



**Erdemann Property Limited v National Environment Tribunal & another;
NEMA & another (Interested Parties) (Constitutional Petition E325 of 2021)
[2023] KEHC 22384 (KLR) (Constitutional and Human Rights) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E325 OF 2021**

**AC MRIMA, J
SEPTEMBER 21, 2023**

BETWEEN

ERDEMANN PROPERTY LIMITED PETITIONER

AND

NATIONAL ENVIRONMENT TRIBUNAL 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

NEMA INTERESTED PARTY

LONDON DISTILLERS LTD INTERESTED PARTY

RULING

Introduction:

1. The Petitioner herein, Erdemann Property Limited, is a construction and development company. It instituted the Petition dated 9th August 2021 and an evenly dated application by way of Notice of Motion contesting any further application of Section 129(4) of Environment and Co-ordination Management Act, (EMCA) (hereinafter referred to as ‘the impugned section’), by the National Environment Tribunal, (hereinafter referred to as the ‘NET’ or ‘1st Respondent’) on account of the said Section having been repealed.
2. The Petitioners asserted that the continued application of the impugned section which enforces automatic stop orders on any construction or development upon a party filing an appeal before the NET was grossly unlawful and prejudicial to developers’ right to property, the right to fair hearing, protection from discrimination and the right to fair administrative action.



3. On the foregoing factual basis, the Petitioner sought interim reliefs in the application and in the main Petition, sought the following prayers: -
 - a. An order of Certiorari be and is hereby issued, to bring into the High Court and quash the 1st Respondent's illegal, unprocedural and irregular order purporting to apply the stayed and suspended provision of the EMCA.
 - b. An Order of prohibition be and is hereby issued to bring into the High Court and stop the 1st Respondent from purporting to apply the stayed and suspended provision of section 129(4) of the EMCA.
 - c. A declaration be and is hereby issued that the illegal, unprocedural and irregular order by the 1st Respondent on 5th August purporting to apply the stayed and suspended section 129 of the EMCA violated the Petitioner's constitutional rights under Articles 27, 40, 47 and 50.
 - d. Costs of this Petition; and
 - e. Any other or further reliefs as this Honourable Court may deem fit to grant.

The 1st Interested Party's Preliminary Objection:

4. The 1st Interested Party opposed the Petition through the Preliminary Objection dated 1st September 2021. He sought to strike it out in limine on the following grounds: -
 1. THAT this Honourable Court is divested of the requisite territorial and subject matter jurisdiction pursuant to Article 162(2)(b) as read with Article 165(5) of *the Constitution* of Kenya as read with section 13 of the *Environment and Land Court Act*.
 2. That the Petition flies in the face of sub-judice principle as it has been presented during the pendency of the Nairobi HC Petition No. E011 of 2020, Nairobi HC Petition No. 251 of 2017 and Nairobi High Court Petition No. 268 of 2018 all of which address the issue of constitutionality of Section 129(4) of the Environment Management and Coordination Act, 1999.

The Submissions

5. The 1st Interested Party supported its case through written submissions dated 16th November 2021.
6. On the first issue of jurisdiction, it submitted that pursuant to Article 162(2)(b) as read with Article 165(5) of *the Constitution*, this Court is debarred from hearing the instant dispute.
7. Support to the foregoing position was sourced from Waste and Environment Management Association of Kenya -vs- County Government of Nairobi and Another (2021) eKLR where the High Court decline jurisdiction on the basis that Environment and Land Court under Section 13 of the Environment and *Land Act* had jurisdiction to hear and determine issues related to the Bill of Rights associated with the environment.
8. As regards the contest on territorial jurisdiction, reference was made to Section 12 of the *Civil Procedure Act* where it requires suits involving immovable property to be instituted in the Courts within the local limits whose jurisdiction the property is situated.
9. On the foregoing, it was submitted that the suit property is in Machakos County and as such the suit ought not to have been instituted in Milimani Law Courts in Nairobi.



10. On the bar of the doctrine of sub-judice, it was submitted that pendency of Nairobi HC Petition No. E011 of 2020, Nairobi HC Petition No. 251 of 2017 and Nairobi High Court Petition No. 268 of 2018 operated as a complete bar to the instant dispute.
11. To that end, reference was made to section 6 of the Civil Procedure Act and the decision of the Supreme Court in Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2020) eKLR where it was observed that it was observed that: -

... A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly, that the suits are between the same parties or representatives.
12. In conclusion, the 1st Interested Party urged the Court to discourage the perpetuation of multiplicity of suits by striking out the Petition.

The 2nd Interested Party's Preliminary Objection:

13. In further opposition to the Petition, London Distillers (K) Limited, the 2nd Interested Party herein, filed the Preliminary Objection dated 1st September 2021. It sought to strike out the Petition on the following grounds: -
 1. To the extent that the Petitioner has contemptuously instituted the instant Petition in contravention of the subsisting Orders issued by Honourable Mr. Justice Mbogo on 23rd April 2020 in Machakos JR Appl. No. 75 of 2019 Erdermann Property Limited -vs- National Environment Management Authority & Others forbidding it from ever challenging the applicability of section 129(4) of the Environment Management and Coordination Act No. 8 of 1999 in any proceedings whatsoever except with leave of the Court, the same is incompetent, a nullity in law and an abuse of the processes of this honourable Court.
 2. This Honourable Court has no jurisdiction to entertain try and or determine the instant Petition in view of the exclusive jurisdiction of the Environment and Land Court Act as underpinned by Article 162(2)(b) of the Constitution of Kenya, 2010 and sections 4 and 13 of the Environment and Land Court Act.
14. In support of its case, the 2nd Interested Party filed the Affidavit of Pushpinder Singh Mann, its Administrative Manager, deposed to on 1st September 2021. It also filed written submissions dated 16th November 2021.
15. In the affidavit Mr. Mann deposed that on the same day the Petitioner filed the instant application, it also instituted parallel proceedings before the Environment and Land Court in Machakos vide JR No. E16 of 2021 Erdermann Property Limited -vs- National Environment Tribunal & Others where it challenged the applicability of the impugned provision and sought the same stay orders which were declined.
16. It was his case that the Petitioner was abusing the Court process by filing parallel proceedings and obtaining ex-parte stay Orders on the basis of misrepresentations concealment of material facts. He referred to Machakos JR. Application No. 75 of 2019 Erdermann Property Limited -vs-



National Environment Management Authority & Others where Mbogo, J. issued an express Order forbidding the Applicant from ever challenging the applicability of Section 129(4) of the Environment Management and Co-ordination Act.

17. He deposed that the foregoing Orders have never been stayed and as such, the instant Petition and application are fatally incompetent.

The Submissions:

18. In its written submissions dated 16th December 2021, the 2nd Interested Party largely reiterated its case as in the depositions of Mr. Pushpinder Sing Mann.
19. It submitted that the Petitioner was essentially forum shopping by filing parallel proceedings.
20. In a bid to demonstrate impropriety of the Petitioner's conduct, reference was made to the Stay Orders issued in JR. Application No. 75 of 2019 Erdermann Property Limited -vs- National Environment Management Authority & Others, where the Learned Judge upon considering the facts, found that the Petitioner herein was seeking a favourable forum in a case where the Environmental Impact Assessment Licenses issued by National Environmental Tribunal were the subject of challenge by the very Tribunal.
21. On the issue of this Court's jurisdiction, it was submitted that the decision by the Petitioner to institute this Petition in this Court was a violation of Article 162(2)(b) of *the Constitution* as read with section 13(2) of the *Environment and Land Court Act*.
22. Deriving from the foregoing, and the Supreme Court decision in Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank & 2 Others, it was urged that this Court is divested of jurisdiction to hear the instant dispute.

The Petitioner's response:

23. In opposition to the Preliminary Objections, the Petitioner filed written submissions dated 27th October 2021.
24. It was submitted that the Petition raised constitutional issue and the claim that the Court lacks territorial and subject matter jurisdiction was misconceived and unfounded in law.
25. It was the Petitioner's case that it had demonstrated violation of constitutional rights under Articles 27, 28, 40 and 47 by the 1st Respondent by purporting to apply a stayed and suspended provision of Section 129(4) of the EMCA.
26. In reference to this Court's decision in RC -vs- KKR (2021) eKLR, the Petitioner maintained that it had established a clear manifestation of contravention or contravention by the 1st Respondent and appropriate for determination by this Court.
27. It was its case that in Constitutional Petition No. E011 of 2020 Harpece General Contractors Limited -vs- NET which the Respondent seeks to rely on for the claim of sub-judice, was also before this Court.
28. It was further its case that Nairobi HC Petition No. 251 of 2017 Okiya Omtatah -vs- National Assembly of Kenya and HC Petition No. 251 of 2017 which challenges the amendments to Section 129(4) of EMCA are all before Court.
29. On the foregoing, the Petitioner submitted that the 1st Interested Party could not be heard alleging that this Court does not have jurisdiction.



30. On the aspect of territorial jurisdiction, it was submitted that the violation that is the subject of this suit was committed by NET which sits in Nairobi and all the parties involved are based in Nairobi.
31. The Petitioner relied on the decision in *Ali Dima Duba & Another -vs- Speaker County Assembly of Isiolo & Another* (2020) eKLR where it was observed: -

The Constitution of Kenya under Article 165(3)(a) provides that subject to clause (5) the High Court shall unlimited original jurisdiction in criminal and civil matters. Under the aforesaid Article there is no limitation of the High Court jurisdiction on the basis of territorial jurisdiction as urged by the Respondents.
32. In rebutting applicability of the principle of sub-judice the Petitioner referred to section 6 of the *Civil procedure Act* and the decision in *Republic -vs- Registrar of Societies – Kenya & 2 Others Ex-parte Moses Kirima & 2 Others* (2017) eKLR and submitted that all the necessary principles operationalizing the doctrine were not met in the case.
33. It was its case that in Nairobi Petition No. 251 of 2017, *Okiya Omtatah -vs- National Assembly of Kenya*, the Petitioner challenges the process of the amendment of Section 129(4) of EMCA by Section 29 of the *Prevention of Torture Act*, 2017 and that those amendments were stayed by the High Court in 2017.
34. It submitted that while the foregoing Petition was pending, Parliament introduced another amendment to Section 129(4) of the EMCA through Statute Law (Miscellaneous Amendment) Act No. 4 of 2018, but those amendments were equally stayed in High Court in Petition No. 268 of 2017 filed by Katiba Institute.
35. It was its case that the two Petitions have already been consolidated and are pending before the High Court.
36. In respect to Petition No. E011 of 2020, *Harpece general Contractors Limited -vs- National Environment Tribunal*, it was its case that the Petitioner raised questions as to violation of fundamental rights and freedoms through application of a repealed law, the scope and extent of the interpretation of the exercise of constitutional authority delegated to the National Environment Tribunal and the legal import and effect of a suspension of a repealing legal provision on the repealed provision.
37. Based on the foregoing, the Petitioner submitted that the matters raised in the instant Petition are different and parties involved in all the three different matters are also different.
38. The Petitioner maintained that Section 129(4) of the EMCA is now repealed and that the provision is null and void.
39. Further ad more important was the submission that that once an amendment has been stayed, the law does not revert to the position that was before the amendment.
40. It was its case that Parliament must take an action in order to resuscitate, revive or re-enact 129(4) of the EMCA, 1999.
41. The Petitioner relied on the decision in *Civil Appeal No. 291 of 2021, IEBC vs- David Ndi & Others* to buttress the foregoing position.
42. On the issue whether the Petitioner is barred from challenging the applicability of Section 129(4) of EMCA, it was submitted that the dispute in *Machakos JR App Np. 75 of 2019, Erdermann Property Limited -vs- National Environment Management Authority & Others* arose from NET 21 of 2019



where the 2nd Interested Party was challenging the decision of the 1st Interested Party to issue the Petitioner with a licence to develop a property.

43. It was its submission that in the case, Machakos JR App No. 75 of 2019, judgment had been rendered dismissing the 2nd Interested Party's appeal.
44. The Petitioner hastened to point out that the orders in Petition E011 o 2020, Harpece General Contractors Limited -v- National Environment Tribunal, suspending applicability of Section 129(4) of EMCA were issued long after the orders in JR App No. 75 of 2019.
45. The Petitioner was emphatic that the Petition was properly before this Court and urged the Court to dismiss the Preliminary Objections.

Way Forward:

46. This Court has considered this matter with a lot of patience. There is no doubt that this matter in a way or so has a bearing to the matters raised in High Court of Kenya at Nairobi in Constitutional Petition No. 251 of 2017, Okiya Omtatah -vs- National Assembly of Kenya and the High Court of Kenya at Nairobi in Petition No. 268 of 2017, which two matters have already been consolidated and are pending before this Court. There is also High Court of Kenya at Nairobi Constitutional Petition No. E011 of 2020 Harpece General Contractors Limited -vs- NET which is also pending before this Court.
47. All the three suits referred above as well the instant one are all before this Court, the High Court. They all, in a way or the other, raise issues on Section 129(4) of the EMCA.
48. It is, therefore, a good case management practise to have all such related matters be considered by one Court.
49. To that end, this Court makes the following orders: -
 - a. This matter shall be handled by the Court which is seized of the High Court of Kenya at Nairobi Constitutional Petition No. 251 of 2017 and High Court of Kenya at Nairobi Constitutional Petition No. 268 of 2017 (as consolidated).
 - b. The High Court of Kenya at Nairobi Constitutional Petition No. E011 of 2020 Harpece General Contractors Limited -vs- NET shall also be mentioned alongside the above matters for further Court's direction.
 - c. This matter shall be listed before the Presiding Judge for appropriate orders and directions.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Ruling delivered Virtually in the presence of:

N/A for The Petitioner

N/A for the Respondents

Mr. Tiego Learned Counsel for the 2nd Interested Party

