REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 05 OF 2020

JULIUS NYAGAH KITHOME..PLAINTIFF

VERSUS

JANTON INVESTMENT LIMITED..1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI...........................2ND DEFENDANT

RULING

1. This application concerns a Notice of Preliminary Objection filed by the 2nd defendant which is in the following format:

NOTICE OF PRELIMINARY OBJECTION

Take notice that the 2nd defendant shall at the hearing of the plaintiff's application dated 22nd June, 2020 raise a Preliminary Objection on a point of law, to be determined *in liminie*, on the grounds that:

1. This honorable court lacks jurisdiction to hear and determine the application dated 22nd June, 2020 and the suit given the provisions of Article 159(2) (c) of the Constitution and sections 125, 126, 127, 129 and 130 of the Environment Management and Co-ordination Act, Chapter 387 of the Laws of Kenya.

2. The suit, as presented, is premature, bad in law, incompetent and an abuse of court process.

3. Such other grounds as shall be adduced at the hearing hereof.

Dated at Nairobi this 8th day of July, 2020

SALUNY ADVOCATES LLP

ADVOCATES FOR THE 2ND DEFENDANT

2. The Preliminary objection was canvased by way of written submissions.

3. There is no better way to ensure that all issues canvassed by the parties are taken into account than to reproduce their written submissions in full as is done herebelow.

4. The 2nd defendant's written submissions are reproduced in full herebelow:

THE 2ND DEFENDANT'S SUBMISSIONS ON IT'S PRELIMINARY OBJECTION DATED 8TH JULY 2020.

Your Lordship,

INTRODUCTION

1. Before this Honourable Court is the 2nd Defendant's Preliminary Objection dated 8th July 2020 through which it seeks the

suit filed by the Plaintiff to be struck out on the following: -

i. **THAT** this Honourable Court lacks jurisdiction to hear and determine the Application dated 22nd June 2020 (Amended on 23rd October 2020) and the suit given the provisions of Article 159 (2) (c) of the Constitution and Section 125, 126, 127, 129 and 130 of the Environmental Management and Co-ordination Act, Chapter 387 of the Laws of Kenya.

ii. **THAT** the suit, as presented, is premature, bad in law, incompetent and an abuse of Court process.

iii. Such other grounds as shall be adduced at the hearing hereof.

2. These submissions are written in compliance with this Honourable Court's directions issued on 18th November 2020.

ISSUES FOR DETERMINATION

3. The 2nd Defendant delineates the following issues for determination by this Honourable Court:

a) Whether this Honourable Court lacks jurisdiction to hear and determine this Application and suit?

b) Whether the suit as presented is premature, bad in law, incompetent and an abuse of Court process.

LAW AND ANALYSIS

a. Whether this Honourable Court lacks jurisdiction to hear and determine this Application and suit?

4. My Lord, **Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350** defines "jurisdiction" as "*…the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."*

5. *It suffices to note that while defining the concept of jurisdiction, the* ***Supreme Court of Kenya in Republic -vs- Karisa Chengo & 2 others (2017) eKLR*** *agreed with the aforementioned definition in paragraph 4 above and proceeded to note as follows: -*

"**John Beecroft Saunders** in his treatise **Words and Phrases Legally Defined Vol. 3, at page 113** defines the term 'jurisdiction' as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance 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 cognisance 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".

From these definitions, it is clear that the term "jurisdiction", as further defined by **The Black's Law Dictionary, 9th Edition**, is the Court's power to entertain, hear and determine a dispute before it."

6. The Supreme Court further settled the question of jurisdiction in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others (2012) eKLR** wherein the Court stated as follows: -

"A court's jurisdiction flows either from the Constitution or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law..….it cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution.

7. This position was forcefully stated in the *locus classicus* decision by *Nyarangi, J. A* in **The Owners of Motor Vessel Lilian "S" -vs- Caltex Oil Kenya Ltd. [1989] KLR 1** wherein the Court defined "jurisdiction" to be everything, without which a Court downs it's tools and cannot make a move.

8. My Lord, it is our respectful submission that the Jurisdiction of this Honourable Court flows from the provisions of **Article 162 (2) (b) of the Constitution** as well as **Section 4 of the Environment and Land Court Act**. This jurisdiction, respectfully, is not exclusive. This position is firmly supported by the holding in the case of **County Government of Nyeri -vs- National Environment Management Authority [2014] eKLR** wherein Honourable Justice A. Ombwayo held as follows: -

"Section 13 of the Environment and Land Court Act presupposes that the Environment and Land Court does not

have exclusive original jurisdiction as the Tribunals that deal with Environment and Land Disputes, that were not abolished have jurisdiction to hear and determine disputes in accordance with the Act of parliament that donates the jurisdiction to them while the Environment and Land Court has appellate jurisdiction over them."

9. Granted, this Honourable Court has, by virtue of the instant Preliminary Objection, been called to scrutinize the provisions of Article 159 (2) (c) of the Constitution and Sections 125, 126, 127, 129 and 130 of the Environmental Management and Co-ordination Act and subsequently make a determination on whether the herein Application and suit ought to be heard, at first instance, by this Honourable Court.

10. My Lord, it is our humble submission that this Honourable Court lacks jurisdiction to entertain the herein suit in the first instance.

11. Section 31 of the Environmental Management and Co-ordination Act, Chapter 387 of the Laws of Kenya provides for the establishment of Public Complaints Committee(s). A Public Complaints Committee has the mandate to **investigate any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya**. See section 32 of the Environmental Management and Co-ordination Act, Chapter 387 of the Laws of Kenya. Further, section 33 of the Act clothes a Public Complaints Committee with powers to summon any person to appear before the it for examination concerning matters relevant to the investigation of any complaint under section 32. Any person who fails to comply with the directions of the Public Complaints Committee commits an offence which is punishable under section 33 (2) and (3) of the Environmental Management and Co-ordination Act, Chapter 387.

12. Upon conclusion of investigations by a Public Complaints Committee, if need be, the National Environment Management Authority may issue and serve any person in respect of any matter relating to the management of the environment an environmental restoration order. **See section 108 of the Environmental Management and Co-ordination Act, Chapter 387**. The Authority may issue an environmental restoration order to—

(a) require the person on whom it is served to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order;

(b) prevent the person on whom it is served from taking any action which would or is reasonably likely to cause harm to the environment;

(c) award compensation to be paid by the person on whom it is served to other persons whose environment or livelihood has been harmed by the action which is the subject of the order;

(d) levy a charge on the person on whom it is served which in the opinion of the Authority represents a reasonable estimate of the costs of any action taken by an authorised person or organisation to restore the environment to the state in which it was before the taking of the action which is the subject of the order.

13. An environmental restoration order may contain such terms and conditions and impose such obligations on the persons on whom it is served as will, in the opinion of the Authority, enable the order to achieve all or any of the purposes thereof. An environmental restoration order may further require a person on whom it is served to—

(a) **take such action as will prevent the commencement or continuation or cause of pollution**;

(b) **restore land, including the replacement of soil, the replanting of trees and other flora and the restoration as far as may be**, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land or sea as may be specified in the particular order;

(c) **take such action to prevent the commencement or continuation or cause of environmental hazard**;

(d) **cease to take any action which is causing or may contribute to causing pollution or an environmental hazard**;

(e) **remove or alleviate any injury to land or the environment or to the amenities of the area**;

(f) prevent damage to the land or the environment, aquifers beneath the land and flora and fauna in, on or under or about the land or sea specified in the order or land or the environment contiguous to the land or sea specified in the order;

(g) **remove any waste or refuse deposited on the land or sea specified in the order and dispose of the same in accordance with the provisions of the order**;

(h) **pay any compensation specified in the order**.

14. Section 125 of the Environmental Management and Co-ordination Act establishes the National Environment Tribunal whose authority is outlined under Section 129 of the Act. The aforementioned sections read as follows: -

125. Establishment of the National Environment Tribunal

(1) There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members— …………..

129. Appeals to the Tribunal

(1) Any person who is aggrieved by—

(a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

(b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

(c) the revocation, suspension or variation of the person's licence under this Act or its regulations;

(d) the amount of money required to paid as a fee under this Act or its regulations;

(e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(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.

15. Flowing from the herein above provisions of the law, it suffices to note the allegations made by the herein Plaintiff should have been first tabled before NEMA through its Public Complaints Committee. In his Amended Notice of Motion, the Plaintiff seeks, amongst others, the following orders: -

a) That pending the hearing and determination of his Application, this Honourable Court be pleased to order stoppage and discontinuing of any work at Kathwana Primary School.

b) That this Honourable Court be pleased to order the removal of the contaminated soil from Kathwana Primary School.

c) That the 1st Respondent be compelled to refrain from using contaminated soil from the Hospital dumping site in rehabilitation of the stadium.

d) That the 1st and 2nd Respondent be compelled to carry out and publish the Environmental Impact Assessment.

16. Your Lordship, it is our humble submission that NEMA has the authority to address all the prayers made by the Plaintiff at the interlocutory stage. Indeed, we have demonstrated in paragraph 13 above that the authority may, in an environmental restoration order, direct the stoppage and discontinuing of any work at Kathwana Primary School. Equally, the Authority may compel the 1st Respondent to **remove any waste or refuse deposited** on the stadium at Kathwana Primary School.

17. Similarly, NEMA can grant all the final prayers sought by the Plaintiff if merited. In his Amended Plaint, the Plaintiff seeks the following orders: -

a) An order compelling the 1st Defendant to remove the contaminated soil and cleaning of the stadium to avoid polluting of the soil and the water and also from risking the lives of the pupils in the school.

b) A permanent injunction restraining the 1st Defendant from using the contaminated material in upgrading or rehabilitating the stadium.

c) A mandatory injunction directing the 1st and 2nd Defendants to conduct the Environment Impact Assessment before commencement of any work in the school.

d) General damages.

18. Your Lordship, we respectfully urge you to find that the reliefs sought by the herein Plaintiff, both at the Interlocutory and Final Stages, can be granted by NEMA pursuant to section of the Environmental Management and Co-ordination Act, Chapter 387. Indeed, NEMA may order any person to **pay any compensation** which is akin to the general damages sought by the Plaintiff.

19. Any person aggrieved by the decision of NEMA is at liberty to, at first instance, move and be heard by the National Environmental Tribunal. Thereafter, the Jurisdiction of this Honourable Court may be invoked by way of an Appeal arising from the decision of the Tribunal. The herein Plaintiff has erroneously moved this Court by skipping the initial two stages available to him i.e., NEMA and the Tribunal. Consequently, we beseech this Honourable Court to decline exercising jurisdiction in the first instance.

20. In **Bridge Gate Holding Ltd -vs- National Environment Management Authority & another [2015] eKLR** Honourable Justice L. N. Waithaka similarly upheld the herein above proposition of the law when he held as hereunder: -

> **"……………..Section 130 provides an avenue for a second appeal to this court should a party to the appeal to the Tribunal not be satisfied with the decision of the Tribunal. From the foregoing statement of the law, there is no doubt that the law does not contemplate a situation where this court would be seized of the dispute herein as a court of first instance.**
>
> **The upshot of the foregoing is that the suit before this court is premature. It is also unmaintainable against the 2nd defendant on account of misjoinder. Since the suit raises pertinent issues of law and fact, I direct that subject to the procedure contemplated in Section 129(2), the same be transferred to the NET for purposes of being heard and determined on merit."**

21. The fact that the Environment Management and Co-ordination Act provides for a process of appeal from the National Environment Tribunal to the High Court presupposes that the original jurisdiction of this Honourable Court is excluded whilst the appellate jurisdiction is expressly provided when the Act expressly provides for the appellate jurisdiction of the Environment and Land Court.

22. It suffices to note that the Plaintiff has not demonstrated through evidence that he referred his claim to the NEMA or the National Environment Tribunal before approaching this Honourable Court. NEMA has experts in the field of environmental conservation who can, from their expertise, adjudicate over this matter expeditiously. This Honourable Court should be alive to the fact that it has, in the interlocutory stage, been called to arbitrate on a fairly technical issue by relying on affidavit evidence. Instead, the Court should decline jurisdiction and order that NEMA is best place to handle the herein issues because the authority has a resource of experts who may easily visit the stadium before adjudging on the matter substantively. The Plaintiff has not, in his pleadings, asked for a site visit and therefore this Honourable Court should not be asked to speculate when making a decision on the matter. NEMA can easily visit the site and order accordingly.

23. Section 127 (2) (e) of the Environmental Management and Co-ordination Act makes it clear in no uncertain terms that any person who fails to comply with the award of the Tribunal commits an offense under the said Act. that provision reads as follows: -

> **(2) Any person who—**
>
> **(e) fails or neglects to comply with a decision order, direction or notice confirmed by the Tribunal, commits an offence under this Act.**

24. The essence of the above provision of the law is that, the Tribunal has the power to enforce its awards. If therefore, the Plaintiff had approached the said Tribunal for adjudication of the instant suit, the award granted by the Tribunal would still be enforced just like the decision of this Honourable Court.

25. In view of the foregoing, it is our humble submission that this Honourable Court lacks jurisdiction to hear and determine this matter at the first instance and that the same ought to be dismissed or in the alternative, be referred to the National Environment Tribunal for disposal.

b. <u>Whether or not the suit as presented is premature, bad in law, incompetent and an abuse of Court process.</u>

26. Having demonstrated beyond peradventure that this Honourable lacks jurisdiction to hear and determine the instant application and suit at the first instance, it is our humble submission that this suit as presented is premature, bad in law, incompetent and an abuse of Court process. Nothing indeed stopped nor does stop the Plaintiff from approaching the National Environment Tribunal and have his matter heard. Moreover, none of the parties will suffer any prejudice in the event this suit is referred to the Tribunal.

27. In view of the foregoing, it is our humble submission that this suit as presented, cannot be cured by the provisions of Article 159 of the Constitution. Indeed, Justice Aburili in **Josephat Muchiri Muiruri & Another vs. Yusuf Abdi Adan, Civil Appeal No. 715 of 2006** cited with approval the reasoning in **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR** wherein the Court held as follows: -

> **"…the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation".**

BRIEF RESPONSE TO THE PLAINTIFF'S SUBMISSIONS DATED 23RD JANUARY 2020

28. Respectfully, the Plaintiff concedes to the fact that Section 129 (1) of EMCA directs or allows any person aggrieved by the decision of NEMA to approach the Tribunal wherein the said decision can be challenged. Unfortunately, the Plaintiff seems not to appreciate the powers of NEMA and the Tribunal as already demonstrated herein above.

29. Be that as it may, the Plaintiff erroneously proceeds to allude that matters (purportedly, such like the foregoing) touching on infringement, denial, violation or threat to right or fundamental freedom relating to environment are a reserve for this Honourable Court. The Plaintiff thereafter proceeds to submit that rights and fundamental freedoms, in particular, the right to clean and health

environment form part of the instant matter before this Honourable Court.

30. My lord, the mother pleading through which the Plaintiff approached this Honourable Court was vide a Plaint. In it, the Plaintiff sought the following orders: -

a) An order compelling the 1st Defendant to remove the contaminated soil and cleaning of the stadium to avoid the polluting of the soil and the water and also from risking the lives of the pupils in the school.

b) A permanent injunction restraining the 1st Defendant from using the contaminated material in upgrading or rehabilitating the said stadium.

c) A mandatory injunction ordering the 1st & 2nd Defendants directing them to conduct the Environmental Impact Assessment before the commencement of any work in the school.

d) General damages.

Nowhere does the Plaintiff move this Honourable Court on the issue of violation, infringement or threat to any rights or fundamental freedom.

31. Granted, a question of violation of rights can, respectfully, only arise if the Plaintiff had approached this Honourable Court by way of a Petition and not a Plaint like he did. The Plaintiff has not pleaded any violation or threatened violation of any right in the constitution.

32. If, which is denied, that the Plaintiff approached this Honourable Court for violation of rights and fundamental freedom as he purports to demonstrate, still, **Rule 4 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides that where any right or fundamental freedom provided in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance with the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.**

33. On its part, **Rule 10 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides that a constitutional petition should disclose the following: -

a) The petitioner's name and address;

b) The facts relied upon;

c) **The constitutional provision violated;**

d) **The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit**; or in a public interest case to the public, class of persons of community;

e) Details regarding any civil or criminal case, involving the petitioner or any of the petitioners which is related to the matters in issue in the petition;

f) The petition shall be signed by the petitioner or advocate of the petitioner; and

g) The relief sought by the Petitioner At this stage, the Court will take notice that in his pleadings, the Plaintiff has not satisfactorily complied with the requirements of the herein above Rule.

34. The provision in paragraph 33 above places an obligation on the Petitioner to ensure that his pleadings are drafted with a good degree of precision. In essence, the rules require petitioners to draft their pleadings without leaving room for speculation regarding the rights and fundamental freedoms that the Petitioners are seeking to enforce under **Article 22 of the Constitution**.

35. The herein Plaintiff has not pleaded any violation or threatened violation of his constitutional rights. My Lord, it is our humble submission that the Application and the Plaint are prejudicial to the 2nd Defendant for the reason that it is difficult for it to gather and comprehend the alleged violation of the Plaintiff's rights. The Plaintiff has made no effort to correct this defect by way of amendment and it is our argument that the 2nd Defendant cannot prepare a proper defence on the basis of speculation regarding which rights have been violated and how.

36. In the case of **Trusted Society of Human Rights Alliance -vs- Attorney General and others [2012] eKLR** the court noted that it is not necessary to set out the violations with mathematical precision but in a manner that will enable the respondent(s) have notice of the allegations and defend themselves and to enable the court adjudicate the violation.

37. In **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the Court pronounced itself as follows on the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court: -

> **“The principle in Anarita Karimi Njeru (1) 1979 KLR 154 underscores the importance of defining the dispute to be decided by the Court…Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in Constitutional Petitions is an extension of this principle”**

38. The rights provided for in the Bill of Rights are very specific and a petitioner who comes before the court must set out with some level of particularity the specific right and how it is violated. This position was asserted by the Court (D. S. Majanja J.) in the case of **A.K.M.M -vs- E.M.K.K & 2 others [2014] eKLR.**

39. See also the case of **Francis Kirima M’ikunyua -vs- Inspector General of Police &3 others [2016] eKLR** where the Court held as follows;

> **“There is no doubt that the generally accepted principle of the law is that where a person alleges constitutional violations and infringements and brings a claim to court, the Constitutional violations must not only be pleaded with a reasonable degree of precision but must also be particularized in a precise manner. The aggrieved party must also enumerate the Articles of the Constitution granting the rights complained to have been violated and the manner in which the rights have been violated or threatened with violation.”**

40. Your Lordship, we humbly submit that the herein Plaintiff has failed to set out with some level of particularity the specific rights he is claiming to have been violated and how they have been violated. In the circumstances, the Application and the Plaint before this honourable court are incompetent, bad in law and an abuse of Court process.

41. Musinga J., in **Willis Evans Otieno -vs- Law Society of Kenya & 2 others [2011] eKLR**, held that the issue of competence of pleadings cannot be termed as a mere procedural technicality. The learned Judge went on to note that the provisions of **Article 159 (2) (d) of the Constitution** cannot be relied upon as a panacea for incompetent pleadings.

42. We wish to point out that the cases the Plaintiff has chosen to rely on in his submissions seek to mislead this Honourable Court. For instance, the case of **Getrude Mukoya Mwenda & Others vs CS Infrastructure & Housing Urban Development (2020) eKLR** can be distinguished from the instant case. Whereas the said case was instituted by way of a Petition, the instant suit is not a petition. As such, the orders granted in the said case are not similar to the ones pleaded herein and may not necessarily be granted by this Honourable Court. We implore this Honourable Court not to place reliance on it, at all.

43. For avoidance of doubt, it is still our submission that the Plaint raises allegations and/or claims which can be conclusively be heard by the Tribunal and appropriate reliefs granted. In fact, the Tribunal has the powers to enforce all the prayers sought by the Plaintiff in the said Plaint. In view of the foregoing, the Plaintiff has failed to address the Preliminary objection as filed.

I. CONCLUSION

44. My Lord, in conclusion, we urge this Honourable Court to dismiss and/or refer the Plaintiff’s suit and Application to the National Environment Tribunal for lack of jurisdiction.

DATED at NAIROBI this 14th day of December, 2020

SALUNY ADVOCATES LLP

ADVOCATES FOR THE 2ND DEFENDANT

5. The plaintiff’s submissions are reproduced in full herebelow:

<u>APPLICANT’S SUBMISIONS ON THE PRELIMINARY OBJECTION</u>

MAY IT PLEASE THIS HONOURABLE COURT, the Applicant submits as hereunder for your kind consideration.

The 2nd Respondent filed a P.O dated 7th July, 2020 in limine, on grounds THAT:-

1. This Honourable Court lacks jurisdiction to hear and determine the Application dated 22nd June, 2020 and the suit in view of the provision of Article 159(2)© of the Constitution and Sections 125,126,127,129 and 130 of the Environment Management and Co-ordination Act, Chapter 387 of the Laws of Kenya.

2. The suit, as presented is premature, bad in law, incompetent and abuse of the Court Process.

3. Such other grounds as shall be adduced at the hearing hereof.

<u>CASE SUMMARY</u>

The Preliminary Objection is as a result of our Application dated 22nd June,2020, seeking the intervention of this Honourable Court in prevention, stoppage and discontinuing of infringement of the right to clean and healthy environment, using of medical wastes in upgrading the stadium and the illegal acts of the Respondents herein in trying to bury the said medical wastes in the said stadium at Kathwana Primary School.

NB: In the Preliminary Objection we are supposed to be the Respondent but we appear as the applicant.

Issues

*i. **Whether this Honourable Court has Jurisdiction to hear and determine the Application dated 22nd June, 2020.***

*ii. **Whether this suit, as presented is premature, bad in law, incompetent and an abuse of the Court process.***

Applicant case

*i. **Whether this Honourable Court has jurisdiction to hear and determine this matter.***

The Jurisdiction of this Honourable Court is premised upon the Constitution and the Environmental Management and Co-ordination Act. Without having to misuse Justice Nyarangi's wise words in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, the Applicant Agrees that jurisdiction is everything and that if it is proved that this Honourable Court lacks it, then it cannot proceed further but can only down its tools immediately. It is therefore clear that the importance of jurisdiction to any tribunal or court cannot be overemphasized.**

The suit before you my Lord is an application by the Applicant seeking the redress from this Honourable Court in Stopping, preventing and discontinuing the Respondents in herein from violating, infringing and continuing to threaten the rights and health of people of Kathwana by continuing to use and burying the contaminated soil in upgrading of the stadium at Kathwana Primary School.

Having gone through the sections relied upon in this Preliminary Objection, I am left without doubt that this is just a delay tactic by the Respondent. Sections 125, 126 & 127 of the Environmental Management and Co-ordination Act (EMCA) provides for establishment, proceedings and awards of the National Environmental Tribunal in summary. It is Section 129 of the Act that provides the Jurisdiction of the Tribunal in determining the Appeals from the decision made by National Environmental Management Authority (NEMA).

Section 129(1) provides any person who is aggrieved by any decision by NEMA a forum where they can challenge that decision. That forum is the National Environmental Tribunal. The Tribunal as per this section has very limited Jurisdiction. It is limited to Appeals only from any aggrieved party by a decision of NEMA. All the other matters touching on infringement, denial, violation or threat to right or fundamental freedom relating to environment are reserved for this Honourable Court.

In the current application, the Applicant is not contending any decision made by NEMA but instead, the substandard, dangerous and harmful work done by the Respondent in this matter. Article 42 of the Constitution of Kenya 2010 as read together with Section 3 of the Environment Management and Co-ordination Act provides for the right to clean and healthy environment to every Kenyan. Section 3(3) continue to state that the person alleging that his right to clean and healthy environment has been, is being or is likely to be contravened, that person may apply to the High Court for redress. This is to clearly show you that any other matter that does not seek to challenge the decision made by NEMA is bestowed upon this Honourable Court.

Article 70 of the Constitution is clear that the alleged violation of Article 42 of the Constitution is and can only be heard and determined by this court and not the Tribunal. Section 13 of the ELC Act states that; "*nothing in this Act shall preclude the court from hearing and determining application for redress of a denial, Violation, or infringement of, or threat to rights or fundamental freedoms relating to the environment and land under Article 42, 69 and 70 of the Constitution."* Justice C.K YANO in Gertrude Mukoya Mwenda & Others Vs CS Infrastructure & Housing urban Development (Mombasa ELC 22 of 2019), while faced by a similar Preliminary Objection as current one, clearly stated that "NET is established by Section 125 (1) of EMCA and its jurisdiction is set out in Section 129. Appeals on the decisions of the Tribunal lay to this court under Section 130 of EMCA. The jurisdiction of this court as given in Article 162(2)(b) and Section 13 of the Environment and Land Court Act means ***that the court can hear any matter related to the environment and land."***

In dismissing the above mentioned Preliminary Objection, Justice C.K YANO continued to provide that "*As already stated under Article 162 (2)(b), the ELC has the mandate to hear disputes relating to the environment and the use and occupation of, and title to land. Section 13(1) of the Environment and Land Court Act provides that the ELC has both original and appellate jurisdiction to hear all disputes relating to the environment and land. Section 13(2)(a) provides such disputes to include disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuation, mining, mineral and other natural resources. Section 13(2) makes clear that what is set out in paragraph (a) to (d) thereof is not conclusive. The same provides that the* ***ELC can hear any other dispute relating to the environment and land. Therefore, unlike the NET, this court is the only one mandated to hear and determine application for redress for a denial, volition or infringement of, or threats to, rights relating to environment and land." (****Emphasis is ours****).***

In conclusion, the current Application before you is seeking relief provided for in the constitution and the Environment Management & Co-ordination Act, that is preventing, stopping and discontinuing of the acts and omissions of the Respondents that are harmful

not only to the environment but also to the many lives of the pupil and the constituents of Kathwana. It is a cry to save the environment and the health of the people of Kathwana and has nothing to do with the Tribunal or the NEMA but all the responsibilities and mandates of this application is bestowed upon this court. Consequently, it is you the court that has the requisite constitutional and statutory jurisdiction to hear and determine this matter and not the Tribunal whose jurisdiction is limited as per section 129 of the Act.

ii. Whether this suit, as presented is premature, bad in law, incompetent and an abuse of the Court process.

The applicant herein will prove to this Honourable Court that this application is with merit and based on very fundamental principles of law at the hearing. As indicated in the application, his suit is based on Article 42, 69 and 70 of the Constitution of Kenya. It is the applicant submissions that this point will be clearly proved at the hearing.

Applicant's prayers

We therefore pray this honorable court to dismiss this Preliminary Objection with costs because it is a waste of court's time.

DRAWN AND FILED BY:

WACHIRA KIRIGO & CO. ADVOCATES.

6. I have considered the submissions proffered by the parties in support of their diametrically divergent assertions. I have also considered the authorities cited by the parties. They are good authorities in their facts and circumstances. But no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. For example, in ***Bridge Gate Holding versus National Environment Management Authority, the Hon. Lady Justice Lucy Waithaka*** held that the suit before her was immature and transferred the suit to the National Environment Tribunal. The Notice of preliminary objection in this case seeks dismissal of this suit on the ground that this court lacks jurisdiction. The judge in the **Bridge Gate Case** ***(op.cit)*** never said that the ELC lacked jurisdiction.

7. Whereas I agree with the 2nd defendant that the institutions established by the **Environment Management and coordination Act** are capable of handling all the matters raised by the plaintiff in his plaint, I opine that it is a completely different cup of tea to have this court declare itself as lacking jurisdiction to hear and determine a matter that raises weighty environmental issues.

8. Section 13 of the Environment and Land Court at subsection (1) decrees that:

> ***"The court shall have original and appellate jurisdiction to hear and determine ALL DISPUTES 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."***

9. Article 162(2)(b) of the Constitution establishes this court to handle matters apposite to the environment and the use and occupation of title to land.

10. Prayer (a) in the plaintiff's plaint seeks:

> ***"(a) An order compelling the 1st defendant to remove the contaminated soil and cleaning of the stadium to avoid the pollution of the soil and the water and also from risking the lives of the pupils in the school."***

11. As Shakespeare said in Romeo and Juliet: **"a rose by any other name would smell as sweet."** Prayer (a), although it does not explicitly say so, seeks conservation and restoration orders. Section 112(1) of the **Environment Management and Conservation Act** states as follows:

> ***"112(1) "A court may, on an application made under this Part, grant an environmental easement or an environmental conservation order subject to the provisions of this Act."***

12. The spirit of the 2010 Constitution broadens the realm of ***Locus Standi***. Article 70(1) states as follows:

> ***"If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being, or likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available to the same matter."*** Although the issues raised in this suit can be handled by the institutions established by the Environment Management and Coordination Act, this matter comes under the purview of" in addition to any other legal remedies that are available to the same matter. Under subsection (3) The same article provides that: ***"for the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury."***

13. Both the **Environment Management and coordination Act** and the **Environment and Land Court Act** embrace the precautionary principle. Perhaps that is why both laws envisage a situation where any person alleging contravention of environment laws is allowed to come to court for redress. See section 3(3) of the Environment Management and Coordination Act and section 13(3) of the Environment and Land Court Act.

14. I find that this court has constitutional and statutory underpinnings to hear and determine this suit. I opine that it would amount to

dereliction of responsibility and duty for this court to declare that this court lacks jurisdiction to hear and determine this suit. This Notice of Preliminary Objection is, therefore, hereby dismissed.

15. The following directions/orders are issued:

a) The plaintiff should fully comply with the provisions of Order 11, CPR, within 14 days of today.

b) The defendants should fully comply with the provisions of Order 11, CPR, within 14 days after receipt of the plaintiff's compliance documents.

c) Costs regarding this Notice of Preliminary Objection shall be in the cause.

d) Parties will come to court for directions on **15th March, 2021.**

Delivered in open Court at Chuka this 10th day of February, 2021

in the presence of:

CA: Ndegwa

Wanjiru h/b Mwangi for the plaintiff

Sichanya for the 2nd defendant

HON. JUSTICE Dr. P. M. NJOROGE,

ELC JUDGE.