



Sidai Concrete Limited v Kenyaman Investment Limited & 3 others (Environment and Land Appeal 40 of 2020) [2023] KEELC 18078 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18078 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 40 OF 2020**

JG KEMEI, J

JUNE 8, 2023

BETWEEN

SIDAI CONCRETE LIMITED APPELLANT

AND

KENYAMAN INVESTMENT LIMITED 1ST RESPONDENT

CAROL BOORE 2ND RESPONDENT

SAMUEL GITHINJI KARIKO 3RD RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 4TH
RESPONDENT**

*(Being an appeal against the Ruling and Order issued on the 1/9/2020
by HON D N MUSYOKA SPM Kikuyu in CMCC No 18 Of 2020)*

RULING

1. The 1st – 3rd respondents herein were the plaintiffs in CMCC No 20 of 2020. The appellant and the 4th respondents were the defendants in the trial court.
2. The plaintiffs filed suit on the 6/3/2020 seeking the following orders;
 - a. A declaration that the 1st defendant’s operations without the noise and air pollution mitigation measures in place are a breach to the plaintiffs’ right to a clean and healthy environment.
 - b. An Order compelling the 1st defendant to put in place all the necessary mitigation measures to curb the noise and air pollution.
 - c. An Order compelling the 1st defendant to stop conducting any of its operations until all the necessary mitigation measures to curb the noise and air pollution are put in pace.



- d. General damages for nuisance.
 - e. Costs of this suit.
 - f. Interest on (d) and (e) above at court rates from the beginning of the suit to Judgment and until full payment.
 - g. Any other or further relief as this honourable court may deem fit to grant.
3. The plaintiffs own plot No Karai/Gikambura/3457 adjacent to that of the 1st Defendant. The Plaintiffs have constructed residential flats with over 30 tenants in its premises comprised of young families.
 4. The plaintiff discovered the change of user of the 1st defendant's land from agricultural to light industrial user through a public notice board displayed on the plot. On 14/6/2018 the plaintiffs objected to the change of user in its letter addressed to the Director of Physical Planning, Kiambu County and copied to the area Member of Parliament. The letter did not elicit any response. They also wrote a letter dated the 1/2/2019 to the 2nd defendant inquiring whether the 1st defendant had carried out the necessary environmental impact assessment and whether a National Environmental Management Authority (NEMA) licence was issued but no response was given.
 5. The 1st defendant completed the construction of the concrete mix plant in the month of May 2019.
 6. The defendants' cause of action is that the court compels the 1st defendant to implement mitigating measures in line with *Environmental Management and Coordination Act* (EMCA) to curb the noise and air pollution that is affecting the Plaintiff and its tenants threatening their right to clean and healthy environment.
 7. Alongside the suit the plaintiffs filed a Notice of Motion dated the 4/3/2020 seeking inter alia interim orders compelling the 1st defendant to implement mitigating measures to curb the noise and air pollution, order stoppage of the 1st defendant from conducting operations until all necessary measures have been put in place.
 8. In response to the application the 1st defendant filed the preliminary objection dated the 16/3/2020 on the following grounds;
 - a. That the aforementioned plaint and application filed on 6/3/2020 were drawn, signed and filed by an unqualified person namely, Patrick Mwangi Ndung'u, within the meaning and application of section 9 of the *Advocates Act*, cap 16 Laws of Kenya.
 - b. That the instant suit is premature, misconceived and ill-advised as it offends the provisions of section 129 of the *Environmental Management & Co-ordination Act*, cap 387 Laws of Kenya.
 - c. That this honourable court lacks jurisdiction to entertain the instant suit as it offends the provisions of section 3(3) of the *Environmental Management & Co-ordination Act*.
 - d. That the plaintiffs' pleading and application are based on incurable illegalities and ought to be struck out forthwith and this suit dismissed with costs to the defendants.
 9. Upon hearing the preliminary objection the court delivered its ruling on the 1/9/2020 dismissing the preliminary objection with reasons.
 10. Aggrieved by the said decision of the said court, the appellant filed this appeal and proffered the grounds set out as;



- a. That the learned trial Magistrate erred in law and fact in holding that the respondent's Advocate was qualified to practice as an Advocate as at March 4, 2020 within the meaning and application of section 9 of the *Advocates Act*, cap 16 Laws of Kenya.
 - b. That the learned Magistrate erred in law and fact in failing to find and hold that the Respondent's Advocate applied and paid for his Practising Certificate for 2020 on April 25, 2020 and was therefore unqualified to practice law on March 4, 2020 when he purportedly drew the pleadings in Kikuyu CMELC 18 of 2020.
 - c. That the learned Magistrate erred in law and fact in relying exclusively on the allegation and/or submissions by the respondents' Advocates to dismiss the appellant's preliminary objection when the allegations and/or submissions were not substantiated by any evidence as required by law.
 - d. That the learned Magistrate erred in law and fact in failing to consider the evidence of the Objector (appellant herein) in respect of the Practice Status of the respondent's Advocates, which evidence was uncontroverted whatsoever, except by mere allegations.
 - e. That the learned Magistrate erred in law and fact in failing to hold that the burden of proof of compliance with section 9 of the *Advocates Act* was on the respondents' Advocate, which burden was not discharged.
 - f. That the learned Magistrate erred in law and fact in holding that the lower court has original jurisdiction to adjudicate the matter, instead of the National Environment Tribunal.
 - g. That the learned Magistrate erred in law and fact in finding that jurisdiction of the trial court and compliance with section 9 of the *Advocates Act* were mere technicalities and thereby dismissing the appellant's notice of preliminary objection.
11. The Appellant sought the following orders;
 - a. This Appeal be allowed and the Ruling of Hon. D. N. Musyoka, SPM, September 1, 2020 in Kikuyu Cmelc 18 of 2020; Kenyaman Investment Limited & 2 others v Sidai Concrete Limited & another, be set aside.
 - b. The plaintiffs' Pleadings and Application at the lower Court be struck out and the suit be dismissed with costs to the defendants (appellant herein).
 - c. The costs of this Appeal and of the preliminary objection be borne by the respondents herein.
 12. Despite directions on the filing of written submissions, only the appellant filed written submissions which I have read and considered.
 13. On the issue of unqualified person, the appellant relied on the case of *Peter Karuiru Gachira v Leonard Wanjohi Murage & another* [2016] eKLR, section 9 of the *Advocates Act* to fault the decision of the Learned Hon Senior Principal Magistrate in agreeing with the Advocate that his Practising License was delayed by the Law of Society of Kenya in the processing of the same. The appellant urged the court to strike out the suit on grounds that the Advocate had no Practising License at the time he filed suit.
 14. On the question of jurisdiction of the court, the appellant contended that the suit filed in the lower court is premature misconceived and offends the provisions of section 129 of EMCA which provides alternative dispute resolution mechanisms before approaching the court. That the 1st appellant ought to have moved the National Environment Tribunal (NET) instead. The appellants contend that the suit of the 1st respondent is couched cleverly to avoid the NET as the appropriate forum for its dispute



resolution. It faulted the 1st respondent of inviting the lower Court to assume an appellate jurisdiction. The orders sought by the 1st Respondent are within the realm of the NET to hear and determine. See the case of *James Kuria v Attorney General & 3 others* [2018] eKLR on the exhaustion of alternative forums of dispute resolution.

15. The appellant relied on the case of *The Speaker of the National Assembly v James Njenga Karume* (1992) eKLR to buttress the presupposition that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or Act of Parliament that procedure should be strictly followed.
16. Further that under section 3(3) of the *EMCA*, the right forum to adjudicate a matter requiring redress for entitlements of clean and healthy environment is the High Court and not the lower court.
17. It faulted the Hon Court for relying on section 26 (3) and (4) of the *Environment & Land Court Act* in holding that it is vested with jurisdiction to entertain the matter.
18. The key issue is whether the appeal is merited.
19. In determining the matter, the court will answer the question whether the preliminary objection is a pure point of law. The heart of this objection is the question of jurisdiction of the court to entertain the suit; the second limb is the exhaustion of alternative dispute mechanisms provided in statute. The third limb is the propriety of the suit alleged to have been filed by an unqualified person. I will address the issues of jurisdiction upfront because jurisdiction is everything and once a court finds it has no jurisdiction, it must down its tools at once.
20. The classical case in the definition of a preliminary objection is *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* [1969] EA 696, where 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.”

Further Sir Charles Newbold in the same case stated as follows;

“The first matter relates to the increasing practices of raising points which should be argued in the normal manner quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises pure points of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained and if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but to unnecessarily increase costs and on occasion confuse the issue. The improper procedure should stop.”

21. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the court to exercise discretion.
22. Where the issue of a court's jurisdiction is raised, the court ought ordinarily to determine such issue at the earliest opportunity. This is because jurisdiction is everything and without jurisdiction, a court



must down its tools at once. In the case of the *Owners of the Motor Vessel "Lillian SS" v Caltex Oil Kenya Limited* [1989] KLR, Nyarangi, J.A (as he then was) stated:

“... I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized ... of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction there would be no business for a continuation of proceedings pending other evidence. It lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

23. In the Supreme Court decision in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* CA No 2 of 2011 the court held inter alia that;

“A court’s jurisdiction flows from either the constitution or legislature or both”

24. I find that jurisdiction of a court is a pure point of law. The next question is whether the objection is merited.

25. The starting point is the cause of action raised by the plaintiff which is that the 1st defendant be compelled to put in measures to curb the air and noise pollution arising from the operation of its quarry nearby. The appellant contends that the 1st defendant ought to have approached the NET for the adjudication of the dispute. Reliance was placed on section 129 of *EMCA* which I wish to reproduce for emphasis;

“(1) Any person who is aggrieved by—

- (a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;
- (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;
- (c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;
- (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;
- (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.”

26. In this case none of the parties has tabled any evidence as to whether the licence was issued to the appellant by NEMA. At the very least even the appellant has not made any disclosure to the court. The 1st respondent states that it is unaware whether the licence was issued, the terms and the conditions of the issuance. Its case is that the appellant be compelled to put in remedial measures to curb air and noise pollution in the residential area. The 1st respondent therefore does not fall within the categories listed in the above section of *EMCA*. Having said that the 1st respondent avowed that the appellant completed the plant in May 2019. It is therefore doubtful whether the 1st respondent can get an



efficacious remedy from the NET on the basis that none of the circumstances cited above applies to it, secondly that the period of filing an appeal with the NET has long expired. The court is of the view that it would be perilous to direct the 1st respondent to a forum whose accessibility is doubtful.

27. In the case of *Joseph Umino & anor v NMEA and Africa Plysack Limited* [2014] eKLR where the court stated

“The word, in addition, should be read to mean that the constitutional redress should be resorted to only where the other available remedies are not efficacious or adequate constitutional redress is in addition not a substitute to the other legal remedies.”

28. Civil jurisdiction of a Magistrate's Court:-

- “1) A Magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —
 - (a) twenty million shillings, where the court is presided over by a chief Magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal Magistrate;
 - (c) ten million shillings, where the court is presided over by a principal Magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident Magistrate; or
 - (e) five million shillings, where the court is presided over by a resident Magistrate.
- (2) The Chief Justice may from time to time, by notice in the gazette, revise the pecuniary limits of jurisdiction set out in Subsection (1), taking into account inflation and change in prevailing economic conditions.
- (3) A Magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law —
 - (a) land held under customary tenure;
 - (b) marriage, divorce, maintenance or dowry;
 - (c) seduction or pregnancy of an unmarried woman or girl;
 - (d) enticement of, or adultery with a married person;
 - (e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and
 - (f) intestate succession and administration of intestate estates, so far as they are not governed by any written law.”



29. Claims relating to violation of human rights:-

- “(1) Subject to article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a Magistrate's Court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) The applications contemplated in Subsection (1) shall only relate to the rights guaranteed in article 25 (a) and (b) of the Constitution.
- (3) Nothing in this Act may be construed as conferring jurisdiction on a Magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.
- (4) The Chief Justice shall make Rules for the better exercise of jurisdiction of the Magistrate's courts under this Section.”

30. Claims in employment, labour relations claims; land and environment cases a Magistrate's Court shall:-

- “(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (No. 19 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -
- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;
 - (iv) public, private and community land and contracts, leases in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally.
- (b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act (No. 20 of 2011) and subject to the pecuniary limits under Section 7(1), hear and determine claims relating to employment and labour relations.”

31. Flowing from the pleadings of the 1st respondent, the relevant law and the jurisdiction of the hon court set out above, the court is satisfied that the court has jurisdiction to entertain the matter. In any event the prayers sought including general damages for nuisance cannot be granted by the NET.

32. On this one the court is satisfied that the Learned Hon Senior Principal Magistrate arrived at the correct decision.



Unqualified person

33. Section 9 of the [Advocates Act](#) states as follows; Qualifications for practising as an Advocate:-

- a. He has been admitted as an Advocate; and
- b. His name is for the time being on the roll; and
- c. He has in force a practising certificate; and
- d. deleted by Act No. 9 of 2000, S. 57, and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of Section 27 or by an order under Section 60(4).”

34. The Advocate concerned Patrick Mwangi swore an affidavit on the 3/8/2020 to the effect that he is admitted as an Advocate No P/105/11986/16, practices in the law firm of MNP Advocates as the Managing partner of the firm. He is enrolled as an Advocate and holds a current practising certificate No LSK/2020/08657 then issued on the 25/4/2020. Admittedly he avowed that he filed the suit on the 5/3/2020 while his Practising Certificate was being processed by the Law Society of Kenya. The Law Society of Kenya in its letter dated 3/9/2020 concurred that he holds a Practising Certificate issued on the 25/4/2020.

35. I rely on the case of [National Bank Of Kenya Limited v Anaj Warehousing Limited](#) [2015] eKLR where the Supreme Court of Kenya stated as follows;

“In our opinion, it is essential to establish the main objective of section 34, as a basis for any conclusions. This Section prohibits unqualified persons from preparing certain documents. It is directed at “unqualified persons”. It prescribes clear sanctions against those who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent as to the effect of documents prepared by Advocates not holding current practising certificates. ...

The transgressor, in our view, is the Advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the Advocate, and not the seeking and receiving of services from that Advocate. ...

(68) The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under section 34(1)(a) of the [Advocates Act](#), only by dint of its having been prepared by an Advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-Advocates, or Advocates whose names have been struck off the roll of Advocates, shall be void for all purposes.”

36. By parity of reasoning I find that the pleading does not become invalid by dint of it’s been prepared by an Advocate who at the time was not holding a current Practising Certificate. For all intents and purposes there was no evidence tendered to show that the Advocate had been struck out of the roll of Advocates. I find no grounds to fault the learned Hon. Magistrate on this one.

37. Final orders for disposal

- a. In the upshot I find the appeal lacks merit.



- b. It is dismissed.
- c. No orders as to costs.

38. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 8TH DAY OF JUNE, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of

Maranga HB Awuor for Appellant

1st – 4th Respondent - Absent

Court Assistants – Kevin & Lilian

