



Bedarin Hotel Limited v National Environment Tribunal & another (Miscellaneous Civil Application E108 of 2022) [2023] KEHC 20803 (KLR) (Judicial Review) (20 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS CIVIL APPLICATION E108 OF 2022**

JM CHIGITI, J

JULY 20, 2023

BETWEEN

BEDARIN HOTEL LIMITED APPLICANT

AND

NATIONAL ENVIRONMENT TRIBUNAL 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA 2ND
RESPONDENT**

RULING

Brief Background

1. By a chamber summons dated September 12, 2022 the applicant filed an application pursuant to order 53 rules 1 and 3 of the Civil Procedure Rules as well as sections 8 of the Law Reform Act cap 26 of the Laws of Kenya seeking the following orders:
 1. That this Honourable Court be pleased to grant leave to the Applicant to apply for an order of *certiorari* to bring into this honourable court for the purpose of being quashed the 1st respondent's ruling (orders) dated December 10, 2021 barring the Applicant from continuing operation of a club/bar at the properties registered as Title Numbers Ruiru East Block1/3255 And Ruiru East Block 1/4290.
 2. That this honourable court be pleased to grant leave to the applicant to apply for an order of prohibition to prohibit the 2nd respondent, its agents of servants, Kiambu county inspectorate department from interfering with the Applicant's use of his property in the title of parcel of land known as Ruiru



East Block1/3255 And Ruiru East Block 1/4290 and/or interfering with the Applicant's use of the aforesaid premise as club/bar.

3. That the grant of leave do operate as a stay of execution of the respondent's orders(ruling) dated December 10, 2021 barring the applicant's use of property in all that parcel of land known as Ruiru East Block1/3255 And Ruiru East Block 1/4290 pending the hearing and determination of this Application.
 4. The costs of this application be provided for.
2. The Application is predicated on the grounds set out on the face therein and by a statutory statement and verifying affidavit sworn by Samson Muriithi.
 3. In opposition to the application the 1st respondent filed a notice of preliminary objection dated October 5, 2022 in which it raised the following objection:
 1. That the proceeding of *certiorari* fatally violates the mandatory provisions of sections 9(3) of the [Law Reform Act](#) and order 53 rule 2 of the [Civil Procedure Rules, 2010](#) being the six –month limitation period imposed by above laws.
 2. That the application is therefore fatally defective and is liable to be struck off in limine.
 4. In opposition to the application the 2nd Respondent filed a notice of preliminary objection dated October 3, 2022 seeking to have the application dated September 12, 2022 struck out with costs to the 2nd respondent on the following ground:
 1. That this Honourable Court lacks the jurisdiction to entertain and/or determine the application because the subject matter in dispute falls squarely under the Environment and Land Court (ELC) pursuant to article 169 (2b) of the [Constitution of Kenya](#) 2010 and section 130 of the [Environmental Management and Coordination Act](#) (EMCA) 1999.
- Relying on the case *locus classicus* case of [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] KLR.
5. The court notes that in the court proceedings dated 2/11/22 the Court granted the Applicant leave to file and serve the amended motion dated October 17, 2022.
 6. Further in the court proceedings dated 23/11/22 the applicant confirmed to have filed and served the amended pleadings dated October 17, 2022. The applicant further stated that two notice of preliminary objections were raised as stated above.
 7. The 1st respondent withdrew its preliminary objection dated October 5, 2022 and it is in support of the 2nd respondents preliminary objection.
 8. Justice Ndungu then issued directions that 2nd respondents' preliminary objection be canvassed by way of written submissions.
 9. This information was not presented before Justice Chigiti.
 10. On 9.5.23 the court directed the parties to exchange submissions further stating that ruling will be delivered on the P.O dated 5.10.22 on 20.7.23.



11. The applicants' amended chamber summons dated October 17, 2022 seeks the following orders:
 1. That this Honourable Court be pleased to grant leave to the Applicant to apply for an order of *certiorari* to bring into this Honourable Court for the purpose of being quashed the 1st respondent's ruling (orders) dated September 9, 2022 barring the applicant from continuing operation of a club/bar at the properties registered as Title Numbers Ruiru East Block1/3255 and Ruiru East Block 1/4290.
 2. That this Honourable Court be pleased to grant leave to the applicant to apply for an order of prohibition to prohibit the 2nd respondent, its agents of servants, Kiambu county inspectorate department from interfering with the applicant's use of his property in the title of parcel of land known as Ruiru East Block1/3255 And Ruiru East Block 1/4290 and/or interfering with the Applicant's use of the aforesaid premise as club/bar.
 3. That the grant of leave do operate as a stay of execution of the respondent's orders(ruling) dated September 9, 2022 barring the applicant's use of property in all that parcel of land known as Ruiru East Block1/3255 And Ruiru East Block 1/4290 pending the hearing and determination of this Application.
 4. The costs of this application be provided for.
12. The applicant filed its response to the preliminary objections by way of replying affidavit dated January 1, 2023.
13. The applicant averred that the National environment Tribunal delivered a Ruling on September 9, 2022 whereby the Applicant was barred from continuing to operate a bar/club and/or playing loud music in its premises located in Ruiru East Block 1/3255 and Ruiru East Block 1/4290 pending the hearing and determination of the main suit.
14. The applicant subsequently filed a chamber summons application dated October 17, 2022 seeking leave to bring a Judicial Review Application for orders of *certiorari* against the said National Environment Tribunal Ruling and consequential orders delivered on September 9, 2022 on the basis of that the Tribunal exceeded its mandate.
15. The Applicant avers that this honourable court has jurisdiction with respect of the subject matter herein being the impugned decision/ruling by the National Environment Tribunal delivered on September 9, 2022 on the basis that the Tribunal acted in excess of its mandate.
16. The jurisdiction of this Honourable Court is hinged on its supervisory jurisdiction to review the impugned ruling of the National Environment Tribunal which has nothing to do with land or environment as alleged by the 2nd Respondent.
17. The High Court has supervisory Jurisdiction under article 165(6) of the *Constitution* over decisions of the subordinate courts and quasi-judicial Tribunals as hereunder ;
 - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”



18. In exercise of the supervisory powers of High Court, it is vested with jurisdiction to hear and determine the Application for Judicial Review orders over the decisions made by inferior court and quasi-judicial Tribunals.
19. The Applicant contends that in the instant application, the court is being asked to assume a supervisory role and quash the ruling and subsequently stop execution of orders issued by that inferior tribunal on the basis that it exceeded its mandate and which subject matter has no nexus in land or environment.
20. That the National Environment Tribunal established under section 125 of *Environmental Management and Co-Ordination Act*, 1999 has limited mandate under section 129 to hear and determine the matters relating to licensing and other matters related to environment regulation of noise pollution.
21. Consequently, it is therefore the jurisdiction of this Honourable court to determine whether or not the National Environment Tribunal had mandate to issue orders barring the Applicant from using its premises as a bar/club and/or whether the Tribunal acted in excess of mandate when it issued orders barring the Applicant from operating a bar/club in its premises.
22. It is the Applicants contention that the Environment and Land Court established under article 162(2) and section 13 of the *Environment and Land Court Act* is only vested with original and appellate jurisdiction regarding matters of land and environment. However, the subject matter herein is not environment or land matter but a review of the impugned Tribunal's decision on the basis that it acted in excess of its mandate.
23. That the jurisdiction of this Honourable Court is pegged in respect of subject matter is the impugned Tribunal's decision to deal with the subject matter in question which is barring of the Applicant to operate a bar.
24. In this case the subject matter which this Honourable Court is being called to determine is the impugned Tribunal's decision to render the said Ruling/orders and consequential orders dated September 9, 2022.
25. The Jurisdiction which this Honourable is being called upon to exercise is with respect to the impugned decision of the National Tribunal and not land or environment as the Applicant assert in the Preliminary Objection.
26. The Applicant submitted that section 130 of the *Environmental Management and Co-ordination Act*, 1999 and the Environment and Land Court established under article 162(2) and section 13 of the *Environment and Land Court Act* is only vested with original and appellate jurisdiction regarding matters of land and environment. However, the subject matter herein is not environment or land matter but a review of the impugned Honourable Tribunal's Ruling on ground that it acted in excess of its mandate.
27. The Applicant relied on the cases of *Republic v Magistrates Court, Mombasa; Absin Synergy Limited (Interested Party)* (Judicial Review E033 of2021) [2022] eKLR and *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 eKLR which set the parameters of judicial review as follows:

“Judicial review is concerned with the decision-making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction.”



28. The 2nd respondent submitted that this suit arises from a ruling of the National Environment Tribunal (1st Respondent) issued on the 9th of September 2022 in NET Appeal No. 29 of 2021.
29. In its ruling, the 1st Respondent issued Orders among them barring the applicant herein from operating a bar/club and/ or playing loud music at the properties comprised in title numbers Ruiru East Block 1/3255 AND Ruiru East Block 1/4290 pending the hearing and determination of the case Appeal before it.
30. The 2nd Respondent stated that article 162(2) of the Constitution of Kenya 2010 provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. In the same breath, Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in article 162(2).
31. Further it contends that section 130 of EMCA has laid down a clear procedure for redress in this case. The first port of call for the Applicant should have been the Environment and Land Court and not the High Court.
32. It relied on Kennedy Ooko Jacob t/a Ssebo Intel & Co. Auctioneers v Agricultural Finance Corporation [2018] eKLR where the court in relying on the decision in the Karisa Chengo case stated;

“Upon a careful consideration of the record it appears that the genesis of this application is Migori ELC No. 149 of 2017. That being so, all resultant matters must be dealt with by the Environment and Land Court and not the High Court. Consequently, this Court declines jurisdiction...”

Analysis And Determination:

33. Upon considering the preliminary objection, the response thereto and submissions filed by the parties, I find that the issue for determination is whether the preliminary objection dated October 3, 2022 raised is merited.
34. The Court of Appeal in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA, had the following to say on circumstances when a Preliminary Objection may be raised.

“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.”
35. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
36. The Preliminary Objection challenges the jurisdiction of this Court to hear and determine the application placed before it. I will start by restating the place of a challenge to the jurisdiction of this court and rely on the classic case of Samuel Kamau Macharia v KCB & 2 others, (2012) eKLR where the Court held that:-

“A Court’s jurisdiction flows from either the Constitution or Legislation or both and that the court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by



Law. Also relies on The *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR for the submission that a question of jurisdiction ought to be raised and decided at the earliest opportunity further that 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.”

37. The 2nd Respondent submitted that this suit arises from a Ruling of the National Environment Tribunal (1st Respondent) issued on the 9th of September 2022 in NET Appeal No. 29 of 2021.
38. The Environment and Land Court is a creation of article 162(2) (b) of the *Constitution* which mandated parliament to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title to land. Under sub-article 3, Parliament was mandated to legislate on the jurisdiction and functions of courts contemplated in Clause 2. Parliament indeed enacted the *Environment and Land Court Act* No. 19 of 2011 being the requisite legislation which spelt out the jurisdiction of this court.
39. The Environment and Land Court’s jurisdiction is highlighted in section 13 of Act No. 19 which states that the court shall have original and appellate jurisdiction to hear and determine disputes in accordance with Article 162 (2) (b) of the *Constitution* and with the provisions of that Act or any other law relating to environment and land.
40. Section 13 (2) (a) of the *Environment and Land Court Act* No. 19 of 2011 provides that in exercise of its jurisdiction under article 162(2)(b) of the *Constitution* , the Court shall have power 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;
41. Section 13 (4) of Act No. 19 provides that 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.
42. This court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. This court being in equal status to the High Court is subject to the provisions of article 165 (b) of the *Constitution* which states thus:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over superior court.”
43. The applicant seeks leave for judicial review orders to prohibit and quash the 1st respondent’s ruling (orders) dated September 9, 2022.
44. Section 130 of the *Environmental Management and Co-ordination Act*, 1999 provides as follows:-

“Appeals to the Environment and Environment and Land Court

 - (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.”

45. Section 9(1) of the *Fair Administrative Action* provides that a person aggrieved by an administrative action may apply for Judicial Review of such a decision in the High Court or subordinate Court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution* 2010.

46. I find that the orders issued in the ruling dated September 9, 2022 by the 1st Respondent places the matter under the jurisdiction of the Environment and Land Court since the same amounts to and relates to “the use and occupation of and title to land” as envisaged under article 162 (2) of the *Constitution* and section 13 of the *Environment and Land Court Act*.

47. The orders that were issued barred the Applicant from operating a club/bar at the properties registered as Title Numbers Ruiru East Block1/3255 And Ruiru East Block 1/4290 or any property within close proximity of the Applicants property pending the hearing and determination of the Applicants’ Appeal. This is a question that falls within the scope of section 13 (2) (a) of The *Environment and Land Court Act* No. 19 of 2011 which provides that in exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes relating to environmental planning and protection.

48. In *R v Peterkin, ex parte Soni* (1972) Imm AR 253 Lord Widgery CJ held as follows:

“Where parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the complaint complains this court should in my judgment as a rule allow the appellate machinery to take its course.



The prerogative orders form the general residual jurisdiction of this Court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when and adequate jurisdiction exists elsewhere.”

49. In the Supreme Court of Kenya decision in the case of *Republic v. Karisa Chengo & 2 others*, Petition No. 5 of 2015 it was stated that:-

“...we note that pursuant to article 162(3) of the *Constitution* , Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined the separate jurisdiction of the ELC and the ELRC as stated above. From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdiction. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.” (Emphasis added)

50. I find from the pleadings herein that there is no doubt, the reliefs sought in the Application are related to land dispute and applying the jurisprudence, flowing from the various decisions cited herein above, the reliefs sought can be granted by the Environment and Land Court which Court is clothed with jurisdiction in terms of article 23(3)(f) of the *Constitution* as read with section 13 of the *Environment and Land Court Act* to determine issues of land dispute and use and fundamental freedoms, in the Bill of Rights associated with land dispute.
51. I find therefore that this Honourable Court lacks the jurisdiction to hear and determine the instant Application.
52. Finally, the Applicant submitted that if the Court finds that it lacks jurisdiction to hear this matter, it may direct the matter to be transferred to the proper court in the interest of doing substantive justice to both parties and to save cost and time.
53. In the decision of the Court of Appeal in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR, a court without jurisdiction has no power to transfer a case to a court with jurisdiction. In the stated case, the Court of Appeal held that:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even article 159 of the *Constitution* to remedy the situation. In the same way, a court of law should not



through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

43. In retrospect, I now realize that transfer in the Daniel N. Mugendi case was based on the reasons that:-

“Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.”

44. It seems the transfer of matters between courts was a temporary measure to take care of the changes introduced by the Constitution, 2010 and to allow parties to familiarize themselves with the new litigation terrain. I do not think that ten years after the promulgation of the current Constitution, a litigant can still be allowed to majestically march to the wrong court and expect that the court without jurisdiction will transfer the matter to the court with jurisdiction. The Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel case which was decided by the Court of Appeal after its decision in the Daniel N. Mugendi case is the decision that should guide this Court on what to do.

45. Having determined that I have no jurisdiction to entertain this petition, the only available remedy is to strike it out this suit which I hereby do.

Disposition:

54. In the case of *Dickson Ngigi Ngugi v Commissioner of Lands* S.C Petition No. 9 of 2019 [2019] eKLR, [36] The Supreme Court made binding finding that Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non iudice and amounts to a nullity because, as Nyarangi, JA famously said in the *locus classicus*, *Owners of the Motor Vessel “Lillian S” v Caltex Oil, (Kenya) Ltd* [1989] KLR 1, “jurisdiction is everything. Without it, a court has no power to make one more step”.

Having arrived at the finding that this court lacks jurisdiction, this court must down its tools. I lack the jurisdiction to deal with the other issues before this court.



Orders:

55. The notice of preliminary objection dated October 3, 2022 is upheld and this suit is hereby struck out with costs to the 2nd respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY, 2023.

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JOHN CHIGITI (SC)

JUDGE

