



**Malika v Butali Sugar Mills Ltd & another (Environment & Land Petition  
E043 of 2022) [2023] KEELC 16419 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E043 OF 2022  
EK WABWOTO, J  
MARCH 9, 2023**

**BETWEEN**

**HANINGTON MALIKA ..... PETITIONER**

**AND**

**BUTALI SUGAR MILLS LTD ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. This Petition was instituted vide a petition dated October 13, 2022 wherein the Petitioner sought the following orders: -
  - i. A declaration that the 1<sup>st</sup> Respondent violated the law in failing to put up prerequisite infrastructure that protects and considers the health of the residents, animals and the general environment before setting up the aforesaid factory.
  - ii. A declaration that the 2<sup>nd</sup> Respondent violated the law in failing to hold the 1<sup>st</sup> Respondent responsible for the mismanagement of the bagasse thus endangering human life animal, crop and plant lives and the degradation of the environment.
  - iii. A permanent order of injunction restraining the 2<sup>nd</sup> Respondent from approving and or licensing the extension of Butali Sugar Mills on LR Nos N/Kabras/Malava/3134 and North Kabras/Malava/4204 in Manyonje area, Kakamega County.



- iv. Such other and or further relief as this Honourable Court may deem fit and just to grant.
  - v. Costs.
2. Contemporaneous to the filing of the petition, the Petitioner also filed an application dated October 13, 2022 in which conservatory orders were sought against the Respondents upon which the court granted some interim reliefs pending further directions.
  3. The 1<sup>st</sup> Respondent upon being served with the Petition and the application dated October 13, 2022, filed an application dated November 10, 2022 seeking to set aside the conservatory orders issued herein and further to strike out the petition dated October 13, 2022.
  4. The application is brought on the grounds that this court has no jurisdiction to grant the reliefs sought in the petition for the reasons that no Environmental Impact Assessment Licence has been issued and further there is no grievance yet that is justiciable to warrant the court's intervention. It was also stated that the Petition and its Notice of Motion are thus extremely premature.
  5. The application was opposed by the Petitioner who filed grounds of opposition dated November 16, 2022. The grounds of opposition was based on the following: -
    1. That this Court has jurisdiction to hear and determining this matter as provided under Article 162(2) (6) of the Constitution as well as sections 4 and 13 of the Environment and Land Court Act.
    2. That the National Environment Tribunal (NET) has no jurisdiction to entertain and grant constitutional reliefs.
    3. That the doctrine of exhaustion is only applicable where the alternative forum is accessible, affordable, timely and effective.
    4. That the 1<sup>st</sup> Respondents application has no basis in law and amounts to gross abuse of the court process.
    5. That the 1<sup>st</sup> Respondent's application is misconceived, fatally defective, bad in law and an abuse of the court process.
  6. Pursuant to the directions issued by this court on November 21, 2022, it was directed that both the Petitioner's application dated October 13, 2022 and the 1<sup>st</sup> Respondent's application dated November 10, 2022 be heard by way of oral submissions to be made by counsel for the parties.
  7. During the plenary hearing of both applications, Learned Counsel Mr Mkan submitted on behalf of the Petitioner while Learned Counsel Mr James Ochieng Oduol and Learned Counsel Mr Miller Bwire submitted on behalf of the 1<sup>st</sup> Respondent. There was no representation from the 2<sup>nd</sup> Respondent despite service.
  8. Learned Counsel Mr Ochieng Oduol while presenting the 1<sup>st</sup> Respondent's case submitted that once an issue of jurisdiction is raised, the same ought to be determined in the first instance. He stated that the Constitution was clear as to where the nature of complaints raised by the Petitioner ought to be referred. It was argued that no decision has been made in respect to the licensing of the sugar mill and in the absence of a decision, there can be no suit to be filed and entertained by this court.
  9. It was contended that the 2<sup>nd</sup> Respondent has the mandate to consider the decision to grant or reject the project even if there are complaints and further the same ought to be directed to the National



Environment Complaints Committee (NECC) for determination before the issues are brought to this court. It was also contended that no public hearing is yet to be undertaken and the statutory bodies are yet to exercise their mandate. The 1<sup>st</sup> Respondent reiterated that the 1<sup>st</sup> point of call was to allow the statutory body to exercise its mandate. Counsel referred to the Court of Appeal decision where the Court emphatically rendered itself on a constitutional petition crafted to appear to be a ventilation of rights under the Bill of Rights in *Kibos Distillers Limited & 4 Others v Benson Ambuti Odega & 3 Others* [2020] eKLR:-

“A party or litigant cannot be allowed to confer jurisdiction on a court or to ask 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 outer 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 delinated disputes of law and act at first instance”.

10. Learned Counsel Mr Bwire also added that where there is a statutory provided mode in any statute then the same ought to be strictly adhered to. He also stated that in the instant case, the 2<sup>nd</sup> Respondent made a call for the members of the public to present their comments and views vide a notice issued pursuant to Regulation 21 that appeared at Gazette Notice No 11459 published on September 23, 2022.
11. Reliance was also made to the following cases in support of the 1<sup>st</sup> Respondent’s position herein, *Mohammed Abushiri Mukullu v Ministry for Lands and Settlement & 6 others* [2015] eKLR, Supreme Court decision of *Benson Ambuti Adega & 2 others v Kibos Distillers Ltd & 5 Others, Salat Aden Mohammed & Another v Noor Aden Abdullahi & 4 others* [2022] eKLR, *National Environment Tribunal v Overlook Management Limited & 5 Others* [2019] eKLR, *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, *Owners of the Motor Vessel “Lillians” v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Benjamin Leonard Macfay v United African Company Limited* [1961] ALL ER 1169.
12. Learned Counsel Mr Mkan in opposition to the 1<sup>st</sup> Respondent’s motion dated November 10, 2022 relied on the grounds of opposition dated November 16, 2022 and added that the application was an abuse of the court process. He submitted that the court has jurisdiction to hear the petition and that a party can only move to the tribunal once a decision has been made by the 2<sup>nd</sup> Respondent and which was not applicable in the instant case.
13. It was contended that where no decision has not been made by NEMA then the Environment and Land Court (ELC) is the right court to handle the matter. Counsel stated that ELC is established to deal with cases of environmental pollution and has power to give preventive and conservatory reliefs. Those powers cannot be given by the Tribunal. The Tribunal has a limited jurisdiction under Section 129 of *EMCA*.
14. It was also argued that the 1<sup>st</sup> Respondent had not filed any affidavit in opposition to the Petitioner’s application dated October 13, 2022 and hence therefore the issues raised in the application have not been rebutted. Counsel relied on the following cases in support of his oral submissions and urged the court to dismiss the 1<sup>st</sup> Respondent’s application, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, *Krystalline Salt Ltd v Kenya Revenue Authority* [2019] eKLR,



*Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga v Eliud Timothy Mwamunga & Sagalla Ranchers Ltd [2017] eKLR*, *Kenya Alliance Insurance Co Ltd v Annabel Muthoni Muketi [2020] eKLR* and *Anarita Karimi Njeru v Republic [1979] eKLR*.

15. The court has carefully considered the applications dated October 13, 2022, November 10, 2022 and the oral submissions made in support and opposition to the said applications and the court is of the view that the following issues are for determination:
- a) Whether the court has jurisdiction to entertain the Petition.
  - b) In answer to (i) above is in the affirmative, whether in light of doctrine of exhaustion and judicial restraint, the Petition is ripe and proper for consideration by this court at this stage.
  - c) What orders should the court grant.
16. I shall proceed to address the issues sequentially.
17. The Environment and Land Court is one of the salient creations of the *Constitution* of Kenya, 2010. Article 162 (2) of the *Constitution* mandated Parliament to establish courts of equal status to that of the High Court to deal with disputes relating to employment and labour; and environment and the use, occupation of and title to land. Article 162 of the *Constitution* provides as follows;
- (1) The Superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in Clause 2.
  - (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to
    - a) employment and labour relations; and
    - b) the environment and the use and occupation of, and title to land.Parliament shall determine the jurisdiction of the Courts contemplated under Clause 2.
18. It is pursuant to this constitutional imperative that Parliament enacted the *Environment and Land Court Act*, 2011 and provided for the expanded jurisdiction. As already stated, the *Constitution* at Article 162(1) provides that the superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in Clause 2.
19. It is therefore clear from the aforesaid provision of the *Constitution* that this court, just like the other four superior courts, is not only a creature of a statute, but also a creature of the *Constitution*. Indeed, in addition to the *Environment and Land Court Act*, the *Constitution* itself confers on the ELC the jurisdiction to determine disputes relating to the environment and the use and occupation of, and title to land. This position was affirmed by the Court of Appeal in *Chimweli Jangaa Mangale & 3 Others v Hamisi Mohamed Mwawasa & 15 others [2016] eKLR* which observed as follows;
- “The *Constitution* has therefore created a specific court, with equal status to the High Court and conferred on it the jurisdiction to hear and determine disputes relating to, among others, use, occupation, title to land and “any other dispute relating to land.”
20. In the current suit, the Petitioner has sought for declaratory and injunctive reliefs against the Respondents. During the plenary hearing of the applications, he argued that the issue of jurisdiction



as submitted by 1<sup>st</sup> Respondent is misplaced for the reasons that no EIA licence has been issued by the 1<sup>st</sup> Respondent and as such the Tribunal cannot handle the Petition.

21. Section 129(1) of the *Environment Management and Coordination Act* which deals with the jurisdiction of the National Environment Tribunal provides that: -

“ Any person 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 variations of the persons licence under this Act or its regulations;
- d) The amount of money required to be 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 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”.

22. In view of the foregoing, it is clear that the National Environmental Tribunal does not have jurisdiction to handle this petition. The National Environment Tribunal cannot grant the reliefs sought in the Petition. It is therefore the finding of this court that having considered the petition and the reliefs sought therein, it is evident that the Environment and Land Court has jurisdiction to hear and determine matters relating to redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42,69 and 70 of the *Constitution*.

23. The next question for determination is whether the Petition as it is, is ripe for determination by the court. In other words, should the Petitioner have awaited the conclusion of the Environmental Impact Assessment process as envisaged under the *Environmental Management and Co-ordination Act* No 8 of 1999 and the Environmental Impact Assessment and Audit Regulations of 2003 before moving to this court or seeking for redress before any appropriate forum?

24. In the instant case evidence was presented to this court to the effect that the 2<sup>nd</sup> Respondent has published a gazette notice inviting members of the public to submit their views, I have perused the entire petition and affidavit in support and noted that the Petitioner has not submitted his views or comments to NEMA in response to that Notice.

25. The invitation of comments during the EIA process is provided for under the law. It has often been said that a public body which is entrusted by parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be stopped from doing its duty. However, that is subject to the qualification that it must not misuse its powers and it is a misuse of power for it to act unfairly or unjustly towards a private citizen where there is no overriding public interest to warrant it.

26. While the court’s jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute before approaching the court, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and



effective. Thus, in the case of *Dawda K Jawara v Gambia ACmHPR 147/95-149/96-A* decision of the African Commission of Human and Peoples' Rights it was held that:

“ A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”

27. In my view, the mere finding that the court may have jurisdiction to entertain a constitutional petition, does not automatically imply that the court should proceed and determine the petition as it is, the doctrine of exhaustion and judicial restraint spells otherwise. Accordingly, having considered that the EIA process is yet to be concluded, it is the finding of this court that the Petition has indeed been filed prematurely. The Petition must await the conclusion of the EIA process. That process is participatory and provided for as per the law, the members of the public including the petition herein have an opportunity to participate in the same. In view of the foregoing, the 1<sup>st</sup> Respondent's objection succeeds only to the extent that the Petition is deemed to have been filed prematurely.
28. From the foregoing analysis and findings, the Petition dated October 13, 2022, the Petitioner's Notice of Motion of even date together with the 1<sup>st</sup> Respondent's application dated November 10, 2022 are hereby determined as follows;
- a) The Petition and Notice of Motion both dated October 13, 2022 are hereby struck out.
  - b) Interim orders issued on October 14, 2022 are discharged.
  - c) Each party to bear own costs.

Orders accordingly.

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

**E K WABWOTO**

**JUDGE**

**In the presence of:**

**Mr Mkan for the Petitioner.**

**Mr Ouma h/b for Mr Ochieng Odoul for the 1<sup>st</sup> Respondent appearing together with Mr Miller Bwire.**

**Ms Cynthia Sakami for the 2<sup>nd</sup> Respondent.**

**Court Assistant – Caroline Nafuna.**

