



**Karanja & 33 others v County Government of Kajaido (County Physical And Planning Department Kajiado) & 2 others; Osumo (Interested Party) (Judicial Review E012 of 2022) [2024] KEHC 450 (KLR) (15 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 450 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
JUDICIAL REVIEW E012 OF 2022  
SN MUTUKU, J  
JANUARY 15, 2024**

**BETWEEN**

**STANLEY KARANJA & 33 OTHERS ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KAJAIDO (COUNTY PHYSICAL AND PLANNING DEPARTMENT KAJIADO) ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup> RESPONDENT**

**ENERGY AND PETROLEUM REGULATORY AUTHORITY .. 3<sup>RD</sup> RESPONDENT**

**AND**

**DOMINIC OSINDI OSUMO ..... INTERESTED PARTY**

**RULING**

1. In this matter the Applicants filed an application seeking judicial review orders of *Certiorari* and Prohibition against the Respondents. Before the substantive application was heard, the Interested Party and the 2<sup>nd</sup> Respondent raised preliminary objections dated 21<sup>st</sup> December 2022 and 27<sup>th</sup> March, 2023 respectively questioning, inter alia, the jurisdiction of this court to determine this matter. The Preliminary Objection (PO) dated 21<sup>st</sup> December 2022 is based on the grounds that:
  - a. The Judicial review is incompetent, fatally defective, bad in law and ought to be dismissed.
  - b. This Honourable Court lacks jurisdiction to entertain this matter.
2. The PO dated 27<sup>th</sup> March 2023 raised the following grounds:



- a. That this suit has been brought to this court in clear and or disregard of the provisions of the Law and is an abuse of the due process of court.
  - b. That the Applicant's case against the 2<sup>nd</sup> Respondent is misguided and offends the provisions of section 9 and 63 of the [Environmental Management and Coordination Act](#).
  - c. That the application offends the provision of section 7(2) of the [Fair Administrative Action Act](#) which outlines the instances in which this court may review an administrative action.
  - d. That the application is an abuse of the court as it does not meet the supervisory threshold of a judicial review court on the instances when a judicial review intervention can lie.
  - e. That the petitioners case as against the 2<sup>nd</sup> Respondent raises no cause of action as no decision regarding the 2<sup>nd</sup> Respondents application for an EIA License has been reached.
3. This court directed that the two preliminary objections be heard together by way of written submissions. The 1<sup>st</sup> Respondent did not file submissions to the preliminary objections while the 3<sup>rd</sup> Respondent is supporting the Preliminary Objections. The Applicants raised a Replying Affidavit on the PO.

### **Interested Party's Submissions**

4. The Interested Party's submissions are dated 19<sup>th</sup> May, 2023. It is the submission of the Interested Party that this court lacks jurisdiction to determine this matter and that the court with jurisdiction is the Environment and Land Court by dint of Article 162(2)(b) of the [Constitution](#) and section 13(1) of the [Environment and Land Court Act](#).
5. It is submitted that the matter herein revolves around environmental protection and land use. That the pleadings demonstrate this as outlined in Chamber summons dated 29<sup>th</sup> November, 2022 that the issues raised in this matter revolve around land use and environmental issues. Further that the statutory bodies involved in this matter include County Government of Kajiado, Lands Physical Planning and Urban Development and National Environmental and Management Authority whose functions relate to land use and matters of environment.
6. On this issue, the Interested Party cited [Republic v Karisa Chengo and 2 others](#) where it was held that:
 

“By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. the [Constitution](#) though does not define the word ‘status’. The intentions of the framers of the [Constitution](#) in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”
7. The Interested Party, while citing [Owners of the Motor Vessel “Lillian S” v Caltex Oil\(Kenya\) Ltd \(1989\)KLR 1](#), submitted that the subject matter of this case touches on land and an interest in land and therefor this court lacks to hear the matter and that the court with jurisdiction is the Environment and Land Court.



## 2<sup>nd</sup> Respondent's Submissions

8. In its submissions dated 28<sup>th</sup> November, 2023, the 2<sup>nd</sup> Respondent raised three issues for determination as follows:
- a. Whether this Honourable Court can grant leave for the commencement of judicial review when there exists other statutory mechanisms provided for and established under the law which have not been exhausted?
  - b. Whether the petitioner's case against the 2<sup>nd</sup> Respondent gives rise to the cause of action?
  - c. Whether this Court has jurisdiction to entertain and adjudicate upon the subject application?
9. On the 1<sup>st</sup> issue it was submitted that section 9(2) of the *Fair Administrative Actions Act*, No 4 of 2015 bars the court from reviewing an administrative action or decision unless the mechanisms for review or appeal under any written law are exhausted and that there are no exceptional circumstances as contemplated under section 9(4) of the above Act to warrant the applicants to seek judicial review orders. It was submitted that the applicants have failed to demonstrate exceptional circumstances to warrant their coming to this court to seek the judicial review orders.
10. On the 2<sup>nd</sup> issue it was submitted that a court can only review an administrative action if a decision has been made by an administrative body as provided for under section 7 of the *Fair Administrative Actions Act*; that the 2<sup>nd</sup> Respondent has not made any decision regarding the issuance of an Environment Impact Assessment Licence and therefore this case cannot be subjected to judicial review; that the rationale of the provisions of the law under section 7 is that the court must satisfy itself that the decision sought to be challenged exist and that the contents of the decision need to be verified to determine whether the decision satisfies the grounds for a judicial review.
11. On the 3<sup>rd</sup> issue it was submitted that a complaint pertaining to the validity, propriety or otherwise of the Environment Impact Assessment (EIA) license ought to have been dealt with in line with the provisions of section 129 of the *Environment Management and Coordination Act* 1999, as was espoused in the case of *Patrick Musumba v National Commission & 4 others* Nairobi [2016eKLR, where the Court relied on the Court of Appeal decision of *Republic v NEMA exparte Sound Equipment Ltd*[2011]eKLR where it was held:
- “Challenges to Environmental Impact Assessment study report and/or Environmental Impact Assessment Licences shall be made to the National Environment Tribunal established under section 125 of *Environment Management and Coordination Act*. The Tribunal should have been given the first opportunity and option to consider the matter. The Tribunal is the specialized body with capacity to minutely scrutinize the Environmental Impact Assessment study report as well as the licences”.
12. The 2<sup>nd</sup> Respondent further cited *Speaker of National Assembly v Hon James Njenga Karume* [2008] 1KLR 425 as stated in the *One hundred and Two Peponi Road LLP & another v National Environment Management Authority & 2 others*[2021]eKLR, where the court held that:
- “Where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of parliament that procedure should be strictly followed.”
13. It was submitted that where the law has granted jurisdiction to other dispute resolution organs, it would be an intrusion into the jurisdiction of another court if this court were to deal with this matter.



That the Applicants should have invoked the jurisdiction of National Environment Tribunal under section 125 and 129(3) of the *Environment Management and Coordination Act*.

14. The Applicants filed a Replying Affidavit dated 13<sup>th</sup> April, 2023 sworn by Stanley Karanja on behalf of the applicants. He has deposed that the PO raises issues that need to go on trial; that it does not raise pure points of law; that the suit raises serious issues on the obligations of the Respondents under Articles 69 and 70 of the *Constitution* and seeks to prohibit the exercise of the Respondents powers in breach of those obligations and that the suit and application raise administrative action to quash the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent who fail to comply with the Energy Regulations.
15. It is the case for the applicants that the Respondents cannot erect fuel tanks on the suit property without approval and due licences, without NEMA approvals from the Respondents and without considering all the attendant pollution and noise risks to the Applicants being that the said area is residential. They have argued that since their case challenges the administrative actions of the Respondents being public bodies and not a land matter as alleged, this is the right court to deal with the matter.

### **Analysis and Determination**

16. For the purposes of determining whether this court has jurisdiction to determine this or not, I will confine myself to the issue of jurisdiction only lest I make pronouncements on the other issues raised here that may be prejudicial to the other parties should this court find that it is not clothed with requisite jurisdiction to hear this matter.
17. What constitutes a preliminary objection was described in *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 thus:

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.
18. In *Owners of the Motor Vessel “Lillian S”*, which has been referred to by the parties above, it was held that:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
19. Jurisdiction of a court flows from the *Constitution* or a statute and a court cannot abrogate itself jurisdiction. The High Court is created under Article 165(1) of the *Constitution* with jurisdiction clearly specified under Article 165(3). The Environment and Land Court (ELC) is a court of equal status with the High Court created under Article 162 (2) of the *Constitution*. The High Court has no jurisdiction over matters falling within the jurisdiction of the courts contemplated in Article 162 (2) of the *Constitution*. ELC is such court contemplated in Article 162 (2). Its jurisdiction flows from the statute, *Environment and Land Court Act*. Section 13 of that Act states that.
  - (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.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- (a) interim or permanent preservation orders including injunctions;
  - (b) prerogative orders;
  - (c) award of damages;
  - (d) compensation;
  - (e) specific performance;
  - (f) restitution;
  - (g) declaration; or
  - (h) costs

20. I have considered the Notice of Motion dated 14<sup>th</sup> December 2022. It seeks orders of *Certiorari* to quash the approval given by the 1<sup>st</sup> Respondent for change of user of land from agricultural to light industrial and order of prohibition against 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to grant permission to develop a petrol station on LR No Kajiado/Olekasasi/2059. The applicants are raising land use and environmental related issues in their pending motion. I agree with the Interested Party that the issues raised by the Applicants relate to land use and environment issues.

21. My careful reading of the provisions of the law and the issues raised in this matter leads me to a considered conclusion that this court is the wrong court to deal with this matter. I cautioned myself from determining the other issues raised here save for the issue of jurisdiction to avoid making pronouncements that might jeopardize the trial and prejudice the parties.

22. I am persuaded that the correct court to handle this matter, and which court is also clothed with the jurisdiction to grant orders including prerogative orders, is the ELC. In the name of substantive justice, I will and do hereby transfer this matter to the ELC, Kajiado for directions on how the same should proceed.



23. The Deputy Registrar of this court is directed to place this file, as soon as possible, before the Presiding Judge of the ELC Kajado for mention to give directions.
24. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 15<sup>TH</sup> JANUARY 2024.**

**S. N. MUTUKU**

**JUDGE**

