



Otieno & another v Homabay County Water And Sanitation Co Ltd & 2 others; County Director of NEMA (Homabay) (Interested Party) (Petition E001 of 2023) [2025] KEELC 5086 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5086 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
PETITION E001 OF 2023
FO NYAGAKA, J
JUNE 25, 2025

BETWEEN

MICHAEL KOJO OTIENO 1ST PETITIONER

EVANS OTIENO OLOO GOR 2ND PETITIONER

AND

HOMABAY COUNTY WATER AND SANITATION CO LTD 1ST RESPONDENT

COUNTY EXECUTIVE SANITATION COMMITTEE MEMBER FOR ENVIRONMENT, WATER AND SANITATION 2ND RESPONDENT

LAKE VICTORIA SOUTH WATER WORKS DEVELOPMENT AGENCY 3RD RESPONDENT

AND

COUNTY DIRECTOR OF NEMA (HOMABAY) INTERESTED PARTY

RULING

1. The 2nd Respondent filed a Notice of Preliminary Objection to the suit on the following grounds;
 1. That this Honourable court lacks Jurisdiction to hear this dispute pursuant to the section 129 of the Environment Management and Coordination Act.
 2. That this instant suit (sic) fails to disclose any constitutional violation, offends the doctrine of exhaustion and as such the same is incompetent and fatally defective and ought to be dismissed in limine.
2. The Objection came hot on heels of the instant Petition dated 19th April 2023 instituted the same date. By it, the Petitioners pleaded that on 19th of January 2023 members of the public raised That there



was discharge of wastewater emanating from a water treatment plant to the effect that it had a bad smell. The petitioners, together with the Member of the County Assembly of the affected Ward and the Managing Director of Homawasco visited the place. They found people using the waste treatment plant water mixing with water from depilated pipes and the sewer, which were extremely harmful to the residents. The respondents were under duty to protect the well-being of their citizens. The Petitioners could not wait and see the state of things which offended Section 3(1) of the Environment and Management Coordination Act (EMCA) which defines the Precautionary Principle. Also, the actions of the Respondents offended Principle 15 of the Rio Declaration on Environment and Development 1992. Further, Section 3(2) of EMCA provided that every person was entitled to a clean and healthy environment and that every person should cooperate with the state organs to protect and conserve the environment and ensure an ecological sustainable development. The petitioners were apprehensive that statutory responsibility was for future generations and also that there should have been principles of intergenerational and intragenerational equity. They relied on Article 70 of *the Constitution* of Kenya, which is about the right to a clean and healthy environment as provided under Article 42 of *the Constitution*. They then pleaded that the Respondents had violated the law.

3. Regarding the violation of *the Constitution* under the legal instruments, the petitioners pleaded that Articles 1(1), 2, 3(1), 42, 69(a), (f) and (h) and 70 of *the Constitution* were violated to the extent that the Respondents were in violation of clear provisions thereof, national legislation, and international law. Further that they violated Article 24 of the African Charter on Human and People's Rights, 1981 which provides that all people shall have the right to a general satisfactory environment favorable to their development. Further, the impugned actions of the Respondents violated the petitioners' legitimate expectation under the law, yet all the Respondents should execute their mandate strictly in accordance with the law.
4. In support of the pleadings, the Petitioners filed an Affidavit sworn by the 2nd Petitioner on 19th April 2023, to which he attached copies of letters served on the respondents and pictures taken during the alleged visit exercise and a List of the persons affected by wastewater from the treatment plant. Then they repeated (in very general and summarized manner) a number of legal provisions under *the Constitution* regarding a clean and healthy environment and the right to access the Environment and Land Court to safeguard rights of persons and defend *the Constitution*.
5. They prayed for the reliefs that;
 - a. A declaration that the 1st, 2nd and 3rd Respondents had violated Articles 42, 69 and 70 of *the Constitution* in the manner in which they had all the months handled the discharging of waste water from the treatment plant to people's homes in Arunda Estate and mixing with sewer water being discharged to Aruja River.
 - b. A declaration that the Respondents respectively repair the depilate sewer lines and make proper channels of disposal of wastewater from the treatment plant not to interfere with the residents' well-being.
 - c. A declaration that the response had violated the petitioners and residents' rights to a clean and healthy environment under Article 42 of *the Constitution*.
 - d. A declaration that the respondents had violated their rights of the petitioners under Article 69 of *the Constitution* to ensure (sic) sustainable exploitation of natural resources, eliminate processes and activities that are likely to endanger the environment.
 - e. An order compelling the public officers to take measures to prevent or discontinue any acts or omissions deleterious to the environment within Aruja Ward.



- f. Any other relief the court may deem just to grant.

The Parties' Written Submissions

7. Parties filed submissions on the Preliminary Objection save for the 1st Respondent whose counsel indicated to the Court that they were in support of the Preliminary Objection and would not be filing submissions.
8. The 2nd Respondent filed submissions dated 12/10/2024. The Respondent submitted that a Preliminary Objection must be only on pure points of law, citing the case of Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited 1969 E.A 696. He additionally relied on the definition of a point of law as set out in the case of Wensley Barasa vs Immaculate Awino Abongo & Another (2020) eKLR.
9. Counsel submitted that the court lacked Jurisdiction to hear the suit as the Petitioners are in breach of the doctrine of exhaustion. He cited the provisions of Section 126 and 129 stating that they create the National Environment Tribunal which has Jurisdiction to entertain matters related to environmental resources as the first port of call. Additionally, that the suit offends the provisions of section 121 of the Water Act which provides that the Water Tribunal has Jurisdiction to hear and determine any disputes concerning water and sewerage services. The Respondent urged the court to dismiss the Petition with Costs.
10. The 1st Petitioner submitted on behalf of all the Petitioners, arguing that the Petition is brought under section 13 of the Environment and Land Court Act and therefore this court has the jurisdiction to entertain and determine it. Further, that they are seeking Constitutional reliefs whereas section 129 of the cited act deals with issuance of licenses or permits. He submitted that the Preliminary Objection does not meet the required threshold and should be dismissed.

Analysis & Disposition

11. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696 defined a Preliminary Objection as follows:

“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 the contract giving rise to the suit to refer the dispute to arbitration.

... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
12. It is clear that a preliminary objection arises on a point of law only. Any factual point and matter that requires long drawn out argument to establish other than the law falls short of a preliminary objection. Any prayer to uphold it as such is discarded and left for determination at the merits stage. For these reasons, this court proceeds to analyse the points raised herein to consider whether or not they fall within the ambit of a preliminary objection.
13. One of the limbs of the Preliminary Objection is that it challenges the jurisdiction of the Court to entertain the Petition on the basis that the Petitioner has failed to exhaust the remedies available



pursuant to Section 129 of the Environment Management and Coordination Act. In the case of *The Owners of the Motor Vessel Lilian 'S' Vs. Caltex Kenya Limited* (1989) KLR 1 the Court of Appeal held that:

‘ 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 obliged 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 basis for a continuation of proceedings pending other evidence.....’

14. A cursory reading of the Petition reveals that the Petitioner seeks declaratory orders against the Respondents regarding, in a nutshell, the discharge of waste water to Aruja River. Section 129 (1) (e) of EMCA provides that:

- (1) Any person who is aggrieved by -
 - (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
 - (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
 - (d) the amount of money required to be paid as a fee under this Act or its regulations;
 - (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
- (2) Any person who is aggrieved:- Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions as may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.’

15. Section 13 (1) of the *Environment and Land Court Act* confers jurisdiction to the Environment and Land Court and stipulates as follows:

- (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.

16. The Preliminary Objection was raised on two limbs, jurisdiction of the court pursuant to section 129 of the EMCA and the failure to disclose a constitutional violation.

17. The above provisions are distinct in terms of jurisdiction of the National Environment Tribunal and the Environment and Land Court. The issue in this Petition is not about grant or refusal to grant a licence to anyone about the environment. Put differently, it is evident that the dispute is not related to matters under the jurisdiction of the National Environment Tribunal, more so under section 129 of the Environment Management and Coordination Act. The Petitioners did not plead that the violations relate to the issuance of licenses and therefore this ground is irrelevant for the instant purpose. The upshot of the foregoing is that on this point, the Preliminary Objection fails.

18. On the second point of objection, to wit; that the Petition fails to disclose any constitutional violation, the court is alive to the fact that determining the same at this juncture would conclusively determine the Petition. The Court of Appeal, in *Gabriel Mutava & 2 Others vs Managing Director, Kenya Ports Authority* (2016) eKLR held as follows;

“Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums.

Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

19. Rule 10(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 provides as follows;

“ 10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;



- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.”

20. I am additionally guided by the holding of the court in *Anarita Karimi Njeru vs Republic* (1979) eKLR where the court set out the legal threshold for a Constitutional Petition thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

21. The Court of Appeal restated this principle in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR as follows:

“(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent.

It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-corruption Commission Act*, 2011, accordingly the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case.”

22. The court has had an opportunity to look at the issues raised in the Petition. The Petition is founded on Articles 1, 2, 3, 4, 10, 19, 20, 21, 22, 23, 24, 27, 35, 42, 69, 70, 47, 48, 50 and 160 of *the Constitution*. Throughout the body of the Petition the Petitioners only state in general terms that the Respondents have violated their and the residents’ rights. They do not state when and how that has been done. The Petition is too general in drafting to raise any specific constitutional violation.

23. In particular, the Petitioners seek declaratory orders for the respondents to repair ‘depilated sewer lines’ and making proper channels for disposal of waste water from the treatment plant, declaratory orders that the respondents have violated the Petitioners’ rights under Articles 42 and 69 of *the Constitution*, and an order compelling the public officers involved to take measures to prevent or discontinue an act ‘deleterious’ to the environment within Aruja ward.

24. In the Petition, the Petitioners allege that the Respondents have failed to stop the discharge of waste water from the treatment plant to Aruja River. Further, that the violation was discovered when there was a complaint lodged by the public due to a smell of waste water discharged and they visited the



area with the MCA. What the Petitioners did was to write an unsubstantiated letter dated 19th January 2023 to the Respondents. It does not show when and where the alleged violations took place. Smelly water is not evidence of contamination or discharge of untreated waste water from a plant. There was no scientific evidence attached to show that indeed the water was polluted. In essence, the Petitioners did not plead at all that the water was tested and proven to have been harmful or polluted. There is no expertise fact pleaded for proof if the Petition were to proceed to trial.

25. Further, the Petition is not specific on which treatment plant it refers to; there is no reference as to where the complaint was made and by who or where the sewer lines subject of the orders are located. Further, the Petitioners have not pleaded that there was discharge or that the water was harmful. They allege that there was a complaint about a smell but other than that, they provide no further detail on the threat posed by said smell.
26. If at all there was a threat arising, the Petitioners have not pleaded when it occurred and no evidence has been attached to prove that there exists a threat from the alleged discharge of water, for example, by way of the results of a test conducted, despite pleading that they alerted the area MCA and visited 'the place'. Having discovered said threat, the Petitioners have not provided any evidence that there was a timeline within which these issues were to be raised, to any authority and further, that said timeline was violated, which brings the ripeness of the Petition into question.
27. The Petition is steeped in generalities which falls foul on the provisions of Rule 10 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, Rules. It does not disclose the nature of the injury caused or likely to be caused, or the nexus between the Petitioners and the alleged violation of their constitutional rights by the Respondents. Additionally, it is not clear on whose behalf they appear as they have annexed a list of people who are allegedly affected by the waste water which list does not contain the Petitioners' names, or meet the requirements of Rule 10 (3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. It provides as follows;

Subject to Rules 9 and 10 the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

28. Further, and of fundamental importance, there is no nexus between the Petitioners and the alleged residents of Aruja Ward whose List was annexed. While this Court appreciates that under Article 22 of *the Constitution* regarding who can institute a Petition, this Court is not convinced that the Petitioners have brought themselves within the constitutional framework of instituting this Petition on behalf of the people of Aruja Ward. The relevant provision is Article 22(2)(b) and (c) of *the Constitution* which is that a petition may be instituted by;

- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest;"

29. To be precise, in light of the above, none of the two Petitioners are listed as members of Aruja Ward, in the List. Also, none of the persons alleged to be members of Aruja Ward in the List ever donated authority to the Petitioners to bring the Petition in their behalf. The Petitioners describe themselves in paragraph 1 of the Petition that they are residents of Homabay County and "public spirited individual and human rights defenders who believe won (sic) the purposes of promoting democratic governance..." That of itself is good. Nowhere in the Petition do they plead (and show a nexus with the persons) for whose interest they are acting. Being spirited for self aggrandizement was not meant



to be the spirit and purpose of Article 22 regarding persons who act on behalf of others in instituting petitions. Guns for hire are also not envisioned by the law. The persons for whom they bring the Petition ought to clearly give a greenlight for one to do so in their behalf if they cannot themselves do so. In this Petition there is none of this. The List of fifty people constitution of 25 on each paper does not show anything than names, identity cards, contacts and signatures. Then at the bottom there is a print, “The Petitioners of Arujo Ward”. But none of them are Petitioners in this matter. Instead it is the two “spirited” individuals who are spirited to be before the Court with an “unconnected” list of people. As to whether these people complained about the alleged smelly water or requested the Petitioners to file the Petition it is a mystery.

30. The upshot of the foregoing is that I find that the objection raised is merited to the extent that the petitioners have failed to plead, with precision, the constitutional violations, the particulars of their complaints against the respondents and the manner in which *the Constitution* has been violated in relation to their complaints, and even the nexus. Therefore, the Petition has not met the threshold established in Anarita Karimi Njeru case (supra). Consequently, it is hereby dismissed with costs to Respondents.
31. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 25TH DAY OF JUNE 2025

HON. DR. IUR FRED NYAGAKA

JUDGE

