



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 322 OF 2016**

- CHARLSITY INVESTMENT LIMITED.....1<sup>ST</sup> PLAINTIFF
- BUFFALO AUTOLAB.....2<sup>ND</sup> PLAINTIFF
- FUJIGENTECH SERVICES LIMITED.....3<sup>RD</sup> PLAINTIFF
- GEORGE OOKO OCHANDA.....4<sup>TH</sup> PLAINTIFF
- SIMON KAKI KIMAZI.....5<sup>TH</sup> PLAINTIFF
- TIMOTHY KAMAU KURIA.....6<sup>TH</sup> PLAINTIFF
- PATRICK MUSA WANZA.....7<sup>TH</sup> PLAINTIFF
- ISAACK ODERO OBARA.....8<sup>TH</sup> PLAINTIFF
- KENNETH OMONDI.....9<sup>TH</sup> PLAINTIFF
- GILBERT OMONDI ODENY.....10<sup>TH</sup> PLAINTIFF
- ALEXANDER MUSUMBA MWANIA.....11<sup>TH</sup> PLAINTIFF
- PATRICK KANDA.....12<sup>TH</sup> PLAINTIFF
- JAMES OKOBA.....13<sup>TH</sup> PLAINTIFF
- SAMUEL GITONGA.....14<sup>TH</sup> PLAINTIFF
- PATRICK MUCHIRI.....15<sup>TH</sup> PLAINTIFF

**=VERSUS=**

- KENYA RAILWAYS STAFF RETIREMENT & BENEFITS SCHEME....1<sup>ST</sup> DEFENDANT**
- NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a plaint dated 6/4/2016 the plaintiffs herein field a suit against the defendant jointly and severally seeking a declaration that they are legally in occupation of the suit premises in accordance with their respective occupation licenses. There is also an order of permanent injunction against the defendant to restrain them from interfering with the plaintiff’s business premises in LR No. 209/12088, at Land Mawe Estate in Nairobi for the entire duration of the respective licenses. The plaintiff also filed a notice of motion dated 6/4/2016 seeking orders of trespassing, injunction against the defendant pending the hearing and determination of the suit. The application is supported by the affidavit of Simon Kaki Kimanzi sworn on the 6<sup>th</sup> April 2016 and a further affidavit sworn on 6<sup>th</sup> May 2016.

2. Upon being served with the pleadings and the notice of motion the 1<sup>st</sup> defendant/respondent swore a replying affidavit through Simon Nyakundi, its chief executive officer on 20<sup>th</sup> April 2016. The 2<sup>nd</sup> defendant/respondent also filed a notice of preliminary objection dated 26/4/2016. It also put in a replying affidavit sworn by Titus W. Simiyu, the Nairobi Country Director sworn on the 22<sup>nd</sup> April 2016.

3. On the 11/7/2016, the court directed that the preliminary objection be dispensed of first in priority to the notice of motion dated 6<sup>th</sup> April 2016. It also directed that the same be canvassed by way of written submissions.

4. The preliminary objection by the 2<sup>nd</sup> defendant/respondent is premised on the following grounds:-

**1. That the plaintiff's case against the 2<sup>nd</sup> defendant/respondent is misguided and offends the provisions of Section 129 of the Environmental Management and Coordination Act, Cap 287 Laws of Kenya.**

**2. That this court lacks jurisdiction to hear this matter.**

**3. That the plaintiff's case as against the 2<sup>nd</sup> respondent is frivolous, vexatious and the same should be struck out in the costs to the 2<sup>nd</sup> respondent.**

#### **The plaintiffs'/applicant's submissions**

5. This court has original jurisdiction to determine this matter. They have relied on the case of **the Owners of Motion Vessel "Lilians S" vs Caltex Oil Kenya Limited [1989] KLR**. The matter involves Environmental Protection which squarely falls under the ambit of this honourable court.

6. Article 162(2) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act of Kenya gives this court jurisdiction to deal with this matter. They pray that this court do find that it has the competence and jurisdiction to hear and determine this matter.

#### **The 1<sup>st</sup> Defendant's/Respondent's Submissions**

7. [The 2<sup>nd</sup> defendant/respondent's preliminary objection is brought pursuant to Section 129 (1) of the Environmental Management and Coordination Act. It has relied on the case of **Diana Kethi Kilonzo & Another vs the IEBC & 10 Others PET No. 359 of 2012 [2013] Eklr**

8. Section 129 (2) of the Environmental Management and Coordination Act empowers the Director General, the Authority or committees of the authority to make decisions, such decisions may be subject to an appeal to the tribunal. This claim is based on an Environment Restoration Order issued by the National Environment Management Authority and therefore the dispute falls under the jurisdiction of the National Environment Tribunal.

9. Section 129 (1) of the Environmental Management and Coordination Act read together with Section 130 (1) of the said Act presupposes that an appeal should have been filed by the parties before the Tribunal. The Environmental Management and Coordination Act creates certain rights and liabilities and gives special remedy for enforcing the same and therefore the order or any remedy of approaching the high courts is impliedly excluded. Section 130 of the Act presupposes that the Environment and Land Court does not have exclusive original jurisdiction as the tribunals that deal with Environment and Land Disputes were not abolished. It prays that the suit be struck out with costs.

10. I have considered the written submissions filed by the parties. **Section 129 (1)** of the Environmental Management and Coordination Act provides that:-

**"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. ....**

**d. ....**

**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".**

**Section 129 (2)** Provides that

**" 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 may be subject to an appeal to the Tribunal in accordance**

with such procedures as may be established by the Tribunal for that purpose.”.

Section 130 (1) of the Environmental Management and Coordination Act, provides that:-

**“Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.”**

The above provisions confirms that the plaintiffs/applicants should have appealed to the National Environment Tribunal instead of filing this suit in this court.

Section 9 (2) of the Fair Administrative Action Act No. 4 of 2015 provides that:-

**“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”**

Subsection (3) provides that:-

**The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**

11. The plaintiffs'/applicants ought to have exhausted the remedies available before instituting this suit.

12. Each of the plaintiffs/applicants was served with the Environmental Restoration Order. All they needed to do was to follow the procedure laid down in the Environmental Management Coordination Act if they needed to challenge it.

13. In the case of **Michael Moragia Nyachae & Another vs Buddies Kisii Limited & 2 Others [2006] eKLR** it was held that:-

**“The 1<sup>st</sup> respondent in support of its submission places reliance in the ruling of Musinga J (as he then was). In the case of Kisii HCCC No 8 of 2008 Wakenya Pamoja Sacco Ltd vs Stephen Ogamba where the Judge in holding that the court has no original jurisdiction to deal with matters where there are other institutions that have been mandated by statute to deal with such matters, placed reliance on the decision of the Court of Appeal in the case of Speaker of the National Assembly vs Hon. James Njenga Karume in Civil Appeal Nairobi 92 of 1992 where the appellate judges held:-**

**“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedures should be strictly followed”]**

The court proceeded to observe thus:-

**“My view is that a statute such as Environmental Management and Coordination Act, PPA, Chapter 286 Laws of Kenya WRMA of 2009 which makes provisions for the specialized committees and tribunal must be permitted to exercise their mandate before the court can be seized with jurisdiction save for exceptional cases of judicial review in regard to which the court intervention may be sought. In the instant matter, it is my view that the Environmental Management and Coordination Act has prescribed a procedure for hearing of grievances and/or disputes which arise from its application and/or the application of the regulations made under it. In the words of the Court of Appeal in the case of Speaker of the National Assembly vs Hon. James Njenga Karume (Supra) the procedure set out thereunder should be strictly followed”.**

I agree with the 2<sup>nd</sup> respondent's submissions that the Tribunal is a specialized body that is acquainted with the environmental issues and should have been given the first option to consider the matter.

14. In conclusion, I am persuaded by the 2<sup>nd</sup> respondent that the plaintiffs/applicants suit is frivolous and vexatious. I find that this court lacks original jurisdiction to hear and determine this matter. I am guided by the case of **“The Owners of Motor Vessel “Lilian S” Vs Caltex Oil Kenya [1989] KLR** where Nyarangi JA stated that:-

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where 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.”**

15. All in all I find merit in the preliminary objection herein and the same is upheld. Consequently the plaintiffs' suit herein is struck out with costs to the defendants.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 18<sup>TH</sup> day of SEPTEMBER 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the 1<sup>st</sup> Defendant

.....Advocate for the 2<sup>nd</sup> Defendant

.....Court Assistant