
14. As to whether these are proper preliminary objections, I am guided by the case of *Mukisa Biscuits Co. Ltd vs West End Distributors Ltd [1969] EA 696* where the court stated thus as per Sir Charles Newbold P;

' ....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 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 exercise of judicial discretion'

As per Law JA,

'...so far as I am aware a preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary objection 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 arbitrator.'

I am satisfied that the preliminary objections herein are proper preliminary objections as per the above definition.

15. Section 129(2) of *EMCA* provides that:-

' 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'

Section 129(3) of *EMCA* provides that:-

'Upon any appeal, the tribunal may—

- a. confirm, set aside or vary the order or decision in question;



- b. exercise any of the powers which could have been exercised by the authority in the proceedings in connection with which the appeal is brought; or
- c. make such other order, including an order for costs, as it may deem just.'

16. I agree with the 1<sup>st</sup> respondent's submissions that the petitioner's grievance is that the 1<sup>st</sup> respondent issued an EIA Licence to the 2<sup>nd</sup> respondent in an irregular manner. This falls within the purview of NET. In the case of *Joseph Owino & Another vs NEMA & Another* (2014) e KLR, Tuiyott J (as he then was) stated:-

' ...the right to appeal to the tribunal. Section 129(2) of EMCA is clear on this and provides:-

- (2) Unless otherwise expressly provided in this act, where this act empowers the Director-General, the authority or committees of the authority or its agents 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.

No doubt a person who is aggrieved by such a decision has a right to appeal to the tribunal. This court is unable to find any provision in the act, either express or indirect barring an appeal against a decision to grant an EIA Licence.'

17. Similarly, in The *Speaker of the National Assembly vs James Njenga Karume Civil Appeal No 92 of 1992 (Nairobi)*, the Court of Appeal stated as follows:-

' In our view, there is considerable merit in the submission 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.'

18. In the case of *Benson Ambuti Adega & 2 Others vs Kibos Distillers Ltd & 5 Others* [2020] e KLR, it was held that:-

' It would therefore seem that the Superior Court, determined, quite incorrectly, that it had the power or jurisdiction to hear and determine the petition, which although raised issues that were clearly 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.'

19. I am guided by the above authorities in finding that this court has no jurisdiction to hear and determine this matter.

20. The petitioner ought to have filed an appeal with the National Environment Tribunal (NET).

21. I find merit in the preliminary objections and the same are upheld. Consequently, the notice of motion dated April 4, 2022 and the petition dated April 4, 2022 are hereby struck out. Each party do bear own costs.

22. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**



**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Petitioner

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mutisya –Court Assistant

