



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. PETITION NO. 14 OF 2017**

JUSTUS KALII MAKAU .....1<sup>ST</sup> PETITIONER

MOHAMED ISMAILI ABDI (*Chairman*).....2<sup>ND</sup> PETITIONER

SHADRACK GATORE MBURU (*Secretary*).....3<sup>RD</sup> PETITIONER

KELVIN OCHIENG NYAMOR (*Treasurer*).....4<sup>TH</sup> PETITIONER

*(Suing in their own name and on behalf of the Syokimau Residents Association)*

VERSUS

LINNET ACHIENG AMALLA.....1<sup>ST</sup> RESPONDENT

THE COUNTY GOVERNMENT OF MACHAKOS.....2<sup>ND</sup> RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY....3<sup>RD</sup> RESPONDENT

**RULING**

1. This Ruling is in respect to the 1<sup>st</sup> Respondent's Notice of Preliminary Objection dated 27<sup>th</sup> September, 2017. In the said Notice of Preliminary Objection, the 1<sup>st</sup> Respondent has averred as follows:

***a. This Honourable Court lacks jurisdiction to entertain an Application challenging the development on Plot No. L.R. No. 12715/12673 in Syokimau on the grounds that:***

***i. The Application is before the National Environment Tribunal as Appeal No. Net 207 of 2017;***

***ii. The Application does not satisfy the conditions set out under Section 7(1) and or 9(2) of the Fair Administrative of Action Act No. 4 of 2105 [2015].***

***b. The Petitioners have no locus standi to bring this Petition in public interest.***

***c. No valid or competent Application, Petition or complaint lies before this Honourable Court. The Petition as drawn and filed is vexatious, frivolous and an abuse of the process of the court.***

2. In response, the Petitioners filed Grounds of Opposition in which they averred that the Preliminary Objection is misconceived, bad in law and incompetent; that this court has jurisdiction to entertain the Petition and that the subject matter and array of issues involved in the Petition traverse and are beyond the mandate of the National Environmental Tribunal. The Preliminary Objection proceeded by way of written submissions.

3. The 1<sup>st</sup> Respondent's/Applicant's counsel submitted 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; that under the Physical Planning Act, the Liaison Committee sit in Appeal over the decisions of the Director of Physical Planning concerning any physical development plan and that Appeals from the Liaison Committee lie with the National Physical Planning Liaison Committee.

4. Counsel submitted that the 1<sup>st</sup> Respondent commenced developments on her land after obtaining the requisite approvals; that no objection was raised by the elements challenging the said approvals and that it is premature for this court to assume jurisdiction in the first instance.
5. The 1<sup>st</sup> Respondent's/Applicant's counsel submitted that the Petition offends the provisions of Sections 33 and 38 of the Physical Planning Act and Section 9(2) of the Fair Administrative Act and that the Physical Planning Act establishes a mechanism for resolving of any dispute under the Act. Counsel submitted that this court does not have the requisite jurisdiction to entertain the Petition.
6. In his submissions, the Petitioners' advocate submitted that the Petition raises multiple issues including construction of multiple dwelling units in an area zoned for single dwelling residences; the threat posed by the development to the environment; health and sanitation; authorization of the project by the 2<sup>nd</sup> Respondent despite the existence of lawful court orders barring the same; lack of clear development plans, amongst other grounds.
7. Counsel submitted that the issues raised in the Petition go beyond the issuance of an Environmental Impact Assessment Licence (EIA) by the 2<sup>nd</sup> Respondent; that the availability of an alternative remedy is not a bar to proceedings in court especially when it concerns the wider public interest and that in any case, the 1<sup>st</sup> Respondent has exhibited utmost contempt and disregard of the orders of the National Environmental Tribunal issued on 22<sup>nd</sup> June, 2017.
8. The Petitioners' counsel finally submitted that the Petitioners bring the Petition in their own names and on behalf of the Syokimau Residents Association; that the Constitution has expanded the scope of *locus standi* and that under Articles 22, 23, 70 and 258 of the Constitution, every person has the right to institute court proceedings in respect of his rights.
9. This Petition was commenced by way of a Petition dated 4<sup>th</sup> September, 2017. In the Petition, the Petitioners averred as follows:

**“5A. Facts**

***a. The 1<sup>st</sup> Respondent oblivious of the Syokimau area residents' concerns has embarked on a project of construction of multiple dwelling units on land parcel L.R. No. 12715/12673 in Syokimau on Community Road Opposite Mikato Court which is demarcated as a single dwelling unit zone.”***

10. The grounds upon which the Petition is premised are as follows:

**“B. Grounds of the Petition**

***4.a. That the 1<sup>st</sup> Respondent has irregularly and unlawfully embarked on construction of multiple dwelling units on land parcel L. R. No. 12715/12673 which was excised after sub-division of a five acre land parcel being block number 12715/261 in Syokimau on Community Road Opposite Mikato Court which is demarcated as a single dwelling unit zone.***

***b. That the project poses grave environmental, infrastructural, health, sanitation and other socio-economic hazards to the residents of Syokimau Area particularly Community Road Opposite Mikato Court.***

***c. That the project is a commercial building and the Environmental Impact Assessment Licence (EIA) Licence for the same was irregularly obtained from Mavoko Sub-County long after the development had commenced. The Deed Plans had been cancelled because of fraud over the same and the issue is still subsisting in court Machakos ELC. Case 761/2016 which is still pending but nevertheless the 1<sup>st</sup> and 2<sup>nd</sup> Respondents proceeded with the development. The 3<sup>rd</sup> Respondent gave the project the go-ahead while aware and clearly misrepresenting the Syokimau residents' serious concerns on the negative effects and impact of the project on their lives, welfare and the environment.***

***d. That the nature of the project being construction of multiple dwelling units in an area zoned for single dwelling units is certain to compromise social amenities and pose serious health hazards and threaten/infringe the Petitioners' rights to a clean and healthy environment under Article 42.***

***e. The issuance of the Environmental Impact Assessment Licence long after commencement of the project was irregular, contrary to the law and violated the Environmental (Impact Assessment and Audit) Regulations, 2013.***

***f. That there are no sewer lines in Syokimau and as such multiple dwelling units are using bio digesters most of which are defective thus discharging sewer in the open and to the public roads thus compromising the safe environment and particularly the borehole water used by majority of the residents. This threatens the right to the highest attainable standards of health and compromises the right to clean and safe water captured under Article 43 of the Constitution.***

***g. That the building approvals including change of user and the Environmental Impact Assessment Licence were unlawfully, improperly and irregularly obtained by the 1<sup>st</sup> Respondent from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents long after the Deed Plans for the said parcel had been cancelled in clear violation of the Physical Planning Act. In this regard the Petitioners' right to Fair Administrative Action under Article 48 and particularly the requirement for inclusivity and to be given written reasons for the adverse administrative action by the Respondents have been violated.***

***h. That the Respondents proceeded with the project in full knowledge and disregard of lawful court orders issued on 22<sup>nd</sup>***

**February, 2017 in Machakos ELC Petition No. 5 of 2017 restraining the 2<sup>nd</sup> Respondent from approving any building plans and/or issuing change of user for any construction that is not a single residential building on the said parcel of land.**

***i. That the Petitioners/Applicants and the residents of Syokimau Mikato Court are greatly aggrieved and stand to be seriously affected if the construction of the said residential flats is not halted. Their views and concerns were not considered by the Respondents in direct violation of Article 47 of the Constitution, Sections 4 and 5 of the Fair Administrative Action Act and Articles 10 and 69 that require transparency and proper public participating in the management, protection and conservation of the environment.***

***j. That the 1<sup>st</sup> Respondent's acts if allowed to continue unabated are likely to prejudice, compromise, jeopardize and even paralyze the water, drainage, sanitation, ecosystem and infrastructural and socio-economic setting and amenities enjoyed by the residents of Syokimau."***

11. It is true, as submitted by the 1<sup>st</sup> Respondent's advocate, 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 (***See Speaker of the National Assembly vs. Hon. James Njenga Karume (2008) 1 KLR, 425.***)

12. Indeed, the Physical Planning Act establishes a mechanism for resolving of disputes under the Act. Section 7 of the Act establishes the Physical Planning Liaison Committees whose mandate includes hearing appeals lodged by persons aggrieved by decisions made by the Director or local authorities under the Act (***See Section 10(2) (e) of the Act.***) The jurisdiction of Liaison Committees is restricted to hearing of appeals concerning any physical development or matters connected therewith (***See Section 13(1) of the Act.***)

13. On the other hand, the jurisdiction of the National Environmental Tribunal is limited to hearing appeals by a person aggrieved by the grant of a licence or refusal to grant a licence under the Environmental Management and Co-ordination Act (***EMCA***) (***See Section 129 of the Act.***)

14. The jurisdiction of the Liaison Committees under the Physical Planning Act and the National Environmental Tribunal under the Environmental Management and Co-ordination Act (***EMCA***) is limited. Indeed, the jurisdiction of these two bodies ought to be exercised within a period of time, which is sixty (60) days, from the day of the decision appealed from. This limitation of time within which one has to file his Appeal presupposes that one is aware of the date that the impugned decision was made, which may not be true all the time.

15. The complaint raised in the current Application is not limited to the jurisdiction of the Liaison Committee and the National Environmental Tribunal. The issues raised in the Petition are multiple, and include the construction of multiple dwelling units in an area zoned allegedly for single dwelling residences; the threat, if at all, posed by the 1<sup>st</sup> Respondent's development project to the environment, health and sanitation and the authorization of the project by the 2<sup>nd</sup> Respondent despite the alleged lawful restraining orders of the court.

16. The Petitioners have also alleged that the principle of public participation, which is one of the cardinal principles of environmental law, was not complied with by the Respondents, both before and after the commencement of the project. The Petitioners have further alleged that due to the infrastructural shortcomings in the area, the project by the 1<sup>st</sup> Respondent will compromise social amenities and serious health hazards, thus threatening their right to a clean and healthy environment.

17. Considering that the Petitioners have raised several issues concerning the purported effect of the 1<sup>st</sup> Respondent's project will have on their right to a clean and healthy environment, and in view of the several cross-cutting issues pertaining to the alleged environmental degradation that is likely to occur due to the 1<sup>st</sup> Respondent's project, it is only this court that can deal with all those issues at once.

18. In fact, the argument by the Respondents, if followed through, means that the Petitioners will have raised different issues pertaining to the same project before different tribunals, a scenario that will not only lead to forum shopping, but is likely to lead to a confusing and embarrassing conflicting decisions from those Tribunals. Indeed, one of the reasons why an Environment and Land Court was established was to deal with a scenario where a multiplicity of issues concerning the Environment and Land are raised in respect of one project.

19. Considering that the Environment and Land Court is the only court with a comprehensive, although not centralized jurisdiction, on matters pertaining to the Environment and Land, it is the only court that can deal with a matter that raises cross-cutting issues that cannot be handled by a specialized Tribunal like the National Environmental Tribunal or the Liaison Committee whose mandates are not only restricted, but are also time bound in so far as filing disputes before them is concerned. Consequently, the objection by the 1<sup>st</sup> Respondent that this court does not have the original jurisdiction to deal with the cross-cutting issues raised by the Petitioners is unfounded.

20. The objection by the 1<sup>st</sup> Respondent that the Petitioners do not have the *locus standi* to file the Petition is also unfounded. I say so because the issues raised by the petitioners are in respect to an alleged infringement or threat of their right to a clean and healthy environment. Under Article 70(3) of the Constitution, any person who alleges that a right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, does not have to demonstrate that he has incurred loss or suffered any injury.

21. Furthermore, Article 22 of the Constitution gives the Petitioners the mandate to file the Petition, not only in their individual capacities, but also as members of, or in the interest of, a group or class of persons, or even in the public interest.

22. It is for the above reasons that I dismiss the Notice of Preliminary Objection dated 27<sup>th</sup> September, 2017 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF JULY, 2019.**

O.A. ANGOTE

JUDGE