



REPUBLIC OF KENYA



Noor v Airtel Networks Kenya Limited & 4 others (Civil Case E002 of 2024) [2024] KEHC 13564 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL CASE E002 OF 2024
JN ONYIEGO, J
NOVEMBER 4, 2024**

BETWEEN

ABDINASIR IBRAHIM NOOR PLAINTIFF

AND

AIRTEL NETWORKS KENYA LIMITED 1ST DEFENDANT

JOHN KIEMA MUTIE 2ND DEFENDANT

COUNTY GOVERNMENT OF MANDERA 3RD DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH
DEFENDANT**

COMMUNICATIONS AUTHORITY OF KENYA 5TH DEFENDANT

RULING

1. The plaintiff through the firm of B.T. Atancha & Co. Advocates instituted this suit by way of a plaint filed contemporaneously with a notice of motion all dated 24.06.2024. The plaintiff sought for the following prayers:
 - i. A declaration that the construction of the telecommunication booster by the 1st and 2nd defendants in Aresa Town, Libehia ward within Mandera East Constituency is unlawful and unconstitutional for posing a security threat to the surrounding community, failing to adhere to the principles of public participation and causing environmental pollution.
 - ii. An order compelling the 1st and 2nd defendants to cease the construction and operation of the telecommunication booster in Aresa Town, Libehia ward within Mandera East Constituency until all the legal requirements, including public participation, ensuring environmental safeguards and obtaining necessary authorizations are fulfilled.



- iii. An order directing the 3rd defendant to ensure adequate security measures are put in place to safeguard the area residents from banditry attacks.
 - iv. General damages for environmental contamination and health risks caused to the plaintiff and his community.
 - v. Costs of and incidental to this suit.
 - vi. Interest on (iv) and (v) above at court rates from the date of filing this suit until payment in full.
 - vii. Any other and such further relief as this Honourable Court may deem just and fair to grant.
2. The suit is anchored on the fact that the 1st defendant has set about construction of a booster within the plaintiff's locality without involving the area residents and other stakeholders in contravention of article 10 of *the constitution*. Additionally, that the 1st defendant did not conduct an Environmental Impact Assessment (EIA) to ascertain the potential impacts of the booster to the community and the neighbouring environment. It was asserted that due to the said construction, the same had attracted birds and other animals whose refuse is contaminating the residential areas of the plaintiff thereby causing environmental pollution.
3. In response, the 3rd defendant filed grounds of opposition dated 08.07.2024 urging that the suit did not disclose any reasonable cause of action against the 3rd defendant. That the plaintiff did not demonstrate that he has an identifiable legal interest or duty in these proceedings. In seeking that the court dismisses this suit, it was urged that the same is a gross abuse of the court process.
4. The 3rd defendant further filed a statement of defence dated 20.08.2024 denying the averments contained in the plaint while contending that its joinder was not necessary. It urged this court to dismiss this suit with costs.
5. On the other hand, the notice of motion sought for the following orders:
 - i. Spent.
 - ii. That a temporary injunction do issue restraining the 1st and 2nd defendants, their agents, servants or any other person acting on their behalf from continuing with the construction of booster in Aresa Town, Libehia Ward within Mandera East Constituency pending the hearing and determination of this application and the main suit.
 - iii. That an order be granted directing the 1st and 4th defendants to conduct public participation and an Environmental Impact Assessment (EIA) before proceeding with any further construction of the booster.
 - iv. That costs of this application be provided for.
6. The application was supported by an affidavit of the applicant reiterating the facts as enumerated on the plaint.
7. Upon considering the pleadings, the court certified the matter urgent and further directed that the same be served upon the defendants for an inter partes hearing on 18.07.2024.
8. When the matter came up for inter partes hearing, the court ordered that:
 - i. A temporary injunction to issue restraining the 1st and 2nd defendants, their agents, servants or any other person acting on their behalf from continuing with the construction of a booster



in Aresa Town, Libehia Ward within Mandera East Constituency pending the hearing and determination of this application.

- ii. That the 3rd respondent to serve their grounds of opposition upon the petitioner within 2 days.
 - iii. That interpartes hearing be on 26.07.2024.
9. Meanwhile, an intended interested party by the name of ATC Kenya Operations Limited sought via an application dated 23.07.2024 to be enjoined in the suit. The intended interested party averred that it was currently undertaking the construction and commissions of the impugned base receiver station and therefore, it was mete and just that it be enjoined in the suit. Noting that no party was in objection to the inclusion of the intended interested party in the suit, the said application was thus allowed.
10. The interested party filed a replying affidavit sworn on 25.07.2024 by John Kiema Mutie, the foreman of the impugned construction site thus deponing that he had been contracted by ATC Kenya Operations Limited to build the aforementioned site in the area known as Aresa Town, Libehia Ward within Mandera Constituency. He urged that prior to commencing the work, all the necessary documents were procured as per the requirement by the law. He averred that the question over the alleged failure to acquire the requisite license for construction of the booster on the impugned site is purely a matter within the jurisdiction of the Environment tribunal.
11. Additionally, before the application could be settled down for hearing, the interested party filed a notice of preliminary objection dated 18.07.2024 on the grounds that:
- i. The jurisdiction of this Honourable court has not been invoked properly by dint of sections 125,126 and 129 of the Environment Management and Coordination Act.
 - ii. The suit relates to a decision that was made by the National Environmental Management Authority, hereafter NEMA and as such, it should be heard and determined by National Environment Tribunal at first instance. That this was well established by the Court of Appeal in the case of Kibos Sugar Ltd and Others vs Benson Ambuti Adegga and others (2020) eKLR.
 - iii. The application dated 24.06.2024 is thus bad in law, defective, an abuse of the court process and the same ought to be dismissed with costs.
12. The court directed that the preliminary objection be determined first and that parties file their respective submissions.
13. The plaintiff/applicant vide submissions dated 12.09.2024 came up with one issue for determination to wit: Whether the court has jurisdiction to hear and determine the petition in view of the preliminary objection raised by the 2nd respondent and the interested party.
14. It was submitted that the suit not only pointed out the issue of environmental impact assessment but also brought out the issues of security posed by the construction of the said telecommunication booster to the locals. That the issues are constitutional in nature and the same notwithstanding, the alleged license presented before this court was procured much later after the construction had commenced. Reliance to support the same was placed on the case of Taib Investment Ltd vs Fahim Salim Said & 5 others where the court held that where environmental issues and development in a suit and the numerous tribunals or bodies cannot deal with the same separately, the court has jurisdiction to determine the issues before the court.
15. That the 2nd defendant/respondent ignored the due procedure provided by the law when it did not conduct public participation before commencing the project. To that end, reliance was placed on the case of Ken Kasinga vs Daniel Kiplangat Kirui & 5 others Nakuru, ELC Constitution Petition No.



50 where the court was of the view that where a procedure for the protection of the environment is provided by the law and the same is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment.

16. That it is trite that section 129(1) of EMCA only grants the Tribunal jurisdiction on matters where the parties have applied for Environmental Impact Assessment (EIA) and not on who is objecting to grant the same. This court was therefore urged to dismiss the notice of preliminary objection and settle down the matter for hearing.
17. The 2nd defendant and the interested party filed joint submissions dated 28.08.2024 wherein it was submitted that this court lacked the requisite jurisdiction to determine the matter. That the plaintiff ought to have registered his displeasure at the National Environment Tribunal instead of this court. They relied on the case of *Kibos Distillers Limited & 4 others vs Benson Ambuti Adegwa & 3 others* [supra] to reiterate the Court of Appeal's finding which underscored the need to exhaust alternative dispute mechanisms provided before approaching the court.
18. That the plaintiff did not demonstrate that he had exhausted the available mechanisms provided and therefore, this court could not move an inch as its bereft of the requisite jurisdiction. This court was therefore urged to dismiss the suit with costs.
19. The 4th respondent filed submissions dated 29.08.2024 urging that this court lacks the jurisdiction to determine this matter. While relying on sections 129(1) (2) of EMCA, the 4th respondent stated that the right jurisdiction for the filing of this suit ought to be the Environment Tribunal in view of the nature of concerns raised. Reliance was placed on the case of *Republic vs Cabinet Secretary, Ministry of Education, Science & Technology & 3 others ex parte John* [2017] eKLR to urge that this court lacks jurisdiction to deal with the matter.

Analysis and determination.

20. The Court has carefully read and considered the plaint, the notice of motion, responses by the parties, the preliminary objection by the interested party and the written submissions filed. The court thus finds that it has been called upon to strike out the suit at the preliminary stage on the grounds already listed above in order to save on the precious judicial time. What therefore is a preliminary objection?
21. The case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed 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”.
22. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law which must be pleaded at the earliest opportunity possible. Indeed the locus classicus case on the question of jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (LTD (Kenya))* (1989) KLR where the Court held:

“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.”

23. *The Constitution* has, on its part, elaborately set out the jurisdiction of the High Court and states in Article 165(3) that:
3. Subject to clause (5), the High Court shall have —
 - a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;(d)jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—(i)the question whether any law is inconsistent with or in contravention of this Constitution;(ii)the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;(iii)any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and(iv)a question relating to conflict of laws under Article 191; and(e)any other jurisdiction, original or appellate, conferred on it by legislation.(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.”
24. Pursuant to Article 162(3) of *the Constitution*, Parliament then enacted the *Environment and Land Court Act* Section 13(1) of which outlines the ELC’s jurisdiction.
25. Section 13, the *Environment and Land Court Act* provides 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.
26. Section 13 (2) (e) provides that jurisdiction of the court extends to ‘any other dispute relating to the environment and land’ the same ought to be understood within the context of the court’s jurisdiction



to deal with disputes connected to environment and the use and occupation of and title to land as captured under article 162 (2) (b) as well as the preamble to the *Environment and Land Court Act* which reads as follows: -

“An Act of parliament to give effect to Article 162 (2) (b) of *the constitution*; to establish a superior court to hear and determine disputes relating to environment and the use and occupation of and title to land, and to make provisions for its jurisdiction functions and powers and for connected purposes.”

27. The foregoing notwithstanding, what is in dispute is whether the cause of action in this suit which the plaintiff urges that compounds issues of security and the right to clean environment and apart from the acquisition of a license way after the impugned project should be dealt with by this court.

28. Even though the provisions are clear that jurisdiction in environment and in land-related matters belongs to an ELC court, I note that the said provisions are less clear on what “land-related” means. In my view therefore, the determination on what land related means has been left for courts to interpret. In order to make a determination as to whether the issues before this court are land related, I choose to rely on the case of *Suzanne Achieng Butler & 4 others vs Redhill Heights Investments Limited & another* [2016] eKLR, where the court stated that;

“In all honesty, it would not be possible for such direction to come from *the Constitution* or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.

23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

25. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

26. In my view, the following factors are significant in determining the nature of the contract:

- a. The language of the contract;
- b. The nature of the business of the vendor;
- c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;
- d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and the remedies sought by the Plaintiff” (emphasis mine).



29. Guided by the above case law, the plaintiff's contest lies mainly on the fact that the 1st defendant has set about construction of a booster within the plaintiff's locality without involving the area residents and other stakeholders in contravention of article 10 of *the constitution*. Additionally, that the 1st defendant did not conduct an Environmental Impact Assessment (EIA) to ascertain the potential impacts of the booster to the community and the neighbouring environment. It was asserted that due to the said construction, the same had attracted birds and other animals whose refuse is contaminating the residential areas of the plaintiff thereby causing environmental pollution
30. From the above, it is clear that the plaintiff's main concern with the fact that the telecommunication booster being erected by the 1st defendant has been done without due consideration of the environment and the impacts the said project would have on the locals. In as much as the plaintiff argues that prior to the project being commenced, public participation was not conducted, it is trite that this is not the predominant issue. It is therefore clear that the plaintiff's claim lies elsewhere in this case ELC or the environment tribunal thus this court therefore has no jurisdiction and henceforth it must down its tools.
31. Accordingly, it is my holding that the preliminary objection is merited and as a consequence of the foregoing, I uphold it and strike out the suit with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE

