



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 14 OF 2020

SYMON WANGOMBE GATHUA.....1ST PETITIONER

JOSEPH MACHARIA GATHUKU.....2ND PETITIONER

ZHAO JIAN.....3RD PETITIONER

STEPHEN MAINGI.....4TH PETITIONER

FREDRICK ORENGO.....5TH PETITIONER

SARAH A OMONDI.....6TH PETITIONER

CRISPIN MURIITHI NJERU.....7TH PETITIONER

=VERSUS=

THE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD RESPONDENT

KENYA URBAN ROADS AUTHORITY.....4TH RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY.....5 TH RESPONDENT

ENERGY AND PETROLEUM REGULATORY AUTHORITY.....6TH RESPONDENT

LEMPIRAS LIMITED.....7TH RESPONDENT

RULING

1. The petitioners brought this petition in objection to development of a petrol station on Land Reference Number 209/7233, situated in Kileleshwa, Nairobi. They contended that the said parcel of land lies in a highly occupied residential area occupied by the petitioners, and neighbours two learning institutions. They further contended that the procurement of authorization to develop the petrol station was done without meaningful public participation, and the respondents had ignored or failed to respond to several objections by the petitioners. They also contended that the intended petrol station would pose a threat to the petitioners’ right to a clean and healthy environment because it will entail storage, in huge quantities, of fuel and noxious gases whose emission pose a threat to the safety and security of the petitioners and their children.

2. Consequently, the petitioners sought the following orders in the petition:

- i. A declaratory order that the actions of the respondents violated the petitioners’ right under Articles 26 and 27 of the Constitution;*

- ii. *A declaratory order that the actions of the respondents were in violation of Articles 42 and 43 of the Constitution;*
- iii. *A declaratory order that the 2nd and 6th respondents have acted in violation of the Article 47 right of the petitioners; (sic)*
- iv. *A declaratory order that the actions of the respondents were in violation of Article 50 of the Constitution;*
- v. *A declaratory order that the actions of the respondents were in violation of Article 53 of the Constitution and that the children residing on plots adjacent to Plot Land Reference Number 209/7233 are entitled to the right to a clean and safe environment;*
- vi. *An order that the development and use of a petrol station on LR No 209/7233 poses a threat to the rights and fundamental freedoms of the petitioners and others including the right to a clean and safe environment;*
- vii. *An order stopping any further development or construction of a petrol station on Plot LR No 209/7233; and in the alternative if at the time of determination of this petition the development and construction of a petrol station on Plot LR No 209/7233 is completed, an order of demolition of the same does issue;*
- viii. *A restoration order that the 7th respondent restores Plot LR No 209/7233 to its condition ante and use as a residential dwelling place;*
- ix. *An order of certiorari do issue quashing the National Environmental Management Authority Licence No. NEMA/EAP/PSL/7960 for the construction of a petrol station on plot LR No 209/7233 to Lempiras Limited;*
- x. *An order of certiorari do issue quashing the approval in a letter referenced KURA/URPD/URP/1VOL.2 (86) and dated the 26th September 2019 for the construction of acceleration and deceleration lanes into Plot LR No 209/7233 issued to Lempiras Limited;*
- xi. *An order of certiorari do issue quashing the approval issued by the National Construction Authority Proj.Reg.No.531127415710252 and dated the 24th February 2020;*
- xii. *An order of certiorari do issue quashing the petroleum Construction Permit No EPRA/PET/5/139 granted by the Energy and Petroleum Regulatory authority to Lempiras Limited for the construction of a petrol station on Plot LR No 209/7233;*
- xiii. *An order of certiorari do issue quashing the approval of Development permission allowing change of user of Plot LR No 209/7233 from a residential to petrol service station issued by the Nairobi City County Government;*
- xiv. *A prohibitory order prohibiting the respondents or any other person from approving the use and development of a petrol station on Plot LR No 209/7233;*
- xv. *Costs of this petition;*
- xvi. *Any further relief or orders that this honourable court may deem just and fit to grant in the circumstances of this case.*

3. On 5/6/2020, the 7th respondent brought a notice of preliminary objection dated 5/6/2020, objecting to this suit and seeking an order striking it out on the following grounds:

1. *That the petition dated 18th May 2020 and the application for conservatory orders, contravene the mandatory provisions of Sections 129 and 130 (1) of the Environmental Management Co-ordination Act (EMCA) Cap 8 of 1999 as read together with Regulation 46 of the Environment (Impact Assessment and Audit Regulation) 2003.*
2. *That Section 61(3), 61 (4) and Section 75 (2) (d) of the Physical Planning Act (2019) provides that a party aggrieved by the decision of the Director of County Urban Planning to appeal the development plans before the County Physical and Land Use Planning Liason Committee.*
3. *That the petition is in clear contravention of Article 159 (1) of the Constitution which recognizes the authority vested in Tribunals and Article 159 (2) (c) of the Constitution which provides for alternative dispute resolution mechanisms.*
4. *That the petitioners have failed and or neglected to exhaust the alternative means of dispute resolution as provided by statute and the Constitution.*
5. *That the instant suit is premature, frivolous and an abuse of the court process as this honourable court's jurisdiction has been limited by statutes.*

4. The said preliminary objection is the subject of this ruling. The preliminary objection was canvassed through written submissions and through brief virtual oral highlighting of the written submissions.

5. Urging the court to strike out the petition, Mr Adan, counsel for the 7th respondent, submitted that Article 159(2) enjoins courts and tribunals to embrace alternative dispute resolution mechanisms, including reconciliation, mediation, arbitration and traditional mechanisms.

He added that Section 129 of the Environmental Management and Co-ordination Act (EMCA) vests in the National Environment Tribunal the (NET) jurisdiction to handle disputes relating to decisions by the National Environment Management Authority, including licensing disputes. Counsel further submitted that Section 61(3) vested in the Liaison Committees jurisdiction to deal with disputes relating to approvals under the Physical and Land Use Planning Act.

6. Counsel argued that the substance of the petition herein was the approvals and licences granted to the 7th respondent and the upshot of the petition was the cancellation of the licences. Counsel contended that the bodies mandated to deal with the dispute in this petition were the NET and the Physical and Land Use Liaison Committee.

7. Citing: (i) **Mutanga Tea & Coffee Co Ltd v Shikara Ltd & Another** (ii) **Orange Democratic Movement v Yusuf Ali Mohamed & 5 Others [2018] eLKR**; (iii) **Deepak Harakch & another v Anamol Ltd & 4 Others [2018] eKLR**; (iv) **R v National Environment Management Authority ex-parte Sound Equipment Limited [2011] eKLR** and (v) **Kibos Distillers Limited & 4 Others v Benson Ambuti Adegga & 3 Others [2020] eKLR**, counsel for the 7th respondent urged the court to uphold the preliminary objection.

8. The Attorney General, through Mr Allan Kamau, Senior State Counsel, supported the preliminary objection and similarly urged the court to strike out the petition. The Learned Senior State Counsel submitted that Article 159 of the Constitution recognized the need to make use of alternative dispute resolution mechanisms. Counsel argued that where a statute has clearly provided for a mode of dispute resolution, a party must first seek resolution of the dispute through the means set by the statute before invoking the jurisdiction of the court.

9. Mr Kamau further submitted that under Section 129 of the EMCA, the petitioners should have filed an appeal at the NET. He added that even if the 60 days limitation period have lapsed, the petitioners should approach the Tribunal under Section 129(2) which grants the Tribunal powers to extend time for lodging an appeal. He added that if the petitioners were not party to the NEMA licensing decision, they cannot claim that time for lodging an appeal has lapsed.

10. Relying on the Court of Appeal decision in **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR**, the Senior State Counsel submitted that even where there are constitutional issues, the petitioners are expected to first exhaust all other statutory mechanisms before resorting to a petition before this court. Citing the decision in **Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 Others [2020] eKLR**, Mr Kamau submitted that unless all other alternative dispute resolution mechanisms exhausted by the statute are provided, the court cannot invoke its original jurisdiction.

11. In response, Mr Willis Otieno, counsel for the petitioners, submitted that the petition was properly before this court, contending that it was the conduct of the respondents which had militated against the filing of an appeal before the Tribunal. Counsel added that part of the violations which the petitioners allege, and which they will be canvassing before this court, is the right to fair hearing and equal benefit of the law. Counsel added that the respondents had acted in a manner to deny the petitioners the opportunity to present their cases before the Tribunal, thereby violating their right to a fair hearing. Counsel contended that this was done by keeping the authorization and approval processes secretive and failing to notify the petitioners when the impugned decision was made.

12. Counsel for the petitioners further argued that the NET did not have jurisdiction to hear and determine this dispute because the time for filing a dispute in the Tribunal had already expired. Counsel argued that, similarly, Section 61(3) of the Physical and Land Use Planning Act provides for a period of 14 days within which to lodge an appeal with the Liaison Committee and that period had already lapsed. Counsel contended that the petitioners wrote a letter which did not elicit a response.

13. Urging the court to exercise jurisdiction, counsel for the petitioners argued that Articles 50 and 48 provide for fair hearing and the right to access to justice and the law does not contemplate a scenario where a litigant has no access to justice. Counsel argued that the conduct of the respondents should not be the basis to undermine the right of access to justice and the right to fair hearing.

14. Counsel for the petitioners further argued that the action in the petition is multifaceted and it would not be prudent to have several tribunals dealing with the issues separately. Relying on the decision in **David Mereka & another v Director General – Nema & 2 others [2020] eKLR**, Counsel argued that in a case such as this, where reliefs being sought are hybrid in nature, the right thing to do is to apply the predominant purpose test by looking at the most substantial question or issue in controversy. Lastly, counsel submitted that the petitioners had given adequate reasons to warrant exercise of jurisdiction by this court.

15. I have considered the preliminary objection together with the parties' respective submissions. The key question falling for determination in the preliminary objection is whether, under the prevailing legal frameworks and circumstances of this dispute this court can properly exercise its original jurisdiction in relation to the substantive dispute in this petition.

16. In substance, the petition challenges the authorization permitting the construction of a petrol station in Kileleshwa. Without the authorization, the 7th respondent would not undertake the development. In essence therefore, the petition challenges the EIA licence granted by NEMA and the development and land use approvals granted by the Nairobi County Government, currently represented by the Nairobi Metropolitan Services.

17. The issues and arguments raised in this preliminary objection are largely the same as the issues raised in the Court of Appeal case of **Kibos Distillers Limited & 4 Others v Benson Ambuti Adegga & 3 Othes [2020] eKLR**. The appeal arose from the judgment of the Environment and Land Court in Kisumu. Before the ELC was a multifaceted petition. One of the key issues falling for determination in the appeal was whether the ELC Judge erred in holding that he had jurisdiction vis-à-vis the NET and the National Environmental Complaints Committee to hear and determine the dispute between the parties.

18. The Court of Appeal rendered itself on the above issue as follows:

“In the instant matter, the Learned Judge citing the case of Ken Kasinga v Daniel Kiplagat Kirui & 5 others, [2015] eKLR, and

other decisions from courts of coordinate jurisdiction held that where a claim in a petition or suit is multifaceted, a court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of the law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting of pleadings – that all that a litigant need to do is to draft pleadings such that claims are raised in multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping.

As aptly stated by the Supreme Court in Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 Others (*supra*), jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a tribunal or another institution by the Constitution or statute.

To this extent, I find that the Learned Judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft or drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutionally or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

Further, I observe that the jurisdiction of ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

In addition, Section 129(3) of EMCA confers power upon the NET to, inter alia, exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance, jurisdiction upon the Tribunal to consider the prayer Nos. 1, 7, 8 and 10 in the petition. It was never the intention of the Constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court.

In this matter, the key dispute in the petition before the trial court was whether the three appellants were polluting the environment and whether the three appellants EIA Licences were lawfully procured. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal or the NECC. To this extent, I find that the Learned Judge erred in usurping the jurisdiction of the Tribunal and or the NECC. I further find that the Trial Judge in usurping the jurisdiction of the Tribunal negated and rendered otiose the legal effect of Section 130(5) of EMCA which makes the decisions of the ELC on appeal to be final. Having erred in exercising original jurisdiction in this matter, the Learned Judge erred in rendering superfluous and ineffectual the provisions of Section 130(5) of EMCA.”

19. The respondents in the **Kibos Distillers Appeal Case** had contended that they did not seek redress in the NET because NEMA did not publish the relevant information in the Kenya Gazette. The Court of Appeal rendered itself on that issue in the following words:

“I have considered the respondents’ contestation that absence of publication in the Gazette led them to have neither notice nor knowledge of the issuance of the EIA Licences to the three appellants. That the non-publication of the EIA Project Report in the Gazette divested jurisdiction from the Tribunal. The submission by the respondents appear logical but has no basis in law. Jurisdiction of a court or Tribunal is not conferred or divested by knowledge or lack of knowledge on the part of a litigant”

20. The Court of Appeal while addressing a similar question revolving around the doctrine of exhaustion of alternative statutory dispute resolution mechanisms in **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR** held as follows:

“The appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High Court by way of constitutional petitions”

21. The same principle was echoed in the earlier Court of Appeal decision in **Speaker of the National Assembly v James Njenga Karume (1992) eKLR**.

22. The petitioners in this petition are, in essence, challenging the EIA licence issued by NEMA and the development and land use approvals granted by the County Government of Nairobi. The EMCA establishes the NET and vests in it jurisdiction to hear and determine disputes relating to NEMA decisions, including EIA licensing. The same Act grants this court appellate jurisdiction over decisions made by the NET. Where necessary, a party seeking redress in relation to a decision by NEMA is entitled to apply to the NET for extension of the time within

which to lodge an appeal at the NET. The petitioners have not demonstrated that they have exhausted the redress avenue provided under EMCA, including an application for leave to lodge an appeal with NET outside the prescribed time, if necessary.

23. Similarly, both the repealed Physical Planning Act and the recently enacted Physical and Land Use Planning Act contain mechanisms for resolution of disputes relating to development and land use approvals. The appellants have similarly not demonstrated that they have exhausted those statutory mechanisms.

24. Counsel for the petitioners cited a number of past decisions by Judges of the Environment and Land Court and urged me to rely on those decisions and dismiss the preliminary objection. However persuasive those decisions may sound, the law remains what the Court of Appeal stated in the **Kibos Distillers Case** and in the other decisions I have cited above. Regrettably for the petitioners in this case, the facts and the arguments in the **Kibos Distillers Case** are exactly the same as the facts and arguments in this preliminary objection. I cannot therefore find a legally sound basis for any logical distinction to warrant a departure from the binding pronouncements of the Court of Appeal in the **Kibos Distillers Case** and in the other cited cases.

25. In light of the foregoing, and without saying much, my finding on the single question in the preliminary objection is that, under the prevailing legal frameworks and the nature of the dispute in this petition, this court cannot properly exercise its original jurisdiction in this dispute. The primary forum for resolution of disputes relating to NEMA decisions, including EIA licensing is the NET established under the EMCA. The proper primary forum for adjudication of land development and land use disputes is the County Physical and Land Use Liaison Committee established under the Physical and Land Use Planning Act 2019. The net result is that the 7th Respondent's preliminary objection is upheld and the petition herein is struck out.

26. The petition raised fundamental environmental issues. Until recently, it was not clear whether or not this court can properly exercise original jurisdiction in similar disputes brought by way of constitutional petitions. For this reason, I will not make any award in relation to costs.

Disposal Orders

27. In light of the above findings, I make the following disposal orders:

a) The 7th Respondent's Preliminary Objection dated 5/6/2020 is upheld and the petition herein is struck out.

b) Parties shall bear their respective costs of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Ms Leah Ezekiel holding brief for Mr Willis Otieno for the Petitioners

Mr Allan Kamau for the 1st, 2nd and 4th Respondents

Mr. Adano holding brief for Mr Ibrahim for the 7th Respondent

Court Clerk - Ms June Nafula