



Maikara & 5 others v Chico Company Limited & 2 others (Environment & Land Petition 8 of 2021) [2022] KEELC 2685 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2685 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND PETITION 8 OF 2021**

JM ONYANGO, J

JULY 6, 2022

**IN THE MATTER OF THE CONSTITUTION OF REPUBLIC OF KENYA
AND
IN THE MATTER OF ARTICLE 2, 40, 43, 47, 60 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF ARTICLE 20, ARTICLE 21, 22
& 23 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE CONTRAVENTION AND VIOLATION OF FUNDAMENTAL
RIGHTS AND FREEDOM OF INDIVIDUALS AS ENSHRINED UNDER
ARTICLE 27, 28, 32, 40, 42, 43, 47 & 70 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF ENVIRONMENTAL IMPACT
AND
IN THE MATTER OF ENFORCEMENT OF BILL OF RIGHTS
UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(1), (10), (12),
(19), (20), (21), (22), (23), (27), (28), (54) OF THE CONSTITUTION OF KENYA**

BETWEEN

**AMON MARUCHA MAIKARA 1ST PETITIONER
CHARLES KEBARI MAGE 2ND PETITIONER
SALOME K OBONYO 3RD PETITIONER**



DENIS MOGERE KEUYA 4TH PETITIONER
TERESA JOMO 5TH PETITIONER
HENRY OMIKO MAUTI 6TH PETITIONER

AND

CHICO COMPANY LIMITED 1ST RESPONDENT
THE COUNTY GOVERNMENT OF KISII 2ND RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 3RD
RESPONDENT

RULING

Introduction

1. What is before me for determination is the Petitioner's Notice of Motion dated May 4, 2020 seeking the following orders:
 - a) Spent
 - b) That the Petitioners in this matter have filed a matter in court seeking for orders compelling the Respondents herein to stop or to discontinue the environmental pollution.
 - c) That an order of permanent injunction be issued to restrain and/or stop 1st the Respondent through themselves, their directors agents, employees and/or representatives from in any way continuing with operations of their factory and/or ballast making at its factory site(sic) in Bonyawangwa area, South Mugirango Sub-County, Kisii County.
 - d) An order of environmental restoration requiring the 1st-3rd Respondents through itself, their agents, employees and/or representatives (sic) to demolish any structures erected in Bonyawangwa area, South Mugirango Sub-County, Kisii County with a view of restoring the environment to its original status within 14 days and in default the Petitioner be at liberty to appoint an auctioneer to demolish the structures and restore the environment and recover the cost from the 1st -4th Respondents.
 - e) A declaration that the failure, neglect and refusal by the 2nd and 3rd Respondents to stop the operations of the 1st Respondents after they had been found to be repeatedly and continuously degrading the environment is unconstitutional, illegal and contravenes the provisions of section 108 of the Environmental Management and Coordination Act 1999 and Articles 3, 10 and 47 of *the Constitution*.
 - f) Compensatory damages for violation of the Petitioner's rights under Articles 43,46 and 47 of *the Constitution*.
 - g) Interest
 - h) Costs of and incidental to the Petition and
 - i. Any other order that this court deems fit and just to grant in the circumstances.



2. The application is anchored on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of Amon Marucha Maikara, the 1st Petitioner herein. In the said affidavit, she depones that she is the immediate neighbour of the site leased by the 1st Respondent at Bonyawangwa village where it operates a ballast processing plant. It is the 1st Petitioner's case that the 1st Respondent which started operations in 2019 has been emitting a lot of dust in the area thus polluting the air. As a result of the emissions released into the air by the 1st Respondent, the Petitioners' farming activities have been adversely affected. For example she has lost about 100 chicken from her poultry farm and her cows which used to produce 10 litres of milk per cow now produce only one litre each as the Napier grass they have been grazing has been polluted.
3. Furthermore her crop yield has significantly reduced as she now harvests only 5 bags of maize per acre compared to her previous yield of 47 bags per acre. Additionally, her aging parents' health has been affected as they have developed problems related to their breathing, sight and vision. She depones that in addition to the medical and other expenses associated with the effects of the 1st Respondents operations, the insecurity in her village has increased as thieves take advantage of the noise emanating from the 1st Respondent's activities to steal from the Petitioners and other villagers. The 1st Petitioner avers that as a result of the 1st Respondent's activities they continue to suffer irreparable damage and urges the court to grant the prayers sought.
4. Upon being served with the application, the 1st Respondent filed a Replying Affidavit sworn on July 4, 2021 by Oscar Obonyo, their Environment Health and Safety Officer. They also filed Grounds of Opposition dated May 26, 2021 in which they raised the following points:
 - i. This Honourable Court does not have jurisdiction to hear and determine the issues raised in the Petition.
 - ii. No constitutional issues are disclosed in the Petition.
 - iii. The orders sought cannot be granted as the same shall have the effect of determining substantive issues at an interlocutory stage.
 - iv. The jurisdiction of this court has not been appropriately invoked with respect to the alleged contravention of the provisions of section 108 of the *Environmental Management and Coordination Act*, 1999.(EMCA) as the 2nd Respondent is autonomous in the exercise of its functions under EMCA while the 3rd Respondent has no mandate to exercise under section 108 of *EMCA*.
 - v. Compensatory damages cannot issue without evidence being taken, a finding of liability against the Respondents being made and proof of loss and/or damage by the Petitioners. The application before court is thus misconceived.
 - vi. The Petitioners/Applicants are guilty of laches.
5. In his affidavit, Mr Obonyo deposed that granting the application would require the determination of substantive issues at an interlocutory stage yet the orders sought by the Applicants which have far reaching consequences were unsupported. He deposes that the 1st Respondent has two stone crushers at Bonyawangwa and Bombure respectively but the one at Bonyawangwa has not been producing any road construction material since September 2020. According to Mr. Obonyo, the 1st Respondent undertakes wet crushing as a mitigation measure against expected dust emissions.
6. He further depones that prior to the commencement of its project the 1st Respondent complied with all licensing requirements including public consultation and participation and the 3rd Respondent



approved the project. He depones that since being issued with a license, the 1st Respondent has strictly complied with the licensing conditions and its activities are monitored by the 3rd Respondent and the Public Health Department. He adds that no complaint has been raised with the said department or the 1st Respondent and that the 3rd Respondent has been satisfied with the mitigation measures put in place by the 1st Respondent.

7. It is further deponed by Mr. Obonyo that the 2nd Respondent has no mandate or capacity to handle the environmental issues raised by the Petitioner, save where the same touch on County legislation and that none of the 1st Respondent's activities have infringed on any County legislation. He depones that the project sought to be stopped is a public project which has been going on for about 3 years and stoppage of the same on spurious allegations would result in massive loss of revenue and jobs.
8. The 2nd and 3rd Respondents did not file any response. Although the Petitioner requested for leave to file a Supplementary Affidavit, none was filed. The court then directed that the application be canvassed by way of written submissions but only the 1st Respondent filed its submissions.

1st Respondents Submissions

9. Learned counsel for the 1st Respondent submitted on three main issues. The first one is that this court lacks jurisdiction to entertain the suit as the same falls within the jurisdiction of the National Environment Tribunal established under section 125 of the *Environment Management Coordination Act*, 1999. It was contended that section 130 of the said Act ousts the jurisdiction of the court as the point of first reference and under the doctrine of exhaustion of remedies, the Petitioners have presented their complaint to the wrong forum. Counsel relied on the cases of *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others, Muslims for Human Rights & 2 Others* (2020) eKLR and *Philip Muiruri Ndirangu v Getamu Housing Co. Ltd* (2019) eKLR.
10. Secondly, it was submitted that the Petition does not raise any constitutional issues as the Petitioners claim is one of trespass and nuisance which can be agitated without the need for a Constitutional Petition. Reliance was placed on the case of *Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 Others* (2018) eKLR for the proposition that where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with a reasonable degree of precision, that of which he complains, the provisions said to be infringed and the manner in which they are alleged to have been infringed.
11. He also cited the case of *Kiambu County Tenants Welfare Association v Attorney General & Another* (2017) eKLR for the proposition that courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it.
12. Thirdly, it was submitted that the orders sought by the Petitioners are final in nature and are not supported by the reliefs set out in the Petition.

Issues, Analysis and Determination

13. The main issues for determination are:
 - i. Whether the court has jurisdiction to hear and determine this matter.
 - ii. Whether this suit meets the threshold of a Constitutional Petition.
 - iii. Whether the orders sought in the application should be granted.



Whether the court has jurisdiction**

14. Under section 9 of the *Environmental Management and Co-ordination Act*, 1999, NEMA is the agency that has the mandate to oversee and co-ordinate the implementation of policies relating to the environment to ensure the environment is protected and is not degraded and that the same is sustainably conserved for the benefit of future generations. Section 68(1) of the Act provides that:

The Authority shall be responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment.

15. Before undertaking any project that is likely to result in major changes in land use such as the one undertaken by the 1st Respondent, the project proponent is under section 58 of the Act required to submit an Environment Impact Assessment report to the Authority. The Authority upon being satisfied with the adequacy of the Environmental Impact Assessment study, evaluation and review issues an Environment License on such terms as may be necessary to facilitate sustainable development and sound environmental management. See Part VI of the Act.
16. Following the issuance of the said licence, the Standards and Enforcement Review Committee is mandated to *inter alia* collect, maintain and interpret data from the industries and local authorities on the nature of effluents and submit to the Director General all necessary recommendations for the monitoring and control of water pollution among others.
17. In the instant suit the Petitioner has complained about the impact of the 1st Respondent's project on the environment and the health and livelihoods of the Petitioners. It is the 1st Respondent's contention that the Act provides an elaborate mechanism for monitoring and reporting on such impact through audit reports by an Environmental Inspector appointed under section 117 of the Act. Under the said Act the body that is mandated to make decisions with regard to ensuring compliance with the provisions of EMCA is the NEMA. Section 125 of *EMCA* establishes the National Environment Tribunal (NET) which is seized with the mandate to hear and determine appeals from NEMA.
18. Section 129 (2) of *EMCA* provides as follows:
- “Unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority or Committees of the Authority or its agents 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”
19. Under section 129(3) of the Act, the Tribunal may confirm, vary or set aside such decision. If a person is aggrieved by a decision of the Tribunal, the statute provides that he can pursue an appeal to the High Court, which provision must now be read to mean the Environment and Land Court.
20. It has been contended that where there is legislation providing for another forum to resolve disputes that forum should be approached before invoking the court's jurisdiction. This is in line with the doctrine of exhaustion of remedies.

Black's law Dictionary 10th Edition defines the doctrine of exhaustion as follows:

“Exhaustion of remedies: The doctrine that if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and



administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary”

21. The courts have had occasion to pronounce themselves on the doctrine of exhaustion. In the case of Philip Muiruri Ndirangu v Gatemu Housing Co Ltd (2019) eKLR the court adopted with approval the decision of the Court of Appeal in the case of Speaker of the National Assembly v James Njenga Karume (1992)eKLR (2008) 1KLR 428 where the Court of Appeal observed that:

“Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed”

22. Similarly in the case of William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others, Muslims for Human Rights & 2 Others (2020) eKLR cited in the case of Martin Nyongesa Barasa v Traffic Commandant & 2 Others (2021) eKLR the Court held that:

“The question of exhaustion of administrative remedies arises when a litigant , aggrieved by an agency’s actions seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all, diligent in the protection of his own interest within he mechanisms in place for resolution outside the courts.

23. In light of the above authorities the suit herein was instituted in the wrong forum as the Petitioners have not exhausted the administrative remedies provided under Article 159 (1) and (2) of the Constitution and section 129(2) of the Environmental Management and Co-ordination Act, 1999.

Whether the suit meets the threshold of a constitutional petition

24. I will now move on to the second question as whether the Petition meets the threshold of a Constitutional Petition. In the case of Japheth Ododa Origa v Vice Chancellor, University of Nairobi & 2 Others(2018) eKLR cited with approval in the case of Meme v Republic(2004) eKLR the Court held that:

“Where a person is seeking redress form the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed”

25. In the case of Kiambu County Tenants Welfare Association v Attorney General & Another (2017) eKLR the Court held that:

“It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of the constitution rather than that of a statute. This court ought to discourage invocation of the constitutional process where there exists parallel or alternative remedies. In John Harun Mwau v Peter Gastrol & 3 Others the court made the following observation;

“Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it. It is established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all”



26. In the instant suit the matter complained of relates to the interpretation of the *Environmental Management and Co-ordination Act*, 1999 and the alleged failure by the 1st Respondent to observe the same. The Petitioners have not set out with precision, the Articles of *the Constitution* that are alleged to have been infringed and how they have been infringed and the court cannot not speculate. As correctly submitted by counsel for the 1st Respondent, the Petitioners have at paragraph 9 of the Petition alleged that the 1st Respondent is negligent in its activities and that those activities amount to trespass and nuisance. I am therefore of the considered view that a claim of negligence, nuisance or trespass can be ventilated through a normal suit without the need for a Constitutional Petition.

Whether the orders sought should be granted.

27. The orders sought by the Petitioners in the application include a permanent injunction, an order of environmental restoration, demolition of structures erected by the 1st Respondent in Bonyawangwa area and compensatory damages. Suffice is to say that these orders cannot be granted at an interlocutory stage as there will be nothing left for the hearing if the same are granted.

28. Having considered the Notice of Motion, rival affidavits and the 1st Respondent's submissions as well as the law and relevant authorities, I have come to the conclusion that the application lacks merit. The same is therefore dismissed. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

