



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 2 OF 2019**

**PATRICK NJENGA MBURU & 98 OTHERS.....PLAINTIFFS/RESPONDENTS**

**-VERSUS-**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**NGETHE MBURU.....2<sup>ND</sup> DEFENDANT**

**YETU LIMITED.....3<sup>RD</sup> DEFENDANT/OBJECTOR**

**YETU LEATHER COMPANY LIMITED.....4<sup>TH</sup> DEFENDANT/OBJECTOR**

**KIAMBU COUNTY GOVERNMENT.....5<sup>TH</sup> DEFENDANT**

**KENYA POWER & LIGHTNING.....6<sup>TH</sup> DEFENDANT/OBJECTOR**

**NAIROBI WATER AND SEWERAGE COMPANY LIMITED...7<sup>TH</sup> DEFENDANT/OBJECTOR**

**RULING**

The Plaintiffs herein filed a **Plaint** dated **7<sup>th</sup> January 2019** and sought for various orders against the Defendants. Amongst the orders that they sought were that the Court makes a Declaration that their rights to a clean and healthy Environment has been infringed, an Environment restoration order under **Section 111(1) the Environment Managements and Coordination Act**, permanent Injunction and General Damages as compensation.

The Defendants however filed **Notices of Preliminary Objections** for determination. One was dated **28<sup>th</sup> January 2019**, by the 7<sup>th</sup> Defendant/ Respondent, **15<sup>th</sup> April 2019**, by the 6<sup>th</sup> Defendant/ Respondent wherein it has averred that the entire suit ought to be struck pursuant to **Order 2 Rule 15**, of the **Civil Procedure Rules** as it raises no reasonable cause of action against them and thus misconceived in law and fact, fatally incompetent and abuse of the Court process.

Further the 3<sup>rd</sup> and 4<sup>th</sup> Defendants also filed **Notice of Preliminary Objection** dated **18<sup>th</sup> January 2019**, on the ground that the Court lacks primary jurisdiction to enquire into the adequacy of an **Environment Impact Assessment(EIA)**, study and the subsequent issuance of an **Environment Impact Assessment License** as they are matters that fall squarely within the Jurisdiction of the **National Environmental Tribunal (NET)**. Further that the suit is defective being that only 29 of the 99 Plaintiffs appear in the authority to plead and swear affidavits. Further that the suit raises no reasonable cause of action as against the 4<sup>th</sup> Defendant as the **Environmental Impact Assessment**, was issued to the 3<sup>rd</sup> Defendant and not the 4<sup>th</sup> Defendant.

The Court directed that the **Preliminary Objection** be canvassed by way of written submissions. In compliance with the said order the 7<sup>th</sup> Defendant through the Law Firm of **Manyonge Wanyama & Associates Advocates**, submitted that the matter falls within the meaning of a Preliminary Objection. It was further submitted that the 7<sup>th</sup> Defendant has been wrongly enjoined in the proceedings as its sole responsibility is to supply water and offer sewerages services and not conducting Environmental Impact Assessment. They relied on various decided case amongst them the case of **DT Dobie & Company (Kenya) Limited ...Vs... Muchina (1982) K.L.R 1** where the Court held that;

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and curable by amendment. If a suit shows some semblance of a cause of action, provided it can be injected to real life by amendment, it ought to be allowed to go forward.”***

The Plaintiffs through the **Law firm of M’Njau & Mageto Advocates** filed their submissions on **15<sup>th</sup> April 2019**, wherein it was submitted that the Preliminary Objections are incompetent and should be dismissed. It was further submitted that the issue of the Number of Plaintiffs that have signed the Authority is a point of **fact** and not **law** and cannot be argued by way of Preliminary Objection. They further submitted that the Court should guard against its jurisdiction where it has been given Jurisdiction by Statutes or the Constitution. They relied on various provisions of law and case laws to which the Court has carefully read and considered. Amongst them is the case of **Corporate Insurance Company Limited ...Vs... Nyali Beach Hotel Ltd CA No.270 OF 1996**, where the Court held that;

***“Summary procedure like the striking out of suits, should not be allowed to become a means of avoiding a trial or obtaining immediate judgment. That in our view still underline the view that this procedure should not be resorted to, save in the clearest of cases.”***

The 3<sup>rd</sup> and 4<sup>th</sup> Defendants through the **Law Firm of COL Advocates LLP** filed, their submissions on the **20<sup>TH</sup> March 2019**. It was submitted that this Court lacks jurisdiction and the matter should be heard and determined by the **National Environment Tribunal (NET)** as the dispute concerns the adequacy and legitimacy of the **Environment Impact Assessment(EIA)** project report. They relied on various case laws amongst them the case of Speaker of the **National Assembly...Vs...Njenga Karume (1992) eKLR** where the Court of appeal held that;

***“...where there is a clear procedure for redress of any particular grievance prescribed in the Constitution or in an Act of Parliament, that procedure should be strictly followed.”***

The Court having laid down the background of this case has now carefully considered the **Notices of Preliminary Objection** as raised by the Defendants/Objectors herein.

The Court will first determine whether what has been raised by the Defendants/Respondents falls within the definition of a ‘**Preliminary Objection**’ as stated in the case of **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.”***

Therefore from the above findings of the Court, it is clear that a **Preliminary Objection** raises pure points of law and there should be no ascertaining facts.

Further it is clear that **Preliminary Objection** stems from the pleadings filed by the parties and must be based on pure points of law. See the case of **Avatar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the Court held that:-

***“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”***

Courts have also severally held that a **Preliminary Objection** should be capable of disposing the matter preliminarily without the Court having to resort to ascertaining facts from everywhere. See the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

***“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”***

The Defendants collectively have raised three issues. That the Court **lacks Jurisdiction, that all the 99 Plaintiffs did not sign the authority to plead and that the suit discloses no cause of action as against the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants/Objectors** and therefore the suit is incompetent, The 4<sup>th</sup>, 6<sup>th</sup> & 7<sup>th</sup> Defendants have also objected and stated that the suit raises no reasonable cause of action against them.

On the issue of Jurisdiction, the Court finds that jurisdiction is everything and a Court without jurisdiction has no option but to down its tools. Therefore the issue of Jurisdiction is a pure point of law and falls within the rubrics of **Mukisa Biscuits case (Supra)**.

On the second issue, the Defendants have pleaded that only 29 of the 99 Plaintiffs appear in the authority to plead and swear affidavit and therefore the Plaintiffs have not complied with the mandatory requirement of filing individual affidavits. However the Plaintiffs have denied this claim and averred that they complied. Whether or not the affidavits have been filed will require ascertaining of facts and it is not at all

pure point of law. In the case of Oraro ...Vs... Mbaja (2005)1KLR 141, the Court held that;

***“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”***

The issue of whether the authority to act were signed is matter of evidence as it will require ascertaining of facts.

Further on the third issue of whether the suit discloses no reasonable cause of action as against the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, it is also clear that the issue of whether there is a reasonable cause of action will require the ascertaining of facts as evidence on the issues will have to be interrogated and as such the same does not raise pure point of law.

Therefore this Court finds that the second and third points raised by the Defendants/Objectors on failure to sign the affidavits and no reasonable cause of action being raised in the suit do not fall within the description of what amounts to a **Preliminary Objection** as described in the **Mukisa Biscuit Case(Supra)**.

Having found that the issue of jurisdiction falls under the category of issues that can be raised in the **Preliminary Objection**, the next issue for determination is whether the said **Preliminary Objection** is merited.

As correctly submitted by the Defendants/Objectors, jurisdiction is everything and it has to be determined at the first instance .See the case of” The Owners of the Motor Vessel ‘Lillian S’...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1, where the Court held that:-

***“...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. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.***

Further in the case of Ndimu...Vs...Ndimu & Another (2007)1EA 269, the Court held 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 straightway”***

It is not in doubt that the issue of jurisdiction is a pure point of law which can be raised at any time and it is better to be raised at the earliest possible opportunity (**See Ndimu ...Vs...Ndimu(supra)**).

Therefore, it is in order for the Defendant to have raised the issue of jurisdiction at the earliest possible opportunity.

The Defendants/Objectors have alleged that the Court has no jurisdiction because there is a process which the Plaintiffs were required to follow as per the **Environmental Management and Coordination Act(EMCA)**. The Defendant/Objector argued that the Plaintiffs being aggrieved with the issuance of the Environment Impact Assessment report and license, ought to have first taken their grievances to the National Environment Tribunal established by the Act(EMCA).

The Plaintiffs on the other hand have submitted that the requirement under **Section 129** does not oust the jurisdiction of the Court and further that the Jurisdiction of the tribunal under **Section 129** of the **Environmental Management and Coordination Act** is limited to issuance and refusal to issue of **Environment Impact Assessment(EIA)** License which issue is not the only issue in the case herein. Further that Part 11 gives the Court the power to deal with issues relating to entitlement to a clear and health environment.

This Court has perused the Complaint that has been filed by the Plaintiffs it is clear that among the prayers that the Plaintiffs have sought is that there be a declaration that their rights to a clean and healthy Environment has been infringed upon. **Section 3(3)** of the **Environmental Management and Co-ordination Act** provides;

***“If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to—***

***a. prevent, stop or discontinue any act or omission deleterious to the environment;***

***b. compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;***

***c. require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;***

***d. compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and;***

***e. provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution***

*and other losses that are connected with or incidental to the foregoing”*

From the foregoing it is clear that when a party feels that its right to a clean environment has been threatened one is required to seek redress in the High Court. The Environment & Land Court is a creation of the Constitution and it has the same status as the High Court and specifically **Article 162(2) (b)** which provides;

*“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.*

Further **Article 162(3)** provides;

*(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*

**Section 3** of the **Environmental Management and Coordination Act(EMCA)**, also empowers the Court to make any orders to stop the degradation of the environment and to protect the right to a clean environment. This Court therefore finds and holds that the said prayer may be granted before this Court and therefore in terms of the prayers sought, the suit is properly before this Court.

The Plaintiffs have also sought for a restoration Order under **Section 111(1)** of the **Environment Management and Coordination Act**. The said section provides;

*“Without prejudice to the powers of the Authority under this Act, a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.”*

In light of the foregoing section the Court therefore finds that it has Jurisdiction to determine the said dispute in issue.

Further **Section 129** of the **Environmental Managements and Coordination Act** provides:-

*(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*

It is this Court’s opinion that the above **Section 129**, of the **Environmental Managements and Coordination Act** does not give a provision whereby the **National Environment Tribunal** is required to handle matters that deals with refusal to grant a license and does not envisage situations where the parties are seeking to cancel the license. See the case **Hosea Kiplagat & 6 Others...Vs...National Environment Management Authority Nema & 2 Others (2015)**, where the Court held that;

*“In my mind the sections 129(1) and 129 (2) do not envisage to members of public moving the Tribunal to challenge the granting of licences as envisaged under Section 63 of Environmental Management and Co-ordination Act it envisages refusal to grant licence, revocation ..... and such like things.*

*Part 11 of the Environmental Management and Co-ordination Act Sections 1, 2, 3 of the said Act, give the court power to deal with issues relating to entitlement to a clear and health environment. This power cannot be taken away. I do find that the Preliminary objection is an attempt to take away this power from court.”*

Further the Court having perused the Plaintiff and the prayers that have been sought, it is clear that there are multiple issues that are to be determined.

The Court as already held and found that the prayer the Plaintiff sought for a declaration that they are entitled to a clean environment is one that is within its jurisdiction. This Court therefore finds that the Plaintiffs having raised various issues which issues cannot be determined by **National Environment Tribunal (NET)**.

Further this Court has original Jurisdiction and it is mandated to deal with the issues that have been raised by the Plaintiffs and not the tribunal. See the case of **TAIB Investment Limited...Vs...Fahim Salim Said & 5 Others (2016)eKLR**, where the Court 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.”***

The dispute between the Plaintiffs and the Defendants is over various issues and it is not specific to the Environment Impact License that falls within the jurisdiction of the National Environment Tribunal.

The Court has already held and found that the issue of signing of the authority to plead and the fact that the suit does not disclose any reasonable cause of action as against the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants does not fall within the limits of a Preliminary Objection, Therefore the Court finds that the dispute herein falls squarely under the purview of the **Environment & Land Court** in its capacity as exercising its original jurisdiction.

At this juncture, the Court is not called to delve into the merit of the Plaintiff’s application but is only supposed to determine whether it has jurisdiction to deal with the instant suit.

Therefore this Court finds that it has Jurisdiction to deal with the matter herein and further finds that all the **Defendants Notice of Preliminary Objections** are not merited and the said **Preliminary Objections** are dismissed entirely with costs to the Plaintiffs herein.

It is so ordered.

***Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of July 2019.***

**L. GACHERU**

**JUDGE**

**12/7/2019**

In the presence of

No appearance for Plaintiffs/Respondents

No appearance for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

3<sup>rd</sup> Defendant/Objector

M/S Kilonzo holding brief for Mr. Otieno for

4<sup>th</sup> Defendant/Objector

No appearance for 5<sup>th</sup> Defendant

Mr. Muthomi holding brief for Mr. Muga for 6<sup>th</sup> Defendant/Objector

Mr. Kevero holding brief for Mr. Peter Wanyama for 7<sup>th</sup> Defendant/Objector

Lucy - Court Assistant.

**Court** – Ruling read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**12/7/2019**