



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CIVIL APPEAL NO. EE007 OF 2020**

**LONDON DISTILLERS (K) LIMITED.....APPELLANT**

**VERSUS**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**ERDERMANN PROPERTIES LIMITED.....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal from the Judgment/Order of the National Environment Tribunal at Nairobi***

***dated 30<sup>th</sup> September, 2020 in Nairobi Net No. 21 of 2019: London Distillers (K) Limited***

***vs. National Environment Management Authority & Erdermann Property Limited)***

**RULING**

**Introduction:**

1. This Ruling is in respect to the 2<sup>nd</sup> Respondent's Notice of Motion and Notice of Preliminary Objection dated 4<sup>th</sup> November, 2020 and 23<sup>rd</sup> November, 2020 respectively. In the Notice of Motion, the 2<sup>nd</sup> Respondent has prayed for the following reliefs:

***a) That the Honourable Court be pleased to forthwith strike out and/or dismiss the instant Appeal, Civil Appeal No. EE007 of 2020: London Distillers (K) Limited vs. National Environment Management Authority & Another as there is already an Appeal Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another preferred against the decision of the National Environmental Tribunal pending before the Environment and Land Court at Nairobi.***

***b) That alternative to prayer two above, the Honourable Court be pleased to stay the proceedings in the instant suit, Civil Appeal No. EE007 of 2020: London Distillers (K) Limited vs. National Environment Management Authority & Another pending the hearing and determination of the previous suit: Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another before the Environment and Land Court at Nairobi.***

***c) That costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 2<sup>nd</sup> Respondent's Director who has deponed that on 14<sup>th</sup> August, 2019, the Appellant herein filed NET Appeal No. 21 of 2019, before the National Environmental Tribunal to *inter alia* challenge the Environment Impact Assessment (EIA) License issued by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent herein to construct Greatwall Gardens Housing Phase 3.

3. The 2<sup>nd</sup> Respondent's Director deponed that on 30<sup>th</sup> September, 2020, the Honourable Tribunal delivered its Judgment in NET Appeal No. 21 of 2019 dismissing the Appeal thereby and that the Honourable Tribunal, in dismissing the Appeal, found that due process was followed by the 1<sup>st</sup> Respondent in issuing the EIA License to the 2<sup>nd</sup> Respondent.

4. It was deponed by the 2<sup>nd</sup> Respondent's Director that on 1<sup>st</sup> October, 2020, the 2<sup>nd</sup> Respondent filed an Appeal before the Environment and Land Court at Nairobi being Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another challenging the said decision; that the Appellant herein was served with a copy of the Record of Appeal and was well aware of the Appeal pending before the Environment and Land Court at Nairobi and that on 2<sup>nd</sup> October, 2020, the Appellant wrote to the 2<sup>nd</sup> Respondent warning that they would institute contempt proceedings against the 2<sup>nd</sup> Respondent for violating the provision of Section 130(2) of the

Environmental Management and Coordination Act as there was an Appeal preferred against the decision of the Tribunal.

5. It was deponed that on 8<sup>th</sup> October, 2020, the Appellant filed a Contempt Application against the 2<sup>nd</sup> Respondent wherein they alleged that the 2<sup>nd</sup> Respondent in continuing with the development of Greatwall Phase 3 was in violation of Section 130(2) of the Environmental Management and Coordination Act as there was already an Appeal preferred against the decision of the Tribunal being Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another.

6. It is the 2<sup>nd</sup> Respondent's case that despite the Appellant herein being aware of the Appeal before the Environment and Land Court at Nairobi Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another, and while the said Appeal is still pending determination, the Appellant herein has also filed the instant Appeal being, Civil Appeal No. EE007 of 2020: London Distillers (K) Limited vs. National Environment Management Authority & Another also challenging the decision of the National Environmental Tribunal in NET 21 of 2019 delivered on 30<sup>th</sup> September, 2020 contrary to Section 6 of the Civil Procedure Act.

7. The 2<sup>nd</sup> Respondent's Director deponed that both Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another and Civil Appeal No. EE007 of 2020: London Distillers (K) Limited vs. National Environment Management Authority & Another challenge the decision of the Honourable Tribunal delivered on 30<sup>th</sup> September, 2020 in NET 21 of 2020; that from the pleadings filed in both suits, it is manifestly clear that they both challenge the decision of the National Environmental Tribunal in NET 21 of 2020 delivered on 30<sup>th</sup> September, 2020 and that the decision that is the subject of this suit is directly and substantially in issue in the Appeal filed by the 2<sup>nd</sup> Respondent before the ELC at Nairobi.

8. The 2<sup>nd</sup> Respondent's Director deponed that the current Appeal is *Res sub-judice*; that the Applicant is apprehensive that if both Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another and Civil Appeal No. EE007 of 2020: London Distillers (K) Limited vs. National Environment Management Authority & Another proceed simultaneously in Nairobi and Machakos, the courts might issue different directions and eventually deliver different verdicts on the different Appeals preferred against the same decision of the National Environmental Tribunal.

9. The 2<sup>nd</sup> Respondent's Director finally deponed that it is in the interest of parties and the system of administration of justice, that multiplicity of suits between the same parties and over the same subject matter is avoided and that the Application should be allowed.

10. In the Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent averred that the Honourable Court lacks jurisdiction under Section 130(2), 133 and 143(1) (d) of the Environmental Management and Coordination Act to entertain the Application dated 4<sup>th</sup> November, 2020 as the Honourable Tribunal has jurisdiction to enforce its own orders and decrees by punishing for contempt of court and that an Application dated 8<sup>th</sup> October, 2020 by the Applicants herein against the Respondents is pending before the Honourable Tribunal seeking the same orders for punishment for contempt of the orders of the Tribunal.

11. The 2<sup>nd</sup> Respondent averred that the Tribunal should therefore be allowed to exercise its jurisdiction by determining that Application; that the Tribunal did not make any orders or Ruling capable of being enforced in terms of Section 130(2) of the Environmental Management and Coordination Act and that the Tribunal simply suspended its previous orders staying the construction of Greatwall Gardens Phase 3 by dismissing the Appeal dated 14<sup>th</sup> August, 2019.

12. It was averred in the Notice of Preliminary Objection that the 2<sup>nd</sup> Respondent cannot be cited for contempt in terms of Section 133 of the EMCA as read together with Section 143 (1) (d) as the Tribunal made no orders capable of being disobeyed by the 2<sup>nd</sup> Respondent and that the Tribunal dismissed the Appeal by the Appellants upon being satisfied that indeed due process was followed in issuing the 2<sup>nd</sup> Respondent with an EIA license.

13. In response to the 2<sup>nd</sup> Respondent's Application dated 4<sup>th</sup> November, 2020, the Appellant's General Manager of Administration deponed that the 2<sup>nd</sup> Respondent is clearly out to scuttle the Appellant's Constitutional right to Appeal against the decision of the National Environment Tribunal dated 30<sup>th</sup> September, 2020 as can be demonstrated by the unmeritorious and strange contempt Application it has filed before the National Environment Tribunal on the basis that the Appellant is in contempt of it for merely preferring an Appeal against its Judgment.

14. It was deponed by the Appellant's General Manager of Administration that it is indeed true that the 2<sup>nd</sup> Respondent has equally filed Nairobi ELC Civil Appeal No. E039 of 2020 Erdermann Property Limited vs. London Distillers (K) Limited and The National Environment Management Authority and that the Applicant has concealed the fact that it is only displeased with the Judgment of the Tribunal to the extent that it did not make some specific findings against the Appellant's witness, and that as such, it is only challenging a part of the Judgment of the Honourable Tribunal, whereas it is happy with the rest of the said Judgment delivered on 30<sup>th</sup> September, 2020 dismissing the Appeal before in its entirety.

15. It is the Appellant's case that the instant Appeal challenges in its entirety, the Judgment of the Honourable Tribunal as contained in its Judgment delivered on 30<sup>th</sup> September, 2020 and that whereas the decision in both Appeals challenge the same decision in NET No. 21 of 2019, the two Appeals raise completely distinct issues which can be determined separately and that in view of the overriding objective of the Constitution of Kenya as well as the Civil Procedure Act to have a just, expeditious, proportionate and affordable resolution of disputes, the same should be heard alongside each other before one Court.

16. The Appellant's General Manager of Administration deponed that Section 12 of the Civil Procedure Act mandatorily provides that proceedings affecting immovable property are to be instituted in the Court within the local limits of whose jurisdiction the property is situate; that the suit property being Greatwall Gardens Housing Development Phase 3 is located off the Mombasa-Namanga Road Interchange, in the

Athi River locality, Mavoko, in Machakos County and is therefore situate within the jurisdiction of this Honourable Court and that the 2<sup>nd</sup> Respondent's decision to contravene the clear provisions of the law by filing its Appeal against the decision of the National Environment Tribunal in Nairobi and not at Machakos where the subject matter of the dispute is situate cannot be rewarded by determining the instant Application in its favour.

17. According to the Appellant, it is not true that the instant Appeal is *Res sub-judice*, incompetent, misconceived, bad in law and an abuse of this Honourable Court's process on account of the pendency of Nrb ELC Civil Appeal No. E039 of 2020 Erdermann Property Limited vs. London Distillers (K) Limited and The National Environment Management Authority as alleged or at all for the reason that the issues in both Appeals are totally distinct.

#### **Submissions:**

18. In his submissions, the 2<sup>nd</sup> Respondent's advocate submitted that from the pleadings filed in the instant Appeal *vis-a-vis* those filed in Civil Appeal No. E039 of 2020: Erdermann Properties Limited vs. London Distillers (K) Limited & Another, it is manifestly clear that they both challenge the decision of the National Environmental Tribunal in NET 21 of 2020 delivered on 30<sup>th</sup> September, 2020; that the substance of both the previous Appeal and the instant Appeal is that they both challenge the decision of the National Environmental Tribunal of 30<sup>th</sup> September, 2020 and that as such it meets the first limb of the conditions necessary for the principle of *res sub-judice* to apply. Counsel relied on the case of **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR** where the court held as follows:

*“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”*

19. It was submitted by the 2<sup>nd</sup> Respondent that the principle of *res sub-judice* applies as both the instant Appeal and Civil Appeal No. E039 of 2020: Erdermann Properties Limited vs. London Distillers (K) Limited & Another are between the same parties and that the previous Appeal is pending before the Environment and Land Court at Nairobi thus rendering the instant Appeal *res sub-judice*, misconceived, bad in law and an abuse of the Honourable Court's process.

20. Counsel submitted that the rationale against multiplicity of suits was well canvassed in the case of **Kampala High Court Civil Suit No. 450 of 1993 – Nyanza Garage vs. Attorney General** as was cited in the case of **ASL Credit Limited vs. Abdi Basid Sheikh Ali & Another [2019] eKLR** where it was held as follows:

*“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”*

21. It was supported by the 2<sup>nd</sup> Respondent's counsel that the plain and unambiguous wording of Section 6 of the Civil Procedure Act, is that a suit filed subsequent to another ought not to be heard but need to be stayed and that the logic and rationale is however to achieve the overriding objective of the court towards timely, fair and proportionate determination of legal dispute at affordable legal costs.

22. It was submitted that in the interest of justice to all parties relevant to the instant suit, this Appeal be struck out with costs to the 2<sup>nd</sup> Respondent and in the alternative, the same be held in abeyance pending the hearing and determination of Civil Appeal No. E039 of 2020.

23. On the Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent's counsel submitted that the Tribunal has jurisdiction to punish for contempt; that Section 133 and 143 (1) (d) of the Environmental Management and Co-ordination Act gives the Honourable Tribunal the jurisdiction to enforce its own orders and decrees by punishing for contempt of court and that the orders that the Appellant is seeking to enforce were issued by the Honourable Tribunal which has the jurisdiction to punish for contempt under Section 133 and 143(1) (d).

24. It was submitted by the 2<sup>nd</sup> Respondent's counsel that the courts have pronounced themselves on the jurisdiction of Tribunals to punish for contempt. Counsel relied on the case of **Patrick Mutune Katubi vs. General Manager Harambee Cooperative Savings & Credit Society Ltd & Another (2012) eKLR** where the court held;

*“The dispute resolution mechanism in the Tribunal should be self-sufficient so that once disputes are filed and heard in the Tribunal which is in charge of enforcing its own orders and decrees either through the execution procedures in the Civil Procedure Act and Rules or by punishing for contempt of court parties who deliberately disobey its orders.”*

25. It was submitted that the *doctrine of exhaustion* provides for the need to explore all available mechanisms of dispute resolutions before proceeding to court and that this doctrine has been observed by the courts in several decisions that have held that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Counsel relied on the cases of **Speaker of National Assembly vs. Njenga Karume** and **Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 others, as cited in Krystalline Salt Limited vs. Kenya Revenue Authority [2019] eKLR**.

26. It was submitted that the Honourable Tribunal did not make any orders or Ruling capable of being enforced in terms of Section 130(2) of the Environmental Management and Coordination Act and that the Tribunal simply suspended its previous orders staying the construction of Greatwall Gardens Phase 3 by dismissing the Appeal dated 14<sup>th</sup> August, 2019 which sought to cancel the EIA License issued to the 2<sup>nd</sup> Respondent for the construction of Greatwall Gardens Estate Phase 3.

27. Upon considering the Appeal, it was submitted, the Honourable Tribunal merely made a negative order dismissing the Appeal as opposed to a positive order capable of enforcement; that the court neither directed the Appellant nor the Respondent to do or to refrain from doing anything and that the issue of the legal effect of negative orders has judicially addressed. Counsel relied on the cases of **Milcah Jeruto vs. Fina bank (2013)** followed in **Electro Watts Limited vs. Alios Finance Kenya Limited (2018) eKLR** where the court held that:

*“An order for stay cannot obtain (by operation of law) or be granted where a negative order has been issued.”*

28. Counsel also relied on the case of **Sonalux Limited & Another vs. Barclays Bank of Kenya & 2 others (2008) eKLR** where the Court of Appeal also addressed the effect of a negative order and stated thus:

*“As regards the matter before us all we can say is that the Ruling of the superior court (Kasango. J) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that Ruling.”*

29. It was submitted that the 2<sup>nd</sup> Respondent cannot be cited for contempt in terms of Section 133 of the EMCA as read together with Section 143 (1) (d) as the Honourable Tribunal made no orders capable of being disobeyed by the 2<sup>nd</sup> Respondent and that the Tribunal dismissed the Appeal by the Appellants upon being satisfied that indeed due process was followed in issuing the 2<sup>nd</sup> Respondent with an EIA license.

30. The 2<sup>nd</sup> Respondent's counsel submitted that the Application dated 4<sup>th</sup> November, 2020 is bad in law, defective and an abuse of this Honourable Court's process and is for dismissal; that this court lacks jurisdiction to entertain this Application as a similar Application lies before the Honourable Tribunal and that this court should allow the Honourable Tribunal to first make a determination on the Application before it and if any party is aggrieved by that decision, they can thereafter Appeal to this court.

31. On his part, the Appellant's advocate submitted that the filing of a parallel Appeal was necessitated by the fact that the Applicant had lodged their Appeal at the Environment and Land Court in Nairobi as opposed to Machakos which is clothed with the requisite territorial jurisdiction to entertain the Appeal and that had the Applicant filed its Appeal in the Environment and Land Court at Machakos, then the Appellant would have filed its cross-appeal in the same Court. Therefore, it was submitted, the issue of *res sub-judice* would not have been raised in the first instance.

32. It was submitted by the Appellant's advocate that the Environment and Land Court at Nairobi in **E039 of 2020: Erdermann Property Limited vs. LDK & NEMA** while transferring the Applicant's Appeal to Environment and Land Court in Machakos noted thus:

*“...Section 19(2) of the Environment and Land Act, 2011 provided that this Court is bound by the Civil Procedure Act. Section 12 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that certain suits in respect of immovable properties must be brought in the Courts within whose jurisdiction the property is situate.....An Appeal can only be heard by an appellate Court within whose jurisdiction the appeal arose...”*

33. It was submitted that for the principle of *res sub-judice* to apply, the court ought to be satisfied from the onset that the Appeals are between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed and that a perusal of the two Memoranda of Appeal before the court reveal that the two Appeals raise completely distinct issues and seek different remedies thus the need to be consolidated and determined together by this Honourable Court.

34. It was submitted that where the test of *res sub judice* is established or met, the explanatory notes to the Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined as opposed to striking out as the Applicants seek in this instant Application.

35. The Appellant's counsel submitted that the Appeal filed by the 2<sup>nd</sup> Respondent vide Nairobi Civil Appeal No. E039 of 2020 Erdermann Property Limited vs. London Distillers (K) Ltd & Others was only partial as against the Judgment of the Tribunal dated 30<sup>th</sup> September, 2020 whereas the instant Appeal seeks to challenge the said Judgment in its entirety.

36. Counsel submitted that since the said Nairobi Civil Appeal No. E039 of 2020 Erdermann Property Limited vs. London Distillers (K) Ltd & Others has already been transferred to this Honourable Court by dint of the Orders made on 25<sup>th</sup> February, 2021, the effective use of judicial time will be best served by hearing both Appeals at the same time, and not staying the instant Appeal as sought.

37. On the issue of the Notice of Preliminary Objection, the Appellant's counsel submitted that Section 130(2) of the Environment Management and Co-ordination Act clearly provides as follows:

*“...No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined...”*

38. It was submitted that the import, purport and meaning of the said provision is that the construction of Greatwall Gardens Development Phase 3 is to automatically remain stayed pending the determination of this instant Appeal which was lodged on 21<sup>st</sup> October, 2020 and served upon the parties herein on 26<sup>th</sup> October, 2020 and that this notwithstanding, the 2<sup>nd</sup> Respondent in blatant disregard of the clear provisions of the said Section 130(2) and immediately after the Judgment of the Honourable Tribunal was delivered on 30<sup>th</sup> September, 2020 proceeded to advertise the houses, (*the subject matter of this Appeal*) for sale and re-commenced the construction and drilling of boreholes at the site, which actions are geared towards the completion and sale of the same during the pendency of this Appeal.

39. The Appellant's counsel submitted that following the contemptuous and egregious conduct of disobedience of the clear provisions of Section 130(2) of the Environmental Management and Co-ordination Act (EMCA), the Appellant moved the Honourable Tribunal and has since withdrawn a similar Application and thereafter filed the instant Application dated 4<sup>th</sup> November, 2020 before this Honourable Court.

40. It was submitted that the issue as to the interpretation of Section 130(2) of the Environmental Management and Co-ordination Act and whether any orders capable of being enforced in terms thereof exist, are squarely within the remit of this Honourable Court and not the Environment Tribunal which is now *functus officio*.

41. Counsel for the Appellant submitted that the power of this Honourable Court to punish for contempt is prescribed by Section 5(1) of the Judicature Act; that the Tribunal rendered its Judgment on 30<sup>th</sup> September, 2020 and drew the attention of the parties to the provisions of Section 130 of the Environmental Management and Coordination Act and that the Tribunal became *functus officio* the moment it rendered its Judgment and is therefore devoid of jurisdiction to entertain any further Application filed after rendering its Judgment in NET No. 21 of 2019 which has precipitated the instant Appeal.

#### **Analysis and findings:**

##### **A. The 2<sup>nd</sup> Respondent's Application dated 14<sup>th</sup> November, 2020**

42. The Appellant herein filed NET Appeal No. 21 of 2019, before the National Environmental Tribunal to *inter alia* challenge the Environment Impact Assessment (EIA) License issued by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent to construct Greatwall Gardens Housing Phase 3.

43. The said Appeal was filed together with an Application for injunction to stop any further construction of the said Greatwall Gardens Phase 3 by the 2<sup>nd</sup> Respondent pending the hearing and determination of the Appeal. The Tribunal delivered its Ruling on the Application by the Appellant seeking an injunction to stop any further construction on 6<sup>th</sup> December, 2019. In its Ruling, the Tribunal allowed the Application and ordered for the maintenance of *status quo* pending the hearing and the determination of the Appeal.

44. It is not in dispute that on 30<sup>th</sup> September, 2020, the Tribunal delivered its Judgment in NET No. 21 of 2019 wherein it dismissed the Appeal. The 2<sup>nd</sup> Respondent being dissatisfied with a portion of the Judgment of the Tribunal filed an Appeal before the Environment and Land Court at Nairobi being Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another.

45. The 2<sup>nd</sup> Respondent has argued that despite being aware of the 2<sup>nd</sup> Respondent's *Civil Appeal No. E039 of 2020: Erdermann Property Limited vs. London Distillers (K) Limited & Another*, and while the said Appeal is still pending determination at the Environment and Land Court in Nairobi, the Appellant herein went ahead to file the instant Appeal being, Civil Appeal No. EE007 of 2020: London Distillers (K) Limited vs. National Environment Management Authority & Another purporting to challenge the decision of the Tribunal contrary to Section 6 of the Civil Procedure Act.

46. Section 6 of the Civil Procedure Act provides as follows:

*"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."*

47. Courts have established certain conditions that must exist for the principle of *res sub-judice* to apply. In the case of **Republic vs. Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** the court held that:

*"...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..."*

48. To buttress this position, the court in **Edward R. Ouko vs. Speaker of the National Assembly & 4 Others [2017] eKLR** held as hereunder:-

*"18. This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:*

*(1). There must exist two or more suits filed consecutively.*

*(2). The matter in issue in the suits or proceedings must be directly and substantially the same.*

*(3). The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.*

*(4). The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."*

49. In the case of *David Ndi & Others vs. Attorney General & Others, Nairobi High Court Petition No. 282 of 2020*, the court held as follows:

*“The rationale behind this provision is that it is vexatious and oppressive for a claimant to sue concurrently in two Courts. Where there are two Courts faced with substantially the same question or issue, that question or issue should be determined in only one of those Courts, and the Court will, if necessary, stay one of the claims. Ordinarily, it is the second suit that will be stayed. (See **Thames Launches Ltd v Trinity House Corporation (Deptford Strond) [1961] 1 All ER 26; Royal Bank of Scotland Ltd v Citrusdal Investments Ltd [1971] 3 All ER 558) 509.***

*Two obvious pre-requisites necessary to stay a suit under this provision of the law are one, the matter in issue in the subsequent suit must be ‘directly and substantially in issue’ in the previously instituted suit and, two, the parties in the two suits must be the same parties or are parties claiming under them or litigating under the same title.”*

50. In the case of *Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR*, the court held as follows:

*“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”*

51. The Appellant herein has argued that the filing of a parallel Appeal was necessitated by the fact that the Applicant had lodged their Appeal at the Environment and Land Court in Nairobi as opposed to Machakos which is clothed with the requisite territorial jurisdiction to entertain the Appeal. Had the Applicant filed its Appeal in the Environment and Land Court at Machakos, it was argued, then the Appellant would have filed its cross-appeal in the same Court.

52. I agree with the Appellant’s argument that even if the parties and the issues raised in the two Appeals were similar, to the extent that the 2<sup>nd</sup> Respondent filed its Appeal in a court which did not have territorial jurisdiction to handle the Appeal, he was entitled to file the Appeal in court which had the requisite jurisdiction, which is this court. The Appellant cannot therefore be faulted for not having filed its cross-appeal in a court (*Nairobi ELC*) which he believed was not the right forum to file the Appeal in the first place.

53. The Appellant’s fears were vindicated when Okongo J. delivered a Ruling in Nairobi ELC No. E039 of 2020: *Erdermann Property Limited vs. LDK & NEMA*. While transferring the Applicant’s Appeal to this court, the Judge held as follows:

*“...Section 19(2) of the Environment and Land Act, 2011 provided that this Court is bound by the Civil Procedure Act. Section 12 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that certain suits in respect of immovable properties must be brought in the Courts within whose jurisdiction the property is situate.....An Appeal can only be heard by an appellate Court within whose jurisdiction the appeal arose...”*

54. The 2<sup>nd</sup> Respondent should have filed its Appeal in this court and not in Nairobi. That being the case, the Appellant was entitled to file a separate and distinct Appeal in this court, and not a cross-appeal in Nairobi. That was the correct thing to do considering that there was a likelihood that the Appeal filed in Nairobi by the 2<sup>nd</sup> Respondent could have been struck out on the ground that the cause of action arose in Machakos and not Nairobi.

55. Furthermore, a perusal of the two Memoranda of Appeal reveal that the two Appeals raise completely distinct issues and seek different, although related remedies. The Appeal filed by the 2<sup>nd</sup> Respondent vide Nairobi Civil Appeal No. E039 of 2020 *Erdermann Property Limited vs. London Distillers (K) Ltd & Others* was only partial as against the Judgment of the Tribunal whereas the instant Appeal seeks to challenge the said Judgment in its entirety. That being the case, the current Appeal cannot be said to be sub judice.

56. Since the said Nairobi Civil Appeal No. E039 of 2020 *Erdermann Property Limited vs London Distillers (K) Ltd & Others* has already been transferred to this Honourable Court by dint of the orders made on 25<sup>th</sup> February, 2021, the effective use of judicial time will be best served by hearing both Appeals at the same time, and not staying the instant Appeal as sought.

57. Indeed, it is for that reason that the current Appeal cannot be stayed, leave alone being struck out, pending the hearing and determination of the Appeal filed by the 2<sup>nd</sup> Respondent. Staying the current Appeal will be prejudicial to the Appellant because the issues that have been raised in the 2<sup>nd</sup> Respondent’s Appeal are very specific and do not challenge the entire decision of the Tribunal, unlike the Appellant’s Appeal.

58. It is for the above reasons that I find that the current Appeal is not *res sub judice* the 2<sup>nd</sup> Respondent’s Appeal, which has since been transferred to this court.

59. I will now turn to the 2<sup>nd</sup> Respondent’s Notice of Preliminary Objection which was filed in response to the Appellant’s Notice of Motion dated 4<sup>th</sup> November, 2020. In the Notice of Motion, the Appellant is seeking to have the 2<sup>nd</sup> Respondent’s Managing Director, John Zeyung Yang committed to jail for contempt. The Application is premised on the ground that under Section 130(2) of the Environment Management and Co-ordination Act, no decision or order of the Tribunal shall be enforced until the time for lodging an Appeal has expired or, where the Appeal has been commenced, until the Appeal has been determined.

60. The Appellant has argued that the import, purport and meaning of the said provision is that the construction of Greatwall Gardens Development Phase 3 is to automatically remain stayed pending the determination of this instant Appeal; that the Appeal notwithstanding, the 2<sup>nd</sup> Respondent in blatant disregard of the clear provisions of the said Section 130(2) and immediately after the Judgment of the Tribunal

was delivered on 30<sup>th</sup> September, 2020 proceeded to advertise the houses, (*the subject matter of this Appeal*) for sale and re-commenced the construction and drilling of boreholes at the site, which actions are geared towards the completion and sale of the same during the pendency of this Appeal.

61. It is the Appellant's case that the issue as to the interpretation of Section 130(2) of the Environmental Management and Co-ordination Act and or whether any orders capable of being enforced in terms thereof exist, are squarely within the remit of this Court and not the Environment Tribunal, which is now *functus officio*.

62. In the Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent has argued that this Honourable Court does not have the jurisdiction to entertain the Application. Counsel has relied on the provisions of Section 133 and 143 of the EMCA to argue that the Tribunal has the power to punish for contempt and that in any event, the Judgment of the Tribunal is not capable of being stayed because it was negative in nature.

63. Section 133 of the Environmental Management and Co-ordination Act states as follows:

*"It shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish such person for contempt in accordance with the provisions of this Act."*

64. Section 143(1) (d) of the Environment Management and Co-ordination Act states that:

*"Any person who fails neglects or refuses to comply with any order made by the Tribunal commits an offence and shall be on conviction be liable to imprisonment for a term of not less than one year and not more than four years or to a fine of not less than two million shillings and not more than four million shillings or to both such fine and imprisonment."*

65. The courts have pronounced themselves on the jurisdiction of Tribunals to punish for contempt. In the case of **Patrick Mutune Katubi vs. General Manager Harambee Cooperative Savings & Credit Society Ltd & Another (2012) eKLR**, the court held:

*"The dispute resolution mechanism in the Tribunal should be self-sufficient so that once disputes are filed and heard in the Tribunal which is in charge of enforcing its own orders and decrees either through the execution procedures in the Civil Procedure Act and Rules or by punishing for contempt of court parties who deliberately disobey its orders."*

66. The Appellant's Application for contempt is solely premised on the provisions of Section 130(2) of the Environmental Management and Co-ordination Act (EMCA) which provides as follows:

*"...No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined..."*

67. From the above provisions of the Environmental Management and Coordination Act (EMCA) and the case law, it is evident that the Tribunal has power to enforce its own orders and decrees by punishing for contempt. If indeed the decision or order of the Tribunal has been breached by the 2<sup>nd</sup> Respondent contrary to the provisions of Section 130(2), the first port of call is the Tribunal.

68. I say so because *contempt* is defined as "an act or state of despising; conduct that defies authority or dignity of a court or legislature", (*Black's Law Dictionary, 8<sup>th</sup> Edition*). The alleged contemptuous actions of the 2<sup>nd</sup> Respondent's Director, if any, can only be in respect of the Judgment of the Tribunal and not this court.

69. The doctrine of exhaustion provides for the need to explore all available mechanisms of dispute resolutions before proceeding to court. This doctrine has also been observed by the courts in several decisions that have held that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Court is invoked. In the case of **Speaker of National Assembly vs. Njenga Karume (1992) eKLR**, the court expressed itself on the doctrine of exhaustion and stated:

*"Where there is clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure."*

70. In the case of **In Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others**, as cited in **Krystalline Salt Limited vs. Kenya Revenue Authority [2019] eKLR**, the constitutional rationale and basis for the doctrine was stated as follows:-

*"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is 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 his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute."*

71. That being the case, and in view of the provisions of Section 133 of the EMCA which mandates the National Environment Tribunal to enforce its orders and punish for contempt, and the alleged impugned order or decree having been made by the National Environment Tribunal, this court does not have the jurisdiction to entertain the Appellant's Application dated 4<sup>th</sup> November, 2020. Indeed, either party can move this Court on Appeal after the Tribunal has rendered its Ruling on the contempt Application.

72. For those reasons, I find the 2<sup>nd</sup> Respondent's Application and the Appellant's Application, both dated 4<sup>th</sup> November, 2020, to be unmeritorious. The two Applications are dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 21<sup>ST</sup> DAY OF MAY, 2021.**

**O. A. ANGOTE**

**JUDGE**