



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**ELC NO. 46 OF 2021**

PAOLO DI MARIA.....1<sup>ST</sup> PLAINTIFF  
ALESSANDRO LAMACCHIA.....2<sup>ND</sup> PLAINTIFF  
FRANCESCO LEPRI.....3<sup>RD</sup> PLAINTIFF  
ROSARIA RAFAELA BONETTI.....4<sup>TH</sup> PLAINTIFF  
ALBERTO DI MARIA..... 5<sup>TH</sup> PLAINTIFF  
EDUARDO ZINNA.....6<sup>TH</sup> PLAINTIFF

**VERSUS**

ALICE M. KURIA.....1<sup>ST</sup> DEFENDANT  
SARAH W. KURIA.....2<sup>ND</sup> DEFENDANT  
AMERICAN TOWERS CORPORATION (KENYA) .....3<sup>RD</sup> DEFENDANT  
NATIONAL ENVIRONMENT  
MANAGEMENT AUTHORITY.....4<sup>TH</sup> DEFENDANT  
COMMUNICATION AUTHORITY OF KENYA.....5<sup>TH</sup> DEFENDANT  
KILIFI COUNTY GOVERNMENT.....6<sup>TH</sup> DEFENDANT

**RULING**

The plaintiff/applicants filed a Notice of Motion dated 13<sup>th</sup> May 2021 seeking for the following orders:

**a) Spent**

**b) That a temporary injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents either by themselves/agents and/or servants from continuing the constructions, of Base Transceiver Stations tower at the 1<sup>st</sup> and 2<sup>nd</sup> Respondent property known as L.R. NO 2917 Malindi pending the hearing and determination of this application.**

**a) That an order compelling the 3<sup>rd</sup> Respondent to immediately suspend the operation /activities of the base transceiver mast station/tower pending the hearing and determination of this application.**

**b) That a permanent injunction does issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents either by themselves/agents and or servants from constructions of the Base Transceiver Stations tower, at the 1<sup>st</sup> and 2<sup>nd</sup> Respondent property known as L.R.**

*NO 2917 Malindi pending the hearing and determination of this suit.*

- c) That an order compelling the 3<sup>rd</sup> defendant/respondent to immediately suspend the any operation, activities of the base transceiver mast station/tower pending the hearing and determination of this suit.*
- d) That the OCS Malindi to ensure compliance of the orders granted.*
- e) That any other relief that this Honourable court may deem fit to grant.*
- f) That the costs of this application be provided for.*

The court granted temporary orders and directed that the application be served on the respondents for inter partes hearing. Before this Notice of Motion could be heard and determined, the 3<sup>rd</sup> Defendant filed a Notice of Preliminary Objection dated 16<sup>th</sup> June 2021 and raised the following issues:

- a) This Honourable Court does not have jurisdiction to hear and determine this matter.*
- b) The Physical and Land Use Planning Act, 2019 not only outlines the procedure to be followed when dealing with the issues raised by the plaintiffs, but also establishes the County Physical and Land Use Planning Liaison Committee which is mandated to hear and determine the dispute presently before this Honourable Court.*
- c) The Environment Management and Coordination Act, 1999 establishes the National Environment Tribunal (the Tribunal) to, inter alia, determine matters that are raised by the plaintiffs. This court cannot usurp the powers of the National Environmental Tribunal.*
- d) This Honourable Court's jurisdiction is appellate from the determinations of the Tribunal and the County Physical and Land Use Planning Liaison Committee.*
- e) The Plaintiffs have not exhausted the available procedural mechanisms for the resolution of the dispute herein, before moving this Honourable Court.*
- f) The Application is an abuse of the process of this Honourable Court and should be dismissed with costs.*

Counsel agreed to canvas the preliminary objection by way of written submissions which were duly filed. Mr. Luseno counsel for the 4<sup>th</sup> Defendant supported the preliminary objection and submitted that this court's jurisdiction is derived from statute and in matters involving licensing, this court can only act as an appellate court. It was counsel's further submission that parties must go to the tribunals as there is a specialized tribunal dealing with multi media. That the court's jurisdiction does not deal with cancellation of licenses.

### **3<sup>RD</sup> DEFENDANT'S SUBMISSIONS**

On 22<sup>nd</sup> September 2021 when this matter came up for mention for purposes of confirming that parties had filed submissions, counsel for the 3<sup>rd</sup> defendant Ms Okuta informed the court that they had filed submissions to the preliminary objection but the same are not on record. The same is also not in the online filing system. However, the court will rely on the grounds on the notice of the preliminary objection as filed.

Ms Okuta submitted that the 4<sup>th</sup> defendant issued EIA licenses to the 3<sup>rd</sup> defendant hence this court has no jurisdiction to hear and determine this matter. Counsel urged the court to uphold the preliminary objection and dismiss the suit with costs.

### **1<sup>ST</sup> TO 5<sup>TH</sup> PLAINTIFF'S SUBMISSIONS**

It should be noted that Mr. Ndungu for the 6<sup>th</sup> Plaintiff opposed the preliminary objection and submitted that this is a contested issue which involves licenses that were never issued as was confirmed by the Communication Authority. Counsel therefore urged the court to dismiss the preliminary objection with costs.

Counsel for the 1<sup>st</sup> to 5<sup>th</sup> plaintiffs submitted that the Constitution of Kenya, 2010 established the Environment and Land Court (ELC) and subsequently the Environment and Land Court Act (ELCA) came into force on 30<sup>th</sup> August 2011.

It was counsel's further submission that the Article 162 (2) (b), of the Constitution provided for the ELC mandate to hear disputes relating to the environment, the use and occupation of, and title to, land. Further that Section 13 (1) of ELCA elaborates the jurisdiction of the court and provides that the ELC has both original and appellate jurisdiction to hear all disputes relating to environment and land. Such disputes will include, as provided in Section 13 (2) (a), disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. Section 13 (2) (e) makes it clear that what is set out in (a) to (d) above it, is not conclusive, and provides that the ELC can hear any other dispute relating to environment and land.

Ms Metto submitted that the National Environment Tribunal (NET) is only mandated to determine appeals from the 4<sup>th</sup> Defendant (NEMA) as provided for under Section 7 of the Environment Management and Coordination Act (EMCA). That the mandate, as provided for under Section 9 of EMCA, is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal

instrument of Government in the implementation of all policies relating to the environment. Further that part of its mandate is to grant Environmental Impact Assessment (EIA) licenses, and under Section 58 of EMCA, no person should proceed with a project before first obtaining an EIA license.

Similarly, counsel stated that the plaintiff's case is not only over issuance of the EIA License to the 3<sup>rd</sup> defendant but also a claim for violation of their constitutional rights to a clean and healthy environment as envisaged under Article 42 of the Constitution, 2010.

That jurisdiction of National Environment Tribunal is limited to cases where the aggrieved person is challenging a decision by the NEMA (4<sup>th</sup> Respondent) or any of its committees and as such the reliefs the plaintiffs are seeking for are not obtainable at the tribunal

Counsel submitted that section 13 (3) of the ELCA expressly recognizes this court's authority to enforce the rights under Article 42, 69 and 70 of the Constitution hence to limit the court's jurisdiction would defeat the purpose which was intended by the constitution.

Ms Metto relied on the case of *Ken Kasing'a v Daniel Kiplagat Kirui & 5 others* [2015] eKLR where the court had this to say;

***“It will be seen from the above that the ELC has an extremely expansive jurisdiction. Indeed, in my view, as long as a dispute can be categorized as being a dispute over environment, or over land, the ELC has unlimited jurisdiction. One cannot therefore be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the respondents, that the ELC has no jurisdiction in a matter concerning the issuance or the rejection of an EIA licence. True, a person aggrieved by the decision has avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading filed in the ELC as a court of first instance. If the ELC feels that the matter can be determined by NET, it can refer the matter to NET for determination, and wait to sit on appeal over the decision of NET. But such deferral to NET would not be a statement that the ELC has no jurisdiction over the matter. On the first issue, the question whether this court has jurisdiction to try this matter, I do hold that this court is properly seized with jurisdiction to try the suit, and I will now proceed to consider the merits of the case.”***

Ms Metto also cited the case of *Benson Ambuti Adegwa & 2 others v Kibos Sugar and Allied Industries Limited & 4 others; Kenya Union of Sugar Plantation and Allied Workers(Interested Party)* [2019] eKLR where Parties raised a preliminary objection challenging the jurisdiction of the ELC on matters environment, and it was held that;

***“The upshot of the foregoing is that the court finds the preliminary objections raised by the 3<sup>rd</sup> Respondent and the Interested Party to be without merit and are dismissed with costs. That having dealt with the Preliminary Objections, the court now turns to the petition in the following paragraphs.”***

Counsel also relied on the case of *Mohammed Said vs County Council of Nandi, Eldoret E & L Petition No. 2 of 2013*, (2013) eKLR where the court held that:

***“There can be no question that this court has jurisdiction to hear a dispute on whether or not the right of a person to a clean and healthy environment has been violated, for this jurisdiction, is explicitly set out in Section 13 (3) of ELCA. Indeed, this court has jurisdiction to hear any constitutional petition/claim so long as such petition relates to the environment or land.”***

Counsel therefore urged the court to dismiss the preliminary objection with costs.

## **ANALYSIS AND DETERMINATION**

The main issue for determination is as to whether this court has jurisdiction to hear and determine this matter. The principles to be applied in preliminary objections are now well settled as per the *Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A.* A party raising a preliminary objection should know that the issues must be purely on a point of law and not facts as was stated in the Mikisa case:

***“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

***Newbold, P.:***

***“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”***

A preliminary objection should not be raised if any facts have to be ascertained and the court and the parties assume that the facts as pleaded are correct. In this case are the facts as pleaded by the plaintiffs and the other parties correct? There was an issue that arose during the mention as to whether the licenses were issued. There were two conflicting submissions where counsel for the 6<sup>th</sup> plaintiff submitted from the bar and stated that no licenses were issued and that the same had been confirmed by the 5<sup>th</sup> defendant. Ms Okuta counsel for the 3<sup>rd</sup>

defendant who also submitted from the bar that the 4<sup>th</sup> defendant issued EIA license to her client. This conflicting information needs to be ascertained as this is the gist of the preliminary objection on the jurisdiction of the court.

In the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR*.

**“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”**

The 3<sup>rd</sup> Defendant’s notice of preliminary objection is that the court does not have jurisdiction to hear this case as the matter should be heard and determined by the County Physical and Land Use Planning Liaison Committee (CPLUPLC) and NET as the court acts as an appellate court to hear appeals that arise from those bodies.

In the Supreme Court case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR para 68*, the court observed thus:

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”**

The National Environment Tribunal is established under Section 125(1) of the EMCA which reads:

***(1) There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members...***

Further Section 129 EMCA sets out the jurisdiction of the NET as follows:

***(1) Any person who is aggrieved by—***

***(a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;***

***(b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;***

***(c) the revocation, suspension or variation of the person's licence under this Act or its regulations;***

***(d) the amount of money required to paid as a fee under this Act or its regulations;***

***(e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.***

Section 130 further makes provision for appeals to the Environment and Land Court as follows:

***(1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.***

***(2) 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.***

***(3) Notwithstanding the provisions of subsection (2), where the Director-General is satisfied that immediate action must be taken to avert serious injuries to the environment, the Director-General shall have the power to take such reasonable action to stop, alleviate or reduce such injury, including the powers to close down any undertaking, until the appeal is finalised or the time for appeal has expired.***

***(4) Upon the hearing of an appeal under this section, the Environment and Land Court may—***

***(a) confirm, set aside or vary the decision or order in question;***

***(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;***

*(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or*

*(d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.*

*(5) The decision of the Environment and Land Court on any appeal under this section shall be final*

Section 13 of the Environment and Land Court provides for the jurisdiction of the court that is envisaged under Article 162(2) (b) which reads:

### **13. Jurisdiction of the Court**

***(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.***

***(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.***

From the provision under section 13 above, the ELC has original and appellate jurisdiction to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. It also provides that the court shall have the jurisdiction to hear any other disputes relating to environment and land.

It is trite law that where there are laid down procedures and processes for hearing disputes then a party must adhere to such procedures including filing the cases in the right forums. It is also noteworthy that where statutes have established tribunals for hearing disputes, then the parties must exhaust such remedies before filing their cases in other forums. Parties are not allowed to forum shop for their convenience. There has to be order and certainty in administration of justice.

Counsel raised an objection that the plaintiffs ought to have filed their claim with the County Physical Planning Liaison which is established under section 76 of the Physical and Land Use Planning Act No.13 of 2019 (PLUPA) and its functions laid out under section 78 as follows:

### ***Functions of the County Physical and Land Use Planning Liaison Committee***

***The functions of the County Physical and Land Use Planning Liaison Committee shall be to—***

***(a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;***

***(b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;***

***(c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and***

***(d) hear appeals with respect to enforcement notices.***

It is clear from the above section that the objective is to govern matters relating to planning, use, regulation and development of land in Kenya. One of the developments requiring a development approval under this Act is a base transmission station. The Plaintiffs challenge the licenses issued by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants. They expressly state as much on paragraph 16 of the Plaintiff.

According to section 2 of the PLUPA, the county planning authority is responsible for development control and planning within the county. This means that they are responsible for, amongst other things, the issuance of compliance licenses or approvals. Once approval is issued or denied and a party feels aggrieved, they can appeal that decision at the CPLUPC. In the absence of such an application, approval or denial there is nothing to appeal.

I have looked at the 4<sup>th</sup> Defendant's Replying Affidavit to the Plaintiff's Notice of Motion sworn by one Cecilia Nyambu on 11<sup>th</sup> June 2021 at Paragraph 7 which indicates that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants commenced construction without licensing from the 4<sup>th</sup> Defendant.

Similarly, it is only after the issuance of such license that an aggrieved party may seek the intervention or appeal at the NET as it is stipulated in section 129 above. In other words, there was no license to warrant an appeal at the NET.

The plaintiffs vide their plaint are seeking for reliefs that relate to environment, land use and development. As seen above, different tribunals/committee are equipped with the jurisdiction to deal with each of those matters. However, it would be difficult to deal with each of the issues raised separately or splitting the claims and yet this court can handle all of them as it has jurisdiction to do so. The plaintiffs are also claiming a violation of the right to a clean and healthy environment which the said committees and tribunals cannot determine.

In the case of *TAIB Investments Limited v Fahim Salim Said & 5 others [2016] eKLR*, Angote J held that the only most suitable forum to deal with such multiple issues would be the ELC by virtue of Article 162(2) of the Constitution and held as follows:

**51. In any event, the Plaintiff's suit has not only raised the issue of whether the 5<sup>th</sup> Defendant (NEMA) issued to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants a licence, but also whether the County Government issued to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants with the approval to commence developments on the suit property pursuant to the provisions of the Physical Planning Act and the County Government Act.**

**52. The Tribunal established under Section 129 of the EMCA cannot entertain a dispute as to whether the County Government or the Director of Physical Planning approved the 1<sup>st</sup> to the 4<sup>th</sup> Defendants' development Plans.**

**53. Where we have environmental and developmental issues in a suit that are supposed to be dealt with by numerous Tribunals or bodies, and where those issues cannot be dealt with separately, it is only this court, pursuant to the provisions of Article 162 (2)(b) of the Constitution, that can deal with all those issues.**

**54. However, where a suit raises specific issues which are supposed to be dealt with by a specific Tribunal or body established by law, then the matter must be commenced in the Tribunal or body so established before an appeal can be lodged in this court or the High Court, as the case may be. That is not the case in this matter. The issues raised in the Plaintiff fall outside the mandate of the National Environment Tribunal.**

**55. It is for the reasons I have given above that I find and hold that this court has the requisite jurisdiction to entertain this matter."**

Similarly, in the case of *West Kenya Sugar Co. Limited – v- Busia Sugar Industries Limited & 2 others, [2017] eKLR*, where the court held that:

**"This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the constitution. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is the preserve of the ELC...." (Emphasis supplied)**

I find that the court has the requisite jurisdiction to hear and determine the plaintiff's suit as per Article 162 (b) of the Constitution, 2010 and section 13 of the ELCA which gives the court a wide mandate to hear and determine matters relating to the environment and land. I therefore find that the preliminary objection lacks merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2021.**

.....

**M.A.Odeny**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.