



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 22 OF 2019

DAVID MEREKA.....1ST PLAINTIFF

JOHN MBOTE..... 2ND PLAINTIFF

Vs

DIRECTOR GENERAL, NEMA.....1ST DEFENDANT

AFRIMAC NUT COMPANY LIMITED.....2ND DEFENDANT

MAZINGIRA & ENGINEERING

CONSULTANTS LIMITED.....3RD DEFENDANT

RULING

1. On the 4/7/19 the Plaintiffs filed this suit together with a Notice of Motion dated the 3/7/19. In the plaint the Plaintiff sought the following orders;

- a. The 2nd Defendant stops immediate operations of charcoal briquettes plant on LR NO NGINDA/SAMAR/BLOCK11/955, Murang'a South Sub County, Murang'a County.
- b. The EIA licence No PR/1239/0054554 dated the 6/2/2019 issued to the 2nd Defendant be cancelled and revoked.
- c. That the 2nd Defendant's do decommission the plant
- d. That the 2nd Defendants give an undertaking to the Plaintiffs and the neighbours with respect to any potential damage to their health that their animals and the environment arising out of the operations of the said plant.
- e. That the Plaintiffs be awarded costs of the suit
- f. Any other relief that this honourable Court may deem fit to grant.

2. Simultaneously, the Plaintiffs filed a notice of motion on even date and sought orders interalia that pending the hearing of the application/suit the Court be pleased to issue an order stopping the 2nd Defendant its agents and or proxies or any other person from operating and or running the charcoal briquettes on the suit land and that the Environmental Impact Assessment (EIA) license be revoked and the plant be decommissioned.

3. On the 18/7/19 the 1st Defendant raised a Preliminary Objection on the entire proceedings on the following grounds;

- a. The jurisdiction of this honourable Court has not been invoked properly as stated under Section 129 of the Environment Management and Coordination Act.
- b. This suit relates to a decision that was made by the National Environmental Management Authority (NEMA) and as such it should be heard and determined by the National Environmental Tribunal (NET) at the first instance.
- c. The application dated the 3/7/19 filed herein are thus bad in law an abuse of the Court process and the same fail from the

threshold.

4. On the 6/8/19 the Plaintiff's filed an amended complaint and sought the following orders;

- a. A declaration that the Plaintiffs right to clean and healthy environment has been violated and is being violated by the 2nd Defendant.
- b. A declaration that the Environment Impact Assessment Report No NEMA PR/5/2/MRG/008/1239 submitted by the 3rd Defendant and executed on the 13/12/2018 was obtained without public participation and therefore null and void.
- c. The 2nd Defendant stops immediate operations of the charcoal briquettes plant on the said suit land
- d. The EIA licence No PR/1239/00554554 dated the 6/2/19 issued to the 2nd Defendant be cancelled and revoked
- e. That the 2nd Defendant do decommission the plant.
- f. That the 2nd Defendant give an undertaking to the Plaintiffs and the neighbours with respect to any potential damage to their health that of their animals and the environment arising out of the operations of the said plant.
- g. That the Plaintiffs be awarded costs of this suit.
- h. Any other or other relief that this honorable Court may deem fit to grant.

5. The effect of this amendment is that the Plaintiffs have abandoned their claim on the specific orders in the complaint filed on the 4/7/19 and adopted the claim relative to the prayers in the amended complaint dated 5/8/19.

6. The Plaintiffs filed a Replying Affidavit in response to the Preliminary Objection dated the 18/7/19 which the deponent stated that they are entitled to a clean and healthy environment can only be granted by this Court and not NET. That Section 3(3-5) of EMCA empowers to the Court to make a determination where a right to clean and healthy environment is threatened. That the Plaintiffs had filed an application with NET which was withdrawn vide a notice of withdrawal dated the 1/7/19. The Plaintiffs relied on the case of **Hosea Kiplagat & 6 others Vs NEMA & 2 others (2015); Patrick Njenga Mburu & 98 others Vs NEMA & 6 others (2019) EKLK; Taib Investment Limited Vs Fahim Salim Said & 5 others (2016) EKLK.**

7. On the 16/9/19 the 2nd and 3rd Defendant filed a Notice of Preliminary Objection against the Plaintiffs suit on the following grounds;

- a. The Defendants shall aver that the issues raised in the suit specifically touching on granting or denial of the EIA licence over the 2nd Defendant project squarely fall at the NET as stipulated under section 129 (1) and (2) of the EMCA. The Court is therefore clothed with Appellate jurisdiction only and hence should not entertain the Plaintiffs back door Appeal.
- b. The issue of approval or denial of the change of use of the suit property can only be addressed through an Appeal to Liaison committee of the approving authority, Muranga County Government and therefore the honourable Court does not have jurisdiction to entertain the matter.

8. Simultaneously, the 2nd and 3rd Defendants filed their statement of defence on even date in which they denied the claims of the Plaintiffs. It contended that the EIA licence was granted lawfully after all conditions were met including but not limited to public participation, Environment and social impact assessment report, mitigation measures were provided before final approval was given by NEMA. It admits that whilst commissioning and testing the plant in March 2019 one of the pipes malfunctioned causing blockage and emission of smoke. That the blockage has been rectified. That it shut down the plant and it has not resumed operation. That the plant is not harmful or hazardous to the environment. Finally, that the jurisdiction of the Court is not admitted as it is a matter that should be heard by the NET and not the Environment and Land Court that enjoys Appellate jurisdiction over the decisions of NET.

9. In keeping with the overriding objectives of the Court, the Court directed that the two Preliminary Objections be heard simultaneously.

The written submissions

10. As to whether the Court's jurisdiction has been invoked properly, the 1st Defendant submitted that the suit is against the decision of NEMA that issued the license on the 6/2/19. The Plaintiffs are aggrieved with the said decision and is the subject of the suit. Section 125 of EMCA establishes the NET whose mandate is to hear disputes arising from the decisions of NEMA on issuance denial or revocation license. Further that Section 129 (1) (a) of EMCA confers jurisdiction to NET to adjudicate over any dispute arising from the issuance of licence by the NEMA. In this case the license was issued to the 2nd Defendant on the 6/2/19 and the Plaintiffs if aggrieved by the issuance of the licence ought to have commenced an Appeal before the NET within 60 days after the occurrence of the event (read granting of the EIA licence) as provided by the aforementioned section.

11. The 1st Defendant submitted that entertaining this suit without exhausting the mechanisms provided in statute will be tantamount to enlarging the jurisdiction of the Court through judicial innovation or craft.

12. That the forum for any dispute arising out of a decision of NEMA is an Appeal to the NET which is a Court of first instance (original jurisdiction). In addition, it submitted that the reliefs sought in the suit can be granted by NEMA in accordance with Section 129(3) of EMCA. That the Environment and Land Court Act under Section 13(4) enjoys Appellate jurisdiction to the Environment and Land Court over decisions of the Subordinate Courts or local tribunals in respect to matters falling within the ambit of Article 42 of the Constitution.

13. In conclusion the 1st Defendant submitted that the suit should fail.

14. In support of its Preliminary Objection dated the 13/9/19 the 2nd and 3rd Defendants submitted that the 2nd Defendant acquired the EIA license under the EMCA Act and the requisite permits under the Physical Planning Act. That Section 125 of E MCA establishes the NET. Section 129 (1) of EMCA provides that a person aggrieved by the decision in respect to grant, denial transfer or revocation of a licence inter alia may within 60 days after the occurrence of the event against which he is dissatisfied Appeal to the NET. Under 129 (2) the Act enumerates the decisions that are subject to Appeal to Net as including that of the Director General, the Authority, or committees of the authority or its agents.

Upon Appeal the NET may confirm, set aside or vary the decision in question and or exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the Appeal was brought. Section 130 (1) provides a period of 30 days within which a person aggrieved by the decision of NET may Appeal to the High Court (read ELC).

15. Further the 1st and 2nd Defendants contend that the dispute involves the recognition observance or enforcement of rights or obligations conferred by NEMA in accordance with EMCA. That the suit arises from the issuance of the EIA licence on the 6/2/19 which the Plaintiff claims that they were not consulted in the preparation of the report and pray that the project report be nullified and EIA licence be revoked and cancelled. That to that extent, the remedy is an Appeal in the NET which has provided adequate and sufficient reliefs under Section 130 of EMCA. That Section 162 (2) of the EMCA provides for the determination of the right and liability and states that all questions on any matters relating to the Act shall be determined by NET.

16. They contended further that the prayers in the plaint do not contain any claim that the act of granting the licence infringed on the Plaintiffs right to clean and healthy environment which is protected under Art 42 of the Constitution nor is there a writ of certiorari sought to quash the decision of NEMA. That this suit is an Appeal of the NEMA decision without subjecting themselves to the right for a, which is the NET. This suit ought to have been filed after the determination of the dispute by the NET. To buttress their point further they relied on the case of **Joseph Umino & Anor Vs NMEA and Africa Plysack Limited (2014) ECLR** where the Court interpreted art 70 of the Constitution as

“ the word, in addition, should be read to mean that the Constitutional redress should be resorted to only where the other available remedies are not efficacious or adequate Constitutional redress is in addition not a substitute to the other legal remedies.”

17. In respect to the approval of change of user, they reiterated that section 13 of the Physical Planning Act No 6 of 1996 states that any person aggrieved by a decision of the Director concerning any physical development plan and related matters may within 60 days of receipt by him of notice of such decision Appeal to the liaison committee in writing against the said decision.

18. In conclusion they submitted that jurisdiction of the Court goes to the root of the matter which cannot be remedied by application of the discretion of the Court. That in this case the Plaintiffs have disregarded the forum provided by the EMCA and the Physical Planning Act in seeking redress for their grievances. That the Court does not possess original jurisdiction to entertain the matter.

19. In opposing the Preliminary Objections the Plaintiffs submitted that the Defendants have averred that the issue before the Court is pegged on the issuance of the EIA license issued on the 6/2/19 and which can only be adjudged by the NET and argues that the Plaintiff ought to have exhausted the remedies provided by statute. The Plaintiffs submitted that the matter before the Court relates to the Plaintiffs right to clean and healthy environment under Art 42 as encapsulated in the amended plaint dated the 5/8/19. Prayers a – c of the amended plaint can only be determined by this Court as mandated under section 3(3) of EMCA. That the Plaintiffs have sought a declaration in respect to the right to clean and healthy environment which cannot be granted by the NET. The Plaintiffs relied on the decision of the Court in **Patrick Njenga Mburu & 98 others Vs NEMA & 6 others (2019)** which affirmed the decision in Hosea Kiplagat.

20. That the issues raised in the amended plaint fall outside the jurisdiction of the NET and relates to environmental pollution and development which in any event this Court has the jurisdiction to entertain the suit as decided in the case of **Taib Investments Limited Vs Fahim Salim Said & 5 others (2016) ECLR** .

21. The Plaintiffs urged the Court to find that the Preliminary Objections are misplaced, bad in law and calculated to waste the Courts time and should be dismissed with costs.

The analysis and determination

22. In order to effectively deal with the matters relating to Preliminary Objections the Court will endeavor to determine the two Preliminary Objections jointly in this ruling. The common objections in these Preliminary Objections are; jurisdictions of the Court vis-à-vis the procedure prescribed for Appeals to the NET; the approval or denial of change of user of the suit property by the Liaison Committee (Physical Planning) of the Murang'a County Government; and that the application dated the 3/7/19 is bad in law and is an abuse to the process of the Court;

23. The classical case in the definition of a Preliminary Objection is in **Mukisa Biscuits Manufacturers Ltd. ...Vs...West End Distributors Ltd. [1969] E.A. 696**, where the Court held that:-

“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”.

Further **Sir Charles Newbold** in the same case stated as follows;

“The first matter relates to the increasing practices of raising points which should be argued in the normal manner quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises pure points of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained and if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but to unnecessarily increase costs and on occasion confuse the issue. The improper procedure should stop.”

24. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

25. Where the issue of a Court’s jurisdiction is raised, the Court ought ordinarily to determine such issue at the earliest opportunity. This is because jurisdiction is everything and without jurisdiction, a Court must down its tools at once. In the case of **the Owners of the Motor Vessel “Lillian SS” -vs- Caltex Oil Kenya Limited [1989] KLR**, Nyarangi, J.A (as he then was) stated:

“...I think 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 obligated 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 business for a continuation of proceedings pending other evidence. It lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

26. In the Supreme Court decision in the case of **Samuel Kamau Macharia Vs Kenya Commercial Bank & 2 others CA No 2 of 2011** the Court held inter alia that;

“ a Court’s jurisdiction flows from either the constitution or legislature or both.”

27. The dispute in this case stems from the licensing of the 2nd Defendant by the 1st Defendant to operate a charcoal briquette plant on the suit land. The Plaintiffs aver that the operation of the plant by the 2nd Defendants is harmful to the environment and is violating their right to clean and healthy environment. In addition, they allege that the licence was issued improperly on account of want of public participation and that the 2nd Defendant is in breach of the terms of the licence in operating the plant. The Defendants have denied the allegations and contend that the licence was obtained legally and all the processes taken in consideration and that the plant to the contrary is not polluting the environment. They have argued inter alia that this Court is bereft of jurisdiction to entertain the matter because the right forum for the determination of such a dispute is the NET and not this Court.

28. I shall now examine the jurisdiction of the Court and the NET in turns.

29. The Environment and Land Court established under Article 162 (2) (b) of the Constitution derives its jurisdiction from the Constitution which provides that: -

(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to-

(a)

(b) The environment and the use and occupation of, and title to, land

30. In exercise of that mandate Parliament enacted the Environment and Land Court Act No. 19 of 2011. Section 13 of the Environment and Land Court Act sets out the jurisdiction of the Court and provides as follows:-

“(1) Section 13(1) of the Environment and Land Act, 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 of fundamental freedom relating to land under Articles 42 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.

(5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

(a) Interim or permanent preservation orders including injunctions;

(b) Prerogative orders;

(c) Award of damages;

(d) Compensation;

(e) Specific performance;

(f) Restitution;

(g) Declaration; or

(h) Costs.

31. Art 42 of the Constitution provides that every person has a right to clean and healthy environment. It states as follows;

“Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70

32. It follows that this Court thereof has jurisdiction to hear and determine Constitutional issues arising under Articles 42, 69 and 70 of the Constitution. relating to the protection of the environment and the enforcement of environmental rights and in particular the right to clean and healthy environment.

33. Section 3 (3) of the EMCA is a replica of Art 42 of the Constitution and empowers the Court to determine matters arising from violation or infringement of rights to clean and healthy environment . 33. Section 129 of the EMCA provides as follows:-

(1) Any person who is aggrieved by—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, Appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

34. A person aggrieved by the decision of the NEMA on grounds cited above may Appeal to the NET.

35. I find that in a case such as this where the reliefs being sought are hybrid in nature I hold the view that the right thing is to apply the predominant purpose test by looking at the most substantial question or issue in controversy. I concur with the Court in the case of **TAIB Investment Limited... Vs...Fahim Salim Said & 5 Others (2016)eKLR**, where it held that:-

“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 those issues.”

36. Given that the Plaintiffs are seeking declaratory orders that their right to clean and healthy environment have been violated alongside their complaint that the license was issued in circumstances contrary to the statutory provisions set out in EMCA that is without the requisite public participation as alleged, I find that the matters complained of by the Plaintiffs do not fall in the jurisdiction of NET. With the exception of the complaint in respect to the licence, I find that the declaratory reliefs being sought by the Plaintiffs cannot be granted by NET. In any event Section 3(3) of EMCA gives the Court power to deal with issues relating to entitlement to a clean and health environment.

37. I am cognizant of the provisions of Art 70 of the Constitution that provide that if a person alleges that a right to a clean and healthy environment recognized under Art 42 has been is being or is likely to be denied violated infringed or threatened the person may apply to a Court for redress in addition to any other legal remedies that are available in respect to the same matter. Looking at the prayers in this case it is the view of this Court that the remedies available at the NET are not efficacious or adequate redress.

38. In answer to the question as to whether the issue of jurisdiction is a point of law, the Court answers that in the affirmative.

39. The issue as to whether or not the 2nd Defendant has obtained approvals for change of user of the suit land is a matter that requires investigation by the Court and therefore fails as a Preliminary Objection.

40. The last objection that the application dated the 3/7/19 is an abuse of the process of the Court cannot be discussed in this Ruling because the application is yet to be heard.

41. In the upshot the two Preliminary Objections are unmerited and are hereby dismissed with costs in favour of the Plaintiffs.

42. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 27TH JANUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

1st – 2nd Plaintiffs/Applicants – Absent

Ms Chumba HB Ms Koskey for the 1st Defendant/Respondent

2nd & 3rd Defendants/Respondents – Absent

Irene and Njeri, Court Assistants