



Kongoacheke Clan Community Based Organization (CBO Suing through Henry Mwenda) the Chairman v National Environment Management Authority & another (Environment & Land Case E003 of 2023) [2023] KEELC 17377 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E003 OF 2023**

CK NZILI, J

MAY 10, 2023

BETWEEN

**KONGOACHEKE CLAN COMMUNITY BASED ORGANIZATION (CBO
SUING THROUGH HENRY MWENDA) THE CHAIRMAN APPLICANT**

AND

ANTHONY KIAMA NGERA 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

RULING

1. This ruling relates to the application dated 7.2.2023 and a preliminary objection dated 6.3.2023. In the application, the court is asked to issue a temporary injunction barring and restraining the 1st respondent, his parents, servants, or employees from constructing, or building any structures on LR No's. Ntima/Ntakira/7534, 7404, and 7405 pending hearing and determination of this suit. The application is supported by the grounds on its face and a supporting affidavit sworn by Henry Mwenda, the Chairman of the plaintiff CBO. The applicants contend that the 1st respondent acquired approvals from the 2nd respondent to extend the usage of the land to include a light industrial use for an incinerator on the suit parcels of land on 23.3.2022 without the applicant's knowledge. That the applicant was not made aware of the Environment Impact Assessment concerning the construction of a mortuary and their views were never sought as villages in the vicinity.
2. That the applicants filed an enforcement notice with the 2nd respondent to stop the construction at the County Government of Meru but no response has been forthcoming. That the project amounts to an intrusion into the community which is a village set up on freehold parcels of land which process poses a health hazard to it now and in the future due to its adverse impact due to fumes, noise, smoke, smells, and odor. That the village is above the MEWASS water supply project hence likely to poison



- and or adulterate the water source. Despite this, the 1st respondent has started the construction, hence the need for interim reliefs.
3. The 1st respondent opposed the application through a replying affidavit sworn on 6.3.2023 on the basis that he is the registered owner of the suit parcels of land where he intends to construct an incinerator to aid in the waste management from his medical facility known as Meru Doctors Plaza following a request to extend the user which he obtained following the due process and requisite approvals. That the members of the public were involved through gazette notification public participation, consideration by the 2nd defendant and the 60 days notice was yet to expire to consider any issues including those of the applicants before a licensee/permit for the project could be issued. Due to this, the 3rd defendant who is seized of the matter should be allowed to exercise its statutory mandate being the court could be asked to intervene after which the next recourse by the applicants would be at the National Environmental Tribunal.
 4. The affidavit was accompanied by copies of title deeds application for change of user dated 23.3.2022 Environment Impact Assessment report, submissions forms, copies of minutes and photos during the public participation, and a memorandum to issues raised dated 3.2.2023 all marked as annexures No. AKN “01” (a), (b) and (c) AKN “02”, AKN “03”, AKN 04 (a) (b) and (c) and AKN “05” respectively.
 5. On the preliminary objection dated 6.3.2023, the 1st respondent averred that the plaintiff lacks locus standi to institute the suit under its name, the court lacks jurisdiction to entertain the suit for non-exhaustion of the institutions under the Environmental Management Coordination Authority Act (EMCA) which has the primary jurisdiction to handle the issues and hence the suit should be struck out.
 6. In their oral submissions made on 7.3.2023, the applicants reiterated that the application is for an injunction and not on licenses under Section 29 of the EMCA which gives the 2nd defendant powers to either revoke or suspend the license with no mandate to issue interim reliefs. Learned counsel for the applicant urged the court to find her clients entitled the reliefs sought for they are entitled to the right to a clean and safe environment under Article 42 of the Constitution.
 7. On the other hand, learned counsel for the 1st respondent urged the court to find that the issues raised by the applicants were before the 2nd respondent as per the letter attached to the replying affidavit dated 3.2.2023 which mandate was yet to be exercised during the set 60 days, hence the suit was premature for the first port of the call should be by way of an appeal. Lastly, learned counsel submitted that the applicant was not a legal entity and hence lacks locus standi since it was an amorphous entity.
 8. The issues calling for the court’s determination are:
 - i. If the applicants have *locus standi* to file and prosecute this suit.
 - ii. If the court has jurisdiction to entertain the claim.
 - iii. If the applicant is entitled to the reliefs sought.
 9. The plaintiff describes itself as a Community-Based Organization composed of adult males and females residing and working for gain at Kongoacheke village Giantune, Ntakira Imenti North Sub-county. They claim that their land owners whose livelihoods and environmental rights are at risk due to the intended project to wit a funeral home by the 1st respondent, which is about to be approved by the 2nd respondent without sufficient public participation.
 10. The 1st respondent raised a preliminary objection that the applicant is an amorphous entity that cannot institute the suit.



11. Article 22 (1) of the Constitution provides that any person acting in his interest or on behalf of another person who cannot act under his name or as a member of or in the interest of a group or class of persons or an association acting in the interest of one or more of its members has the right to institute court proceedings claiming that a right or fundamental freedoms in the Bill of Rights has been denied, violated, infringed or is threatened. Article 260 of the Constitution defines a person to include a company, an association, or body of persons whether incorporated or unincorporated.
12. In this suit, the plaintiff has sued through its chairman, Henry Mwenda who has invoked Article 42 of the Constitution on the right to a clean and healthy environment and the obligations bestowed upon the 2nd respondent on behalf of the state under Article 60 of the Constitution on public participation, sustainable development, and the elimination of processes and activities that are likely to endanger the environment.
13. Article 69 (2) thereof, provides that every person must cooperate with state organs and other persons to protect and conserve the environment. Further, under Article 70 thereof states that a person alleging a right to a clean and healthy environment has a right to apply before a court for redress in addition to any other remedies that are available in respect of the same matter. To this end, my finding is that the applicant is a proper party before this court.
14. The next issue is whether the court has jurisdiction to entertain this suit Article 70(1) of the Constitution provides that the right to come to court is in addition to any other legal remedies available for redress. The 1st respondent takes the view that the first port of call is before the 2nd respondent who is currently seized of the matter. On the other hand, the plaintiff observes that what is before the 2nd respondent is whether to issue, revoke or suspend the license and not whether there is a need for conservatory orders on infringement of the rights of the applicant.
15. Further, the 1st respondent takes the view that the claim is premature and the applicant has jumped the gun instead of waiting for the decision by the 2nd respondent and if aggrieved, to proceed to the National Environment Tribunal.
16. The jurisdiction of this court is provided under Articles 162 (2) (b) and 165 2 (d) of the Constitution as read together with Sections 3 & 13 of the Environment & Land Court Act. This court has both original and appellate jurisdiction on environmental and land matters. In the case of Agatha Jeruto Kimaswai v AG & 3 others (2021) eKLR, a preliminary objection had been raised due to the non-exhaustion of the internal dispute mechanism under the EMCA. The court held that the jurisdiction of the court on redress for denial of constitutional rights is not ousted by Section 129 of the EMCA as to a clean and healthy environment. The court cited with approval Taib Investment Ltd v Fahim Salim Said & 5 others (2016) eKLR, where the court held that environmental and developmental issues in a suit cannot be dealt with separately and it was only the court which could deal with them. Further, the court cited with approval Dominic G Nganga & another v D.G Nema and 4 others (2020) eKLR where it was held that the court is clothed with jurisdiction.
17. In Geoffrey Muthinja Kaburu & 2 others v Samuel Munga Henry & 1756 others (2015) eKLR, the court held that under Article 159 of the Constitution, courts ought to be the last fora or last resort and not the first port of call the soonest a storm brews. The court held that the exhaustion doctrine was a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of this own interest within the parameters set out in the statute, for dispute mechanism outside court.
18. In this suit, the 1st & 2nd defendants are yet to file a defense to the plaint. In the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) E. A 696, a preliminary objection was



defined as consisting of a point of law pleaded or arising out of the pleadings which if argued may dispose of the suit. Whereas the 1st respondent has raised a point on not only jurisdiction and locus standi, the facts in the plaint in my considered view are far wider than on the aspect of licenses and the role of the 2nd respondent.

19. The issues of public participation, and the failure to implement an enforcement notice to stop the construction falls with the County Government of Meru. The threat the project poses to the community and the public interest and the cultural rights of the plaintiff are all matters which fall under the jurisdiction of this court and not the 2nd defendant and the tribunal. The court takes the view that the suit is properly before it.
20. As to whether the plaintiff is entitled to temporary injunctions the party seeking such reliefs has to demonstrate a prima facie case with a probability of success with irreparable damage or loss and must show that the balance of convenience tilts in favor of granting the orders sought.
21. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR, a prima facie case was defined as established if looking at the material before the court, a right has been infringed to call for a rebuttal from the opposite party. Further in *Nguruman Ltd Jan Bonde Nielsen & 2 others* (2014) eKLR irreparable damage was defined as one incapable of being quantified.
22. In the case of *Nixon Azaria Ooko v Rose Weke & 2 others* (2014) eKLR, an injunction was sought against building a funeral home due to its adverse environmental impact. The court declined to review its earlier orders declining issuance of an injunction since the license had been obtained and the application overtaken by events.
23. In *JM v SMK & 4 others* (2022) eKLR, the court cited with approval *Joseph Siro Mosioma v HFCK & others* (2018) eKLR where the court held that damages were not an automatic remedy and cannot be a substitute for loss which is occasioned by a clear breach of law.
24. As to balance of convenience the court cited with approval *Chebii Kipkoech v Barnabas Tuitock Bargoria & another* (2019) eKLR, means that if an injunction was not granted and the suit was ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants, if an injunction was granted and ultimately dismissed.
25. In this suit, it is not in dispute that the 1st defendant in his replying affidavit recognizes the plaintiff as an interested party to the intended project – Annexure marked AKN 04 (b) and AKN 05 is specific to the CBO. The 1st respondent has admitted that the project is yet to commence as the requisite approvals, licenses, and consent are yet to be obtained or approved. The 1st respondent admits that there was public participation whereas the applicant denies this. Further, the 1st respondent avers that 60 days period is not yet over for him to acquire the license.
26. Given the foregoing, I find a prima facie case established. There is apparent irreparable damage if the project was to proceed without considering the rights to a clean and healthy environment by the applicants. The damage likely to be inflicted would be more than if the project was to pend until the suit is determined. The balance of convenience tilts in favor of granting an injunction against the 1st respondent and its agents from the construction of any structures on LR No's. Ntima/Ntakira 7534, 7404, and 7405 pending the hearing and determination of this suit.
27. The same shall last for a period of one year.
Orders accordingly.



**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 10TH DAY OF MAY 2023**

In presence of

C.A John Paul

Kimotho for plaintiff

Mr. Kariuki for 1st respondent

HON. C.K. NZILI

ELC JUDGE

