



**Bamrah v Botrack Limited (Environment & Land Case
E073 of 2025) [2025] KEELC 3068 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E073 OF 2025**

CA OCHIENG, J

APRIL 1, 2025

BETWEEN

KEEMTI BAMRAH PLAINTIFF

AND

BOTRACK LIMITED DEFENDANT

RULING

1. The Plaintiff commenced the instant suit by a Plaint dated the 26th February 2025 and contemporaneously filed a Notice of Motion application of even date. In opposition to the suit, the Defendant filed a Notice of Preliminary Objection dated the 3rd March 2025 contending that the Plaintiff has failed to exercise the doctrine of exhaustion by following the dispute resolution mechanism provided for in the *Environmental Management and Co-ordination Act* (EMCA).
2. The Preliminary Objection was canvassed by way of written submissions.

Submissions

3. In his submissions, the Plaintiff contends that the totality of Article 162 (2) (b) and (3) of *the Constitution* of Kenya as read with Section 13 (1) of the *Environment and Land Court Act* bestows this court with jurisdiction to determine the issues in dispute.
4. Further, that the cause of action herein is a common law strict liability negligence case arising from the Defendant's use of land causing pollution and vibrations onto the Plaintiff's land and which issue this court has jurisdiction to adjudicate.
5. The Plaintiff also submits that neither the National Environment Tribunal (NET) nor the National Environment Management Authority (NEMA) has jurisdiction to determine strict liability tort of negligence pleaded in the Plaint. Further, that if he had challenged issuance of EIA licenses, then NEMA and NET would have jurisdiction.



6. To buttress his averments, he relied on the following decisions: *AKM V NNN* [2019] eKLR; Patrick J.O Otieno v Lake Victoria South Water Services Board [2020] eKLR and *Orbit Chemicals Industries v Professor David M. Ndetei* [2021] eKLR.
7. The Defendant in its submissions contends that the Plaintiff failed to plead that NEMA has inadequate powers to stop the project, to furnish the reports together with licences and to address the grievances that the Plaintiff is claiming such that the court had to be approached. Further, that the Plaintiff should have adhered to the dispute resolution mechanisms as set out in EMCA. It insists that EMCA provides for a complaints procedure whereby NEMA having been shown sufficient cause can stop a project by issuing a stop order. To support its arguments, it relied on the following decisions: *Nicholas v Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties)* [2023] KESC 113 (KLR).

Analysis and Determination

8. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the only issue for determination is whether this Court has jurisdiction to handle the dispute herein.
9. The Defendant has sought for the Plaintiff's suit to be dismissed on the ground that the Plaintiff has failed to exercise the doctrine of exhaustion by following the dispute resolution mechanism provided for in the *Environmental Management and Co-ordination Act*.
10. I note in the Plaint dated the 26th February, 2025, the Plaintiff sought for various prayers including a permanent injunction, mandatory injunction as well as general damages. The Defendant did not file a Defence to controvert any of the Plaintiff's averments.
11. On raising a Preliminary Objection, in the case of *Mukbisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held that:

“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 the 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 the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”
12. Further in the case of *Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others* Civil Application No. 36 of 2014, the Supreme Court stated that:

“A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit..... it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion.” Emphasis Mine



13. In the case of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004, the Court held that:

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.” Emphasis Mine

14. I note the fulcrum of the dispute herein relates to the Defendant’s use of its land including the development thereon and revolves around common law strict liability negligence case, which I opine that this Court has jurisdiction to handle. Further, I note the Defendant has not controverted the Plaintiff’s averments as contained in the Plaint. It is trite that where a party fails to file a Defence expressly rebutting the Plaintiff’s averments, the claim remains unopposed.

15. Based on the facts before me, while associating myself with the decisions I have cited, I find that the issues raised in the Plaint have to be expressly rebutted and later on ascertained during a full hearing. Further, since there is no defence, I find the instant Notice of Preliminary Objection premature as it is not anchored on any pleading.

16. In the circumstances, I find the instant Notice of Preliminary Objection unmerited and will proceed to strike it out but make no order as to costs.

17. I direct the Defendant to file and serve its Defence within fourteen (14) days from the date hereof.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1st DAY OF APRIL 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Litoro for Plaintiff

Shah for Defendant

Court Assistant: Joan

