



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC PETITION NO. 11 OF 2020

IN THE MATTER OF: ARTICLES, 22, 23, 70 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: CONTRAVENTION OF RIGHTS UNDER ARTICLE 26(1),

27, 31, 42, 43 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT

AND

IN THE MATTER OF: CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

KENNETH NGURE MWAURA.....1ST PETITIONER/APPLICANT

MARGARET WAMBUI MWAURA.....2ND PETITIONER/APPLICANT

VERSUS

RUBIS ENERGY KENYA.....1ST RESPONDENT

KIAMBU COUNTY GOVERNMENT

DEPARTMENT OF PHYSICAL PLANNING.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD RESPONDENT

RULING

Vide a Notice of Motion Application dated 6th October 2020, bought under Articles 27 (1), 47(1) and 50(1) of the Constitution of Kenya, Sections 8 and 11 of the Fair Administrative Actions Act No.4 of 2015, Rules 4, 19, 23 and 24 of the Constitution of Kenya, (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Applicants sought for the following orders that; -

a) This Honorable Court be pleased to issue an interim Conservatory order stopping the ongoing construction works for the proposed Petrol Filling Station on L.R No. Ruiru East Block/1/118 along the Eastern bypass pending the hearing of this application inter-parties.

b) This Honorable Court be pleased to issue an interim Conservatory order stopping the ongoing construction works for the

proposed Petrol Filling Station on L.R No. Ruiru East Block/1/118 along the Eastern bypass pending the hearing of this Petition.

c) This Honorable Court be pleased to issue an order compelling the Respondents to furnish the Applicants/Petitioners with the following documents;

I. The Environmental Impact Assessment Study Report for the proposed construction of the petrol filling station and decommissioning of asbestos roofs pursuant to Sec 58 of the EMCA Act No.8 of 1999 as read with part 1 and 2 c of the 2nd schedule.

II. The Strategic Impact Assessment Report for the proposed change of the user of the hereto parcel of land comprised of L.R No. Ruiru East Block/1/118 from agricultural to light industries pursuant to Sec 57 A of the EMCA Act No.8 of 1999 as read with part 1 and 2 c of the 2nd schedule.

III. The Environmental Impact Assessment Study Report prepared at the instance of the 1st Respondent for the proposed construction of the Petrol Filling Station and decommissioning of asbestos roofs on L.R No. Ruiru East Block/1/118 along the eastern bypass L.R No.12581/13 pursuant to regulations 16,17 and 18 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

IV. A panel evaluation report prepared by the technical committee of the 3rd Respondent to necessitate the issuance of the Environmental Impact Assessment Licence herein NEMA/EIA/PSI/9173 to the 1st Respondent for the proposed construction of the Petrol Filling Station and decommissioning of asbestos roofs on L.R No. Ruiru East Block/1/118 along the eastern bypass.

V. The comments on the Environmental Impact Assessment study report for the proposed construction of Petrol Filling Station and decommissioning of asbestos roofs on L.R No. Ruiru East Block/1/118 along the Eastern bypass by the lead agencies under regulation 20 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

VI. The public hearing advertisement for the proposed construction of Petrol Filling Station and decommissioning of asbestos roofs on L.R No. Ruiru East Block/1/118 along the eastern bypass together with the minutes of the meeting held in respect thereof and the report made under regulations 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

d) Costs.

e) Any other order that this honorable court may deem fit to grant.

The Application was supported by the Supporting Affidavit of **Kenneth Ngure Mwaura**, who averred that he is the husband of the 2nd Petitioner and owners of **L.R Ruiru East Block/1/117**, and recently realized that some excavation works were being undertaken in the adjacent **L.R Ruiru East Block/1/118**, neighboring their residential home comprising of **Ruiru Sunrise Estate**. That when the project started, the 2nd Petitioner and himself complained of heavy house shaking vibrations and the contractor promised to bring the EIA Expert. That after making enquiry, it emerged that the 1st Respondent was constructing a **Petrol Station**, based on the placards displayed to the effect that, EIA study report had been prepared and submitted, **EIA permission No.NEMA/EIA/PSR/15394**, had been issued to the 1st Respondent, the **EIA License NEMA/EIA/PSI/9173**, had been issued to the 1st Respondent, authorizing construction of the Petrol Filling Station, the user had been changed vide **Kiambu County Ref No. CPD0941**, issued by the 2nd Respondent.

He further averred that on **12th June 2020**, they wrote to **NEMA, Director of Kiambu County**, listing down their grievances, including a request to be made aware of the intended asbestos removal and disposal process. The said letter was annexed as Exhibit KNM2. That as a result of the construction, noise, dust, water interruption and possible contamination as well as vibrations, their claims for them to be addressed has fell on deaf ears. That the contractor informed him that officers from the 3rd Respondent had visited the site and authorized the removal of the asbestos roof for disposal away from the site. The pictures taken were annexed and marked as Exhibit KNM3.

It was his contention that by the time they managed to obtain a copy of the **EIA License** from the 3rd Respondent, showing authorization of the construction works in **April 2020**, it was too late and they were time barred from mounting a challenge with the **National Environmental Tribunal (NET)**, within stipulated timelines. That he was advised by their Environmental Expert **Mr. Benjamin Langwen**, that asbestos is classified as a hazardous waste and must be subjected to EIA Study. A copy of his report was marked as Exhibit KNM14. That as a result of broken asbestos, lead to continuous contamination of the environment and risk to contracting asbestosis, mesothelioma, lung cancer, ovarian cancer etc.

Further, he contended that by issuing licenses and approvals, the 2nd and 3rd Respondents have acted in breach of their public duties and oath of office to uphold the Constitution.

The Application is opposed and the 2nd Respondent filed Preliminary Objection on **14th December 2020** on the grounds that; *this honorable court lacks jurisdiction based on Sec 61(3) of the Physical and Land Use Planning Act 2019. That a person aggrieved by the decision of the county executive committee regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee and that the Petitioners have failed to exhaust the alternative means of dispute resolution as provided by statute.*

The 3rd Respondent filed a Replying Affidavit dated **30th December 2020**, by **Stephen W. Kitunga**, who averred that the 3rd Respondent has complied with relevant laws, regulations and proper rules of procedure in issuing **EIA License** and the summary project report and prays that the Petitioners' Petition and Application be dismissed with Costs. He attached and annexed Exhibits NEMA1-NEMA 9 as evidence to support its position.

Parties were directed to canvass the instant Application by way of written submissions. The Applicants filed their written submissions dated **11th February 2021**, and supplementary submissions dated **7th May 2021** through the **Law Firm of Tiego & Co. Advocates**. The 3rd Respondent filed its written submissions dated **14th April 2021**, through **Sakami Cynthia for NEMA**. The 1st Respondent filed its submissions dated **22nd April 2021**, through the **Law Firm of Kaplan & Stratton**, while the 2nd Respondent filed its submissions dated **22nd March 2021**, through **Sylvia Muchiri for the County Government of Kiambu**.

The Court has considered the instant **Notice of Motion Application**, the **Preliminary Objection** and **Replying Affidavits**. The Court too has considered the Petition in general, the rival written submissions, the cited authorities and the relevant provisions of law and deciphers the issues for determination as follows;

a) Whether the Court has jurisdiction to determine the instant matter.

b) Whether the Petitioners/Applicants' Application dated 6th October 2020 is Merited.

Whether the Court has jurisdiction to determine the instant matter.

The Court will first determine whether what has been raised by the 2nd and 3rd Respondents falls within the definition of a '**Preliminary Objection**' as stated in the case of **Mukisa Biscuits Manufacturers Ltd. ...Vs...West End Distributors Ltd. [1969] E.A. 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.”

A **Preliminary Objection** raises pure points of law and there should be no ascertaining facts and further a **Preliminary Objection** stems from the pleadings filed by the parties and must be based on pure points of law. See the case of **Avatar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

Courts have also severally held that a **Preliminary Objection** should be capable of disposing of the matter preliminarily without the Court having to resort to ascertaining facts from everywhere. See the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**.

Further in the case of Ndimu...Vs...Ndimu & Another (2007)1EA 269, the Court held that;

“A question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue straightway”.

The Respondents have all alleged that the Court has no jurisdiction because there is a process which the Petitioners/Applicants were required to follow as per the **Environmental Management and Coordination Act (EMCA)**. The Respondents argued that the Petitioners/Applicants being aggrieved with the issuance of the **Environment Impact Assessment Report and license**, ought to have first taken their grievances to the **National Environment Tribunal (NET)** as established by the Act (**EMCA**).

This Court has perused the Petition that as filed by the Petitioners/Applicants and it is clear that among the prayers that the Petitioners/Applicants have sought is that there be a declaration that their rights to a clean and healthy Environment has been infringed upon and a declaration that the decision of the 3rd Respondent to grant an **EIA License No NEMA/EIA/PSI/9173 for L.R No. Ruiru East Block/1/118** is null and void.

Further the Petitioners/Applicants have challenged the **Environmental Impact Assessment license**, the **EIA License NEMA/EIA/PSI/9173** and/or **approval of EIA permission No. NEMA/ EIA/PSR/15394**, having been issued to the 1st Respondent by the 3rd Respondent (NEMA). Specifically, paragraph 56 of the Petitioners Supporting Affidavit states that by ***“issuing licenses and approvals, the 2nd and 3rd Respondents have acted in breach of their public duties and oath of office to uphold the Constitution...”***

The Court finds that **Section 129(1)** of **Environmental Management and Coordination Act** provides that:-

(1) Any person who is aggrieved by—

(a) a refusal to grant a license or to the transfer of his license under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his license under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his license 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.

If the Petitioners/Applicants were dissatisfied or aggrieved by the approval granted to the 1st Respondent by the 3rd Respondent, they ought to have appealed to the **National Environmental Tribunal (NET)** within **60 days**, in accordance with the above provisions of **section 129(1)** of **Environmental Management and Coordination Act**. Instead the Petitioners invoked the Jurisdiction of this Court prematurely without exhausting the **alternative** remedies of disputes resolutions provided for by the statute.

The relevant provisions of law herein have provided forums where such grievances as advanced by Petitioners/Applicants, should first be channeled before coming to Court. The principles of exhaustion of Statutory provisions remedies ought to have been applied herein by the Petitioners.

This Court is bound by the decision of the Court of Appeal in **Kibos Distillers Ltd & 4 others Vs Benson Ambuti Adeg & 3 others (2020) eKLR** (supra) where the Court held:-

“.....In this matter the key dispute in the petition before the trial Court was whether the three appellants were polluting the environment and whether the three appellants EIA licences were lawfully processed. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal on the NECC.”

The 2nd Respondent further claimed that this Honorable Court lacks jurisdiction based on **Section 61(3)** of the **Physical and Land Use Planning Act 2019**. As provided by **section 61** of the **Physical and Land Use Planning Act 2019**, there is a procedure for dispute resolution in instances where a party is aggrieved by the decision of the **County Executive Committee Members**, concerning any development permission matters like in the instant case.

According to **Section 61(3)** of the said Act, a challenge to the decision of the Planning Authority shall first lie with the relevant **Liaison Committee**, and then the Appeal shall lie with the **Environment & Land Court**. The Petitioners/Applicants herein failed to pursue an appeal before the **Liaison Committee** under the **Physical and Land Use Planning Act 2019**. The Petitioners/Applicants having failed to exhaust the remedy provided by the statute, and they invoked the Jurisdiction of this Court prematurely.

The Petitioners/Applicants dispute should be resolved in accordance with the provisions of the **Physical and Land Use Planning Act 2019**. The Court will be persuaded by the decision made in **Petition No. 117 of 2019 KO Holding Ltd vs County Government of Kiambu &**

Another where the Court held:-

“I find the Petitioners failure to have the matter referred to Liaison committee amount to casting aspersions to a public body which is yet to undertake its duty and as usual undermining its independence”

..... I therefore make a finding based on the provision of the Act herein above mention that the Court lacks Jurisdiction to proceed with the instant matter on account of ouster clause provided or in statute that prescribes alternative means of resolving the dispute.”

Therefore, this Court finds that the issues raised by the Petitioners/Applicants herein ought to have been referred to the **County Liaison Committee** of Physical Planning. Consequently, this court upholds the Preliminary Objection as raised by the Respondents.

Whether the Applicants’ Application dated 6th October 2020 is Merited.

Having carefully considered the available pleadings, the rival submissions herein, the cited authorities and the relevant provisions of the law, the Court finds that it lacks jurisdiction to deal with this matter as there are **relevant alternative disputes resolution mechanisms**. Therefore, in light of the above, the Petitioners/Applicants Application dated **6th October 2020**, is found **Not Merited**.

The Upshot of the foregoing is that without Jurisdiction, the Court’s hands are tied and it has no option but to down its tools; as for any action taken without Jurisdiction shall be null and void.

Further, the Court finds that the entire suit herein ought not to stand. For the above reasons, the entire Petition or suit herein is **struck out entirely** with no orders as to Costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF JULY 2021.

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Muhata for the 1st and 2nd Petitioners/Applicants

M/s Onyango for the 1st Respondent

M/ Muchiri for the 2nd Respondent

M/s Sakami for the 3rd Respondent

L. GACHERU

JUDGE

29/7/2021