



Watamu Association (Suing through its elected officials Clare Taylor Bea Anderson & Damian Davies) v Wood & 3 others (Environment & Land Petition 3 of 2023) [2023] KEELC 18807 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18807 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 3 OF 2023

MAO ODENY, J

JULY 13, 2023

IN THE MATTER OF: ARTICLES 3, 10(2), 19, 20, 21, 22, 23, 42, 60, 62, 66, 69, 70, 162 (2), 258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: VIOLATION OF ENVIRONMENT MANAGEMENT & COORDINATION ACT (EMCA) 1999

AND

IN THE MATTER OF: THE ENVIRONMENT (IMPACT ASSESSEMENT & AUDIT REGULATIONS), 2003

AND

IN THE MATTER OF: LAND ACT, 2012 AND IN THE MATTER OF: THE WATER QUALITY REGULATIONS (WQR) (2006)

AND

IN THE MATTER OF: USE AND DEVELOPMENT ON RIPARIAN ZONES

AND

IN THE MATTER OF: DEVELOPMENT OF PERMANENT MULTI-STOREY CONCRETE STRUCTURES ON PROPERTY L.R 8594/13- WATAMU AND ADJACENT RIPARIAN ZONE

BETWEEN

WATAMU ASSOCIATION (SUING THROUGH ITS ELECTED OFFICIALS CLARE TAYLOR BEA ANDERSON & DAMIAN DAVIES) PETITIONER

AND

TARA WOOD 1ST RESPONDENT



**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 2ND
RESPONDENT**

COUNTY GOVERNMENT OF KILIFI 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. This ruling is in respect of a Preliminary Objection dated February 9, 2023 and one dated February 15, 2023 by the 1st and 2nd Respondents respectively on the following grounds:
 - a) This Petition and the antecedent Notice of Motion application is fatally defective as it offends the provisions of Section 125 and 129 of the Environmental management and Coordination Act, 1999 (EMCA) and as such cannot be ventilated before this Honourable Court.
 - b) That the Petition is premature as the Petitioner has not exhausted the available local remedies established under Section 125 of the EMCA.
 - c) The Environmental Management and Coordination Act 1999 establishes the National Environment Tribunal to determine matters that have been raised by the Petitioner herein.
 - d) That the Petition is an abuse of the court process and should thus be dismissed.
2. A similar Preliminary Objection was raised by the 1st Respondent on ground that several points of law and consequential prayers raised in the Petition belong to the preserve of the National Environment Tribunal established under Section 129 of the EMCA.
3. Parties agreed to canvas the Preliminary Objection by way of written submissions which were duly filed.

2nd Respondent's Submissions.

4. Counsel relied on the cases of *Owners of Motor Vessel 'Lilian s' v Caltex Oil (Kenya) Ltd 1985 eKLR* and CIVIL APPEAL NO 153 of 2019 *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR* and submitted that this Court lacks jurisdiction to hear and determine the matters raised in this petition in view of the provisions of Sections 129 of the Environment Management and Coordination Act, No 8 of 1999.
5. It was counsel's submission that the Petitioner's grievance falls under Section 129 of EMCA which grievance is that the 2nd Respondent issued an EIA Licence to the 1st Respondent in an irregular manner submitting that the decision to issue an EIA is a decision that is to be made by the 2nd Respondent which falls under the ambit of the NET jurisdiction.
6. Counsel cited the provisions of section 125 (1) on the establishment of the National Environment Tribunal (NET), Sections 129 (2), on Appeals to the Tribunal and 129(3) upon appeal to the Tribunal.
7. Counsel relied on the case of *Joseph Owino and Another vs NEMA & Africa Plysack Ltd (2014) eKLR* where the Court held that a person aggrieved by a decision has a right to appeal to the tribunal.
8. Counsel further relied on the cases of *Nairobi petition No 461 of 2012 Isaac Ngugi -vs- Nairobi Hospital & Another [2013] eKLR* and *Nairobi Petition No 73 of 2014 Rich Productions Ltd vs Kenya*



Pipeline Limited and Public Procurement Oversight Authority [2014] eKLR where courts have held that where an infringement can be redressed within legislative framework, the course to follow is to take out proceedings under the framework and not under the *Constitution* unless that framework does not provide an efficacious and satisfactory answer to the litigants grievance.

9. The 3rd Respondent supported the preliminary objection and submitted that the dispute ought to be handled under the ambit of the *Physical and Land Use Planning Act, 2019* where a Dispute Resolution Mechanism established under the Act that has proper jurisdiction and is competent to resolve the issues raised in this Petition. The mandate to resolve such disputes is vested upon the County Physical and Land Use Planning Liaison Committees under Section 76 of the Act.
10. Counsel relied on the Case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR* and *Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 others [2015] eKLR* where the court stated that where there is a dispute resolution mechanism outside the court, the same should be exhausted before the jurisdiction of the courts is invoked.
11. Counsel for the 1st Respondent supported the Preliminary Objection and submitted that the Petition is an abuse of process and should be dismissed with costs.

Petitioners' submissions

12. Counsel for the Petitioner opposed the Preliminary objection and submitted that the Petitioners have locus standi as the descriptive part of the parties indicate that the Petitioner is suing through its elected officials namely Claire Taylor, Bear Anderson and Damian Davis and relied on the case of *Kirinyaga United Bar Owners Organization v County Secretary Kirinyaga County Government – Kirinyaga County & 6 others [2014] eKLR* on locus standi
13. On the issue whether the court has jurisdiction to hear and determine this Petition counsel submitted that the issues raised in this petition are constitutional in nature and not founded on the provisions of EMCA and NET.
14. That the issues raised in respect of EIA licenses cannot oust the court's jurisdiction to hear the various violations raised in the petition. Counsel further relied on the cases of *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR* where the court discussed how petitions with multifaceted issues should be dealt with.
15. Counsel submitted that any issue or prayers relating to issuance of EIA license though may be subject of the Jurisdiction of NET, such issues now fall within the exceptions to the doctrine of exhaustion and urged the court to dismiss the preliminary objection.

Analysis and Determination.

16. The issue for determination is whether this court or the National Environment Tribunal has the jurisdiction to hear and determine this petition. The Petitioners filed this petition seeking the following prayers:
 - a) A declaration that the land created and lying between LR No 8594/13 and the shores of the Indian Ocean is riparian zone is public land by virtue of article 62 (2) (1) of the *Constitution*.
 - b) A declaration that construction or development of multi-storey and permanent concrete structures in riparian zones is inconsistent with



sustainable utilization, management and conservation of the environment and a threat to the right to a clean and healthy environment.

- c) A declaration the construction of the multi storey building by the 1st Respondent is being undertaken outside LR No 8594/13, riparian zone and therefore illegal.
 - d) A declaration the approval No. NEMA/SPA/10349 by the 2nd Respondent and CGK/WTM/192/2022 by the 3rd Respondent were obtained in a manner inconsistent with the requirements of the Constitution and the resultant construction is therefore illegal.
 - e. An order of permanent injunction be and is hereby issued restraining the 1st Respondent whether by herself, agents, servants and whomsoever acting under her authority or instruction stopping construction of further construction of the permanent multi storey building on property LR No 8594/13 and the adjacent land.
 - f) An order be and is hereby issued requiring the 1st Respondent at her own cost to demolish the multi storey building under construction and take such necessary steps to restore the land and environment on LR No 8594/13 and adjacent riparian land as near as it may be to the state in which it was before the construction.
 - g) An order be and is hereby issued compelling the 2nd Respondent to take such necessary steps to audit the environmental impact that the construction by the 1st Respondent has caused on the environment and take such necessary steps to protect the environment.
 - h) An order for compensation by the 1st Respondent for violation of the members of the Petitioner's rights to a clean and healthy environment.
 - i) The costs of this Petition be borne by the Respondents.
 - j) Any other or further order or relief that this Honourable Court deems fit to grant.
17. From the onset it should be noted that the Petitioners have locus standi to file this Petition as in the descriptive part of the Petition they described themselves as suing through its elected officials namely Claire Taylor, Bear Anderson and Damian Davis, which is within the law and procedure in respect of Societies.
18. The respondents only picked one issue on EIA license and left the other prayers of clean and health environment and encroachment on riparian land.
19. I agree that the issue of EIA licenses are within the jurisdiction EMCA and if a party is aggrieved then they can appeal to NET but there are other rights violations which NET cannot deal with.
20. The Jurisdiction of the National Environment Tribunal is provided for under Section 129 of the EMCA. The same provides as follows;
- 129. Appeals to the Tribunal
 - (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.
- (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.
- (3) Upon any appeal, the Tribunal may—
- a) Confirm, set aside or vary the order or decision in question;
 - b) Exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
 - c) Make such other order, including an order for costs, as it may deem just.
- (4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

21. In the case of *Republic vs NEMA Ex parte Sound Equipment Ltd CACA No 84 of 2010 [2011] eKLR*, where the Court of Appeal held that;

' Challenges to Environmental Impact assessment Licences should be made to National Environmental Tribunal established for that purpose under Section 125 of the Environment Management And Coordination Act(EMCA). Rather than come to this Court, the Tribunal should have been given the first opportunity and option to consider the matter. We agree with Mr. Gitonga for the 3rd Respondent that the Tribunal is the specialized body with capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licenses.'



22. There is a reason why such Tribunals were established and provided for in law. Where there is dispute mechanism provided for then parties must exhaust the same before moving to courts as was held in the case of *Samson Chembe Vuko vs Nelson Kilumo & 2 Others [2016] eKLR*, that;

' It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.'

23. However, Section 13 of the Environment and Land Court provides for the jurisdiction of the court that is envisaged under Article 162(2) (b) which reads:

13. Jurisdiction of the Court

- 1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- 2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
 - a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b) Relating to compulsory acquisition of land;
 - c) Relating to land administration and management;
 - d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e) Any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for 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*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

24. From the provision under Section 13 above, the ELC has original and appellate jurisdiction to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. It also provides that the court shall have the jurisdiction to hear any other disputes relating to environment and land.



25. In the case of *TAIB Investments Limited v Fabim Salim Said & 5 others [2016] eKLR*, Angote J held that the only most suitable forum to deal with such multiple issues would be the ELC by virtue of Article 162(2) of the Constitution and held as follows:

' In any event, the Plaintiff's suit has not only raised the issue of whether the 5th Defendant (NEMA) issued to the 1st to the 4th Defendants a licence, but also whether the County Government issued to the 1st to the 4th Defendants with the approval to commence developments on the suit property pursuant to the provisions of the Physical Planning Act and the County Government Act.

The Tribunal established under Section 129 of the EMCA cannot entertain a dispute as to whether the County Government or the Director of Physical Planning approved the 1st to the 4th Defendants' development Plans.

Where we have environmental and developmental issues in a suit that are supposed to be dealt with by numerous Tribunals or bodies, and where those issues cannot be dealt with separately, it is only this court, pursuant to the provisions of Article 162 (2)(b) of the Constitution, that can deal with all those issues.

However, where a suit raises specific issues which are supposed to be dealt with by a specific Tribunal or body established by law, then the matter must be commenced in the Tribunal or body so established before an appeal can be lodged in this court or the High Court, as the case may be. That is not the case in this matter. The issues raised in the Plaintiff fall outside the mandate of the National Environment Tribunal.'

26. I find that this court has jurisdiction to hear and determine this petition as provided for Under Section 13 of the Environment Act. Further this being a constitutional petition seeking for redress for violations of other rights we cannot just terminate it at a preliminary stage as was held in the case of *West Kenya Sugar Co Limited – v- Busia Sugar Industries Limited & 2 others, [2017] eKLR*, that:

' This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the Constitution. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment.'

27. The upshot is that the two Preliminary Objections are dismissed with costs to the Petitioner.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF JULY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

