



Mueni & 2 others (Suing on their Own Behalf and on Behalf of Members of "Boyani Community") v Third Engineering Bureau of China City Group Limited & 3 others (Environment & Land Petition E001 of 2024) [2025] KEELC 4000 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4000 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E001 OF 2024**

**EK MAKORI, J
MAY 15, 2025**

BETWEEN

**AMBROSE KALONGO MUENI 1ST PETITIONER
SALIM KUMBO CHITIBWA 2ND PETITIONER
ALI SELEMAN GAMBERE 3RD PETITIONER
SUING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF
"BOYANI COMMUNITY"**

AND

**THE THIRD ENGINEERING BUREAU OF CHINA CITY GROUP
LIMITED 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY 3RD RESPONDENT
THE CABINET SECRETARY, MINISTRY OF MINING BLUE ECONOMY &
MARITIME AFFAIRS 4TH RESPONDENT**

RULING

1. The 1st and 3rd Respondents submitted Preliminary Objections, dated 14th February 2025 and 14th day of June 2024, respectively, in opposition to the Petition, dated 28th March 2024, on the following grounds:



- a. Pursuant to Section 129 (1), (2), (3) & (4) of the *Environmental Management and Co-ordination Act*, the National Environment Tribunal possesses original jurisdiction to adjudicate and resolve the suit.
 - b. The Petition concerns matters concerning the environment and the issuance of licenses by the 2nd Respondent, an issue that falls within the jurisdictional authority of the National Environment Tribunal. Consequently, it should be adjudicated by the National Environment Tribunal.
 - c. The Court lacks original jurisdiction to adjudicate and resolve the suit. Therefore, the Petition presented before this court should be dismissed in limine, with costs.
 - d. The Petition is filed in violation of the mandatory provisions outlined in Section 67 (b) of the *Kenya Roads Act*, 2007. Furthermore, this court is without the requisite jurisdiction to hear and adjudicate the suit as per Section 67 (b) of the *Kenya Roads Act* No. 2 of 2007.
2. Based on the materials and submissions presented before me, the issues that I delineate for the determination of this court pertain to whether this court lacks jurisdiction to hear the petition by virtue of the provisions of Section 129 (1), (2), (3) & (4) of the *Environmental Management and Co-ordination Act* and Section 67 (b) of the *Kenya Roads Act* No. 2 of 2007, as well as the determination of who should bear the costs associated with the preliminary objections raised.
 3. The principles for determining the merit of a notice of PO were established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. This case set criteria for ascertaining what amounts to a PO, including that it raises a pure point of law, the correctness of all pleaded facts, and the absence of ascertainable facts. The court will consistently follow these principles in its ruling.
 4. The Court of Appeal in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga* [2016] KECA 817 (KLR) reiterated the same position on what would constitute a PO and held as follows:

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the *Mukisa Case* (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”
 5. The thrust of the POs in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A. in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR:

“I think that it is reasonably plain 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 right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
 6. A PO rests on the premise that its resolution will affect the matter's outcome by addressing key legal points. It emphasizes prudent time management, flagging weak cases that could waste judicial time and undermine justice. This underscores the importance of efficiency in our proceedings.



7. The 1st Respondent submits that the Petition raises environmental concerns, notably the alleged ecological pollution resulting from the 1st Respondent's mining activities in the Boyani Community. These issues fall within the mandate of the National Environment Tribunal as stipulated under Section 129(1), (2), (3), and (4) of the Environmental Management and Coordination Act and should, therefore, be determined by the Tribunal which is vested with exclusive jurisdiction to hear and determine disputes arising from the grant, refusal, or revocation of licenses.
8. The 1st Respondent submits that in as much as the Environment and Land Court's jurisdiction under Article 22, 162 (2) (b) of *the Constitution* and Section 13 (1) and (2) of the *Environment and Land Court Act* is to hear and determine environmental disputes including those that are related to land use and occupation, its jurisdiction on determining matters on licenses is strictly related to Appeals emanating from the National Environment Tribunal as provided by section 130 of the Environmental Management and Coordination Act.
9. The 1st Respondent submits further that Section 118 of Environmental Management and Coordination Act states that the National Environment Management Authority (NEMA) grants powers to an environmental inspector to prosecute an offender by instituting and undertaking criminal proceedings where it is alleged that offences listed under the Environmental Management and Coordination Act, offences which have also been mentioned in the Petition, have been committed. In this case, no criminal charges were preferred against the 1st Respondent.
10. The 1st Respondent submits that the Petitioners' claims are centered on the alleged failure of NEMA to revoke the Environmental Impact Assessment (EIA) license issued to the 1st Respondent and the continuation of quarry activities after the expiry of the license. These issues fall squarely within the jurisdiction of the National Environment Tribunal, as they relate to the grant, renewal, and revocation of environmental licenses.
11. The 3rd Respondent, referencing various judicial authorities, asserts that the petition constitutes a breach of applicable law and should therefore be dismissed. The 3rd Respondent contended that in 2018, an insurance company was commissioned to conduct an assessment exercise to determine the extent of loss and damages caused by the blasting and crushing activities and the compensation value for the affected families in the Boyani area. Although it was proposed that 138 houses were affected, the Petitioners contended that only 90 houses warranted compensation.
12. Furthermore, the 3rd Respondent contends that the compensation sought pertains to 2018 and 2019. This claim contravenes section 67(b) of the Roads Act 2007, which stipulates that such claims must be filed within 12 months following the act, neglect, or default complained of, or in the case of a continuing injury or damage, within six months following its cessation. Refer to *Kenfric Bakery Limited v National Land Commission & Others* [2022] KEELC 13800 (KLR) and *Wilmory Development Limited v National Land Commission & Kenya National Highway Authority* [2020] eKLR. Consequently, the 3rd Respondent asserts that the current claim is statutorily barred.
13. In a rejoinder, the Petitioners, referencing multiple judicial authorities, assert that the alleged harm and violations claimed transpired outside the timeframes stipulated in Section 129 (1) of EMCA, that the National Environment Tribunal lacks the authority to grant the remedies sought by the Petitioners.
14. Besides, the activities that are the subject of the present petition are, in fact, ongoing within the area. Consequently, invoking Section 67 (b) of the Kenya Road Act 2007 would not be appropriate, as the limitation period has not commenced. Therefore, the action instituted by the Petitioners is not statute-barred, given that the grievances alleged are still in progress and have not ceased. The grievances attributed to the Respondents constitute continuing wrongs; thus, asserting that the cause of action



accrues anew daily is prudent. Hence, the Petitioners have duly filed the petition in accordance with Section 67(b) of the *Kenya Roads Act* 2007.

15. A review of the petition and sought reliefs shows that the National Environment Tribunal cannot fully address them. The Claim by the Petitioners exclusively concerns the violations of constitutional rights by the Respondents, arising from the operations of the 1st Respondent within the Boyani area, for which specific remedies have been sought, including declarations and compensation against the Respondents. The Petitioners sought no relief that falls within the scope of Section 129 (1) of EMCA. Section 129(3) of EMCA cannot be used to transfer specific powers given to the courts under *the Constitution* to the National Environment Authority, particularly powers under Article 23(3) of *the Constitution*, which provides for reliefs that can be granted in a claim for violating constitutional rights. These reliefs include declarations of rights, injunctions, conservatory orders, declarations of invalidity of any law, orders for compensation, and orders for judicial review.
16. The entirety of what the Petitioners have brought before this court for determination concerns questions of the Petitioners' rights under the Bill of Rights, specifically Articles 26, 27, 28, 40, 42, 43, and 45 of *the Constitution* of Kenya 2010, which are being violated, continue to be violated, and are at risk of being further violated by the alleged actions and omissions of the Respondents. The Petitioner's petition is thus in the form of a Constitutional Petition. It is brought pursuant to the provisions of Article 22(1) as read with Article 23(1) of *the Constitution* of Kenya 2010, which grants this court the requisite jurisdiction to hear and determine the petition.
17. Guided by the principles established in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR), the Supreme Court has issued guidance indicating that, in cases where a claim is multifaceted, the court should consider:

“It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations as is the case in the present dispute. The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC.”
18. Whereas the claim presented herein pertains to licensing, and NET was referenced in the initial instance, a multitude of constitutional violations are asserted, for which the Petitioners seek compensation that NET will not address.
19. Besides, section 67 (B) of the Kenya Road Act does not defeat the claim, as the acts complained of constitute continuous trespass.
20. This court is the most adequate and efficacious forum to hear the matter; thus, the POs dated 11 November 2024 and 14 February 2025 are hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 15TH DAY OF MAY 2025.

E. K. MAKORI

JUDGE



In the Presence of:

Mr. Mare for the Petitioners

Mr. Masheti for the 1st Respondent

Mr. Ochieng for the 3rd Respondent

Ms. Lutta for the 4th Respondent

Happy: Court Assistant

