



**Otieno v Osango Farmers Co-operative Society Limited & 2 others (Environment & Land Petition E021 of 2022) [2023] KEELC 749 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 749 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E021 OF 2022  
EK WABWOTO, J  
FEBRUARY 9, 2023**

**BETWEEN**

**JACOB OCHIENG OTIENO ..... PETITIONER**

**AND**

**OSANGO FARMERS CO-OPERATIVE SOCIETY LIMITED .. 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application before this court was filed by the 1st respondent and premised on the notice of preliminary Objection dated September 22, 2022. The preliminary objection is premised on the following grounds:
  - i. That the application and by extension the petition be struck out with costs to the Respondents for want of jurisdiction in that; section 7 of EMCA establishes the National Environment Management Authority (NEMA) which is a body co-operate. The functions & objects of NEMA are wide and set out under sections 9, 58,63 and 67 of EMCA.
  - ii. That the applicant has not exhausted all remedies available to him before moving this court. It is trite law that litigants must exhaust all remedies available before resorting to litigation.
2. On September 27, 2022 the court directed that matter to be canvassed by way of written submissions. The 1<sup>st</sup> Respondent was granted 14 days to file and serve their submissions after which the petitioner was granted 21 days to file and serve their submissions.



3. The facts of the case are that the 1st respondent commenced a residential development project located in Kibos Area on Kithimo Farm under LR 10419 and Karunga Farm under LR No 9994 and LR No 7657. The petitioner aggrieved by the said development moved the court *vide* a petition on the main ground that the project lies within an industrial and commercial zone and is not appropriate for residential use.
4. The 1st respondent filed submissions dated October 7, 2022 in which they argued that the petitioner has not shown that he complained to NEMA to issue any stop order or that NEMA refused his request
5. In submissions dated November 22, 2022 the petitioner averred that the remedies sought in the petition are declarations and injunctive orders which cannot be granted by the National Environment Tribunal.
6. Having perused the written submissions and pleadings filed herein the issue for determination before this court whether the threshold to raise a preliminary objection has been met.
7. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A preliminary objection 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...”

8. The supreme court has pronounced itself on the essence of raising preliminary objections in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [Emphasis added].

9. Additionally, the Supreme Court Kenya in *Communications Commission of Kenya and 5 Others Vs Royal Medical Services & 5 Others* held that the principle of constitutional avoidance ensures that a court will not determine a constitutional issue when a matter may properly be determined on another basis.

10. Paragraph 7 of the petition enumerates the crux of the matter as follows:

“... that the 1<sup>st</sup> respondent has in violation of the land use guidelines subdivided the said land and offered it for sale for residential purposes while the same was not available for the said purpose owing to the fact that the subject land cannot be:

- a. Sub divided
- b. No NEMA applications and approvals were acquired to establish the scheme
- c. No change of use was done



- d. No sewage lines in the area
  - e. No water supply in the area
  - f. No development plan was approved...”
11. Section 9 of the *Environmental Management Coordination Act* (EMCA) includes functions of the National Environment Management Authority (NEMA) including making recommendations to the relevant authorities with respect to land use planning.
  12. In the present circumstances, the 1<sup>st</sup> respondent alludes to fact that the Petitioner has failed to exhaust the dispute resolution mechanism under the National Environment Management Authority which is the main point of contention in this petition. However, the said Respondents have not furnished this court with any Environmental Impact Assessment Licence or approval plans that were issued by the National Environment Management Authority (NEMA) and the County Government respectively for perusal by the court. In the circumstances these remains to be contested facts that cannot be determined summarily. Such a scenario could lead to matters of fact being contested in the future and it would not be prudent for the court to pronounce itself summarily at this moment. It is untenable for the court to proceed on the assumption that all the facts pleaded by the parties are correct. As a result, this court finds that the contention that the petition is filed contrary the doctrine of exhaustion fails.
  13. For the foregoing reasons I arrive at the conclusion that the preliminary objection dated September 22, 2022 is not merited and the same is dismissed with no orders as to costs.
  14. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Mr. Mkan for the Petitioner.

Ms. Mwangi h/b for Mr. Odeny for the 1<sup>st</sup> Respondent.

Court Assistant; Caroline Nafuna.

