



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MOMBASA

ELC. PETITION NO.41 OF 2019

GEDION KIBINDU & 20 OTHERS.....PETITIONERS/RESPONDENT

VERSUS

KENYA PORTS AUTHORITY.....1ST RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND RESPONDENT

COUNTY GOVERNMENT OF KWALE.....3RD RESPONDENT

THE CABINET SECRETARY MINISTRY

OF INFRASTRUCTURE, HOUSING

& URBAN DEVELOPMENT.....4TH RESPONDENT

RULING

1. This ruling is in respect of the preliminary objection dated 22nd October 2019 by the 1st Respondent that this court lacks the requisite original jurisdiction to hear and determine the dispute herein the same being a dispute concerning the procurement and validity of an Environmental Impact Assessment License where the same does not originate from an appeal from the National Environmental Tribunal (NET).

2. Citing the case of **Owners of Motor Vessel "Lilian S" –v- Caltex Oil (Kenya) Ltd (1989)eKLR**, the 1st Respondent submitted that in view of the fact that there are other forum specifically designated to deal with issues raised in the Petition herein which forums the petitioners overlooked or ignored, this court lacks competence to hear and determine the matter herein. Counsel for the 1st respondent submitted that the issues raised by the petitioners herein do not amount to be issues that can be raised by way of a constitutional petition to be litigated before this court. They relied on the cases of **International Centre for Policy and Conflict & 5 Others –v- Attorney General & 4 Others (2015) eKLR**; **Papinder Kaur Atwal –v-Manjit Singh Amrit, Nairobi Petition No.236 of 2011**; **Re Application by Bahadar (1986) LRC (const)**; **Minister of Home Affairs –v- Bickle & Others (1985) LCR (const)**; and **COD & Another –v- Nairobi City Water & Sewerage Company Limited (2015)eKLR**, and submitted that the petition raises issues that can only be litigated before the National Environment Tribunal in the first instance. It was submitted that the process and procedure for application and issuance of a license is well provided under the Environmental Management and Coordination Act (EMCA) and the Environmental (Impact Assessment and Audit) Regulations 2003. Counsel for the 1st Respondent cited Section 58 of EMCA which provides that any person, before commencing any development of any property, must apply for a license from the National Environment Management Authority (NEMA) by submitting a project report prepared by registered Environment Impact Assessment Expert. The Director General of NEMA is then required to assess the application and submit it to the lead agencies for comments in accordance with Section 60 of EMCA.

3. The 1st Respondent submitted that it complied with the aforesaid requirements and the Environment Impact Assessment License Number 0001206 was issued to it on 7th August 2007. That Section 126 of EMCA establishes NET to hear and determine any complaints raised under EMCA while Section 129 provides for institution of suits in relation to issuance of licenses by providing that any person who is aggrieved by the decision to grant or deny a license or permit 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. Section 130 of EMCA provides that appeals from the Tribunal shall be filed in the Environment and Land Court within 30 days. The 1st Respondent cited the case of **Speaker of National Assembly –v- Njenga Karume (1992) KLR**; **Geoffrey Muthinja & Another –v- Samuel Muguna Henry & 1756 Others (2015) eKLR**; **Taib Investments Limited –v-Fahim Salim Said & 5 Others (2016)eKLR**; **Godfrey Paul Okutoyi –v- Habil Olaka & Central Bank of Kenya (2015)eKLR**; and **Mutanga Tea & Coffee Company Ltd –v- Shikara Limited & Municipal Council of Mombasa (2015)eKLR**

and submitted that the application and the petition herein wholly violates the exhaustion doctrine. That the petition is not one to be determined by this court in the first instance. It was submitted that the petitioners have not exhibited having taken any step in pursuance of the prescribed procedure and have not shown any cognizable reasons for their failure to abide by the stipulated procedure. It is the 1st respondent's submission that the motion, the entire application and the prayers sought therein are prematurely before this court and therefore fatally defective and which defect cannot be remedied by Article 159 (2) (d) of the Constitution.

4. The Preliminary Objection is supported by the 2nd and 4th respondents. The petitioners opposed the objection and submitted that the issues the court has been invited to determine in this case transcend beyond the statutory mandate of the National Environmental Tribunal. That to decline jurisdiction as urged would amount to an act of the court abdicating from its constitutional and statutory mandate. That the violation of rights to a clean and healthy environment leads to the violation of other rights in the bill of rights such as right to life. It was submitted that the determination of violation or threat of violation of any right in the bill of rights falls within the province of this court and that the dispute herein is not only about a license but also raises constitutional issues. Relying on case of **Mohamed Ali Baadi and Others –v- Attorney General & 11 Others (2018)eKLR**, the Petitioners submitted that the Petition is not limited to Section 129 (i) (b) of EMCA, adding that this court has power to hear and determine application 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.

5. I have considered the submissions rendered in support and against the preliminary objection. The main issue in the objection raised is whether this court has no jurisdiction to entertain the suit. The case before this court is a constitutional petition alleging violation of various rights enshrined in the constitution including violation of the right to a clean and healthy environment provided for in Article 42 of the Constitution. There is no denial that the violation of the right to a clean and healthy environment is anchored on the EIA license issued. The National Environmental Tribunal is established by Section 125 (1) of EMCA and its jurisdiction is set out in Section 129. Appeals on the decisions of the Tribunal lay to this court under Section 130. The jurisdiction of this court as given in Article 162 (2) (b) and Section 13 of the Environment and Land Court Act mean that the court can hear any matter related to the environment and land. The petition herein is one such matter. The National Environmental Tribunal does not hear constitutional petitions as its mandate is only to hear appeals on NEMA decisions. NEMA is established under Section 7 of EMCA and its mandate as provided by Section 9 is to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument in the implementation of all policies relating to the environment. Part of this mandate is to grant or deny EIA Licences. A person aggrieved by the decision of NEMA may appeal to NET which can confirm, set aside or vary such decision. As already stated, if a person is aggrieved by decision of NET the Act provides that such a person can pursue a final appeal to the environmental and Land Court. As already stated, Under Section Article 162 (2) (b) of the Constitution, the ELC has the mandate to hear disputes relating to the environment and the use of, and occupation of, and title to land. Section 13(1) of the ELC Act provides that the ELC has both original and appellate jurisdiction to hear all disputes relating to the environment and land. Section 13(2) (a) provides such disputes to include 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 clear that what is set out in paragraph (a) to (d) thereof is not conclusive. The same provides that ELC can hear any other dispute relating to the environment and land. Therefore, unlike the NET, this court is the only one mandated to hear and determine applications for redress for a denial, violation or infringement of, or threats to rights relating to the environment and land.

6. Therefore it is my finding that the preliminary objection raised by the 1st respondent is not merited. The same is hereby dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at MOMBASA this 23rd day of January 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Tindi for petitioners

Ngoya for 1st respondent and holding brief for Ms. Sakami for 2nd respondents

No appearance for 3rd respondent

Yumna Court Assistant

C.K. YANO

JUDGE