



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

CONSTITUTIONAL PETITION NO. 10 OF 2018

IN THE MATTER OF PETITION UNDER ARTICLES 20, 21, 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL FREEDOMS AND RIGHTS OF THE PETITIONERS UNDER ARTICLES 35, 40, 42,43, 47,69 AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT (NO.8 OF 1999) AND ENVIRONMENT AND LAND COURT ACT (NO.19 OF 2011)

AND

IN THE MATTER OF ENVIRONMENTAL IMPACT ASSESSMENT LICENCE NO. NEMA/EIA/PSL/337 DATED 24TH JULY 2014 AND CERTIFICATE OF VARIATION OF ENVIRONMENTAL IMPACT ASSESSMENT LICENCE NO. NEMA/VC/699 DATED 23RD NOVEMBER 2017

BETWEEN

MARA SIANA CONSERVANCY LIMITED.....1ST PETITIONER

ENTUMOTO SAFARI CAMP LIMITED.....2ND PETITIONER

ENTUMOTO CONSERVANCY LIMITED.....3RD PETITIONER

VERSUS

DIRECTOR GENERAL NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

ANI INVESTMENTS LIMITED.....2ND RESPONDENT

AND

HIS EXCELLENCY THE GOVERNOR

OF NAROK COUNTY.....1ST INTERESTED PARTY

NAROK COUNTY GOVERNMENT.....2ND INTERESTED PARTY

NAROK COUNTY DIRECTOR.....3RD RESPONDENT PARTY

RULING

1. This Ruling determines the 2nd Respondent's Preliminary Objection (P.O) dated 28th May 2018. The said P.O was raised in response to the Petitioners' Petition and application dated 17th May 2018. In the said Petition the Petitioners seek the following orders:

i. A declaration that failure and/or refusal by the first respondent to grant the Petitioners access to information contained in the report or recommendations of NEMA Narok County Director made pursuant to the application for EIA licence number NEMA/EIA/PSL/337 is in breach of the Petitioners' Constitutional rights and fundamental freedoms set out in article 35.

ii. A declaration that the EIA licence number NEMA/EIA/PSL/337 dated 24th July 2014 was issued in breach of the Petitioners' Constitutional rights and fundamental freedoms set out in articles 42, 69 and 70 and is therefore null and void.

iii. A declaration that the Certificate of variation of EIA licence number NEMA/EIA/VC/669 dated 23rd November was issued in breach of the Petitioners' Constitutional rights and fundamental freedoms set out in articles 42, 69 and 70 and is therefore null and void.

iv. A declaration that the construction, development or operation of Little Olerai Luxury Camp on parcel number Cis –Mara/Siana "A"/116 is in breach of the Petitioners' Constitutional rights and fundamental freedoms set out in articles 42, 69 and 70 and is therefore null and void.

v. An order of Judicial Review in the nature of Certiorari to bring into this Honourable Court the decisions of the 1st Respondents being EIA licence number NEMA/EIA/PSL/337 dated 24th July 2014 and Certificate of variation of EIA licence number NEMA/EIA/VC/669 dated 23rd November.

vi. A permanent injunction restraining the 2nd Respondent from constructing, developing or operating a tourist hotel or camp on parcel number Cis-Mara/Siana "A"/116.

vii. An order of Judicial Review in the nature of Mandamus compelling the 1st and 2nd Respondents to close down and demolish all structures and buildings in Little Olerai Luxury Camp situate on parcel number Cis-Mara/Siana "A"/116.

viii. The Petitioner be awarded the costs of this Petition against the Respondents jointly and severally and

ix. The Honourable Court be pleased to issue any other order that meets the ends of justice.

2. Together with the Petition, the Petitioners filed an application for conservatory orders to stop further developments on the suit property and to compel the 1st Respondent or 3rd interested Party to release to the Petitioners a copy of the report and/or recommendations of the 3rd interested Party issued in May 2014 pursuant to the 2nd Respondent's application for an Environmental Impact Assessment Licence, pending the hearing and determination of the suit herein.

3. Soon after they were served with the said Petition and application, the 1st Respondent filed a Preliminary Objection on the following grounds:

1. This Court lacks the jurisdiction to hear and determine the matters raised in this Petition in view of the provisions of sections 125, 126, 127 and 129 of the Environment Management and Coordination Act, Cap 387.

2. The Honourable Court has no jurisdiction pursuant to Article 165 (5) of the Constitution of Kenya

3. The Petition is fatally defective for material non-disclosure of facts by the Petitioners as at the filing of this Petition failed to disclose to this Court the existence of NET Appeal No 003 of 2018

4. This Petition and application are frivolous, vexatious and abuse of the Court Process

5. Consequently, the Petition should be dismissed with costs to the 1st Respondent.

4. The Court directed that the P.O be canvassed by way of written submissions with brief highlights by the respective counsels on the 11th June 2018. It is this P.O that is the subject of this Ruling.

5. In her submissions, Miss Sakami learned counsel for the 1st Respondent argued that this court lacks jurisdiction to entertain this Petition as its jurisdiction is taken away by section 125 of the Environment Management and Coordination Act Cap 387 hereinafter referred to as EMCA which establishes the National Environment Tribunal (NET) which is seized with the mandate to hear and determine appeals from the National Environment Management Authority NEMA. She submitted that the issues raised in the Petition fall within the jurisdiction of the Tribunal.

6. Section 129 (2) of EMCA provides as follows:

“Unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority or Committees of the Authority or its agents 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”

7. The Petitioners’ main complaint is that the 1st Respondent issued an E.I.A licence to the 2nd Respondent in a procedure that did not conform to the provisions of EMCA. They also challenge the Certificate of variation issued to the 2nd Respondent. The Petitioners attack both the procedure and merit of the said licence

8. She further submitted that section 129 (3) of EMCA empowers NET to confirm, vary or set aside the decisions of NEMA. It was her submission that where the procedure for challenging an infringement of a right has been expressly provided by legislation, one should file a suit under that legislation instead of filing a Petition.

9. Counsel also submitted that the issues raised in the Petition have been raised in a matter before NET which is still pending in the said Tribunal and therefore this Petition is sub-judice and is subject to the provisions of section 6 of the Civil Procedure Act.

10. She stated that even though this court has original and appellate jurisdiction in matters touching on the environment and land, this jurisdiction should not be exercised where there is legislation providing for another forum as this would go against the hierarchy of the judicial system. She is therefore of the view that the Petition is misconceived and ought to be dismissed.

11. Mr. Eric Mutua learned counsel for the 2nd Respondent associated himself with the submissions by Miss Sakami and added that the 2nd Respondent has taken issue with the Court’s jurisdiction in paragraph 3 of the 2nd Respondent’s Replying Affidavit sworn by one KIMONE OLE KARAREI. He submitted that the Petition is an abuse of the process of the Court as it is challenging the issuance of a licence by the 1st Respondent. This falls within the jurisdiction of Net under EMCA. He relied on the case of **Kenya Ports Authority V Modern Holdings (E.A) Limited 2017 eKLR** where the Court held that even though the Court had unlimited jurisdiction, where a statute had excluded it from entertaining certain matters, then that exclusion must be respected.

12. He reiterated that the Petitioners had filed a case at the Tribunal in which the prayers sought were substantially the same as those sought in this Petition. The said case is pending for ruling.

13. Mr. Meingati learned counsel for the 4th Interested party also reiterated that this Court lacks jurisdiction to entertain the Petition. He submitted that the ELC is an appellate Court with regard to environmental matters. He was of the view that the Petitioners ought to have exploited the remedy available to them under EMCA before running to this Court.

14. He maintained that the filing of this Petition while the appeal challenging the issuance of the Licence was pending before NET amounted to running two parallel processes which ought not to be tolerated by this Court. He submitted that this case was not ripe for hearing and the Petitioners and amounted to an abuse of the process of the Court.

15. In his response, Mr. Oyomba learned counsel for the Petitioners submitted that a Preliminary Objection should only be raised on pure points of law. He submitted that this Court’s jurisdiction is drawn from Article 162 (2) of the Constitution which gives the ELC the mandate to hear cases touching on the environment as well as the occupation, use and title to land. The said jurisdiction is elaborated in section 13 of the ELC Act.

16. He added that under section 13 (3) of the ELC Act this Court has the power to hear and determine Constitutional Petitions. He submitted that the Petitioners claim that their rights under Articles 35, 40, 42, 43, 47, 69 and 70 have been violated.

17. Counsel submitted that EMCA does not oust the jurisdiction of this Court. He relied on section 70 (1) of the Constitution which provides that if a person alleges that his right to a clean environment has been violated or threatened, he may apply to a court for redress **in addition to** any other legal remedies that are available to the same matter. He submitted that in the instant suit the Petitioners had filed this Petition in addition to NET Case No. 003/2018 because NET is not an efficacious or adequate forum to address all the matters raised in the Petition which include infringement of various rights under the Constitution. He differed with the Respondents counsels that NET has the mandate to interpret the Constitution.

Issues for Determination

18. I have considered the pleadings and the rival submissions and the following issues arise for determination:

- i. Have the Petitioners challenged the decision of NEMA in issuing the licence to the 2nd Respondents?
- ii. Does the legislation provide for a remedy and have the parties pursued that avenue?
- iii. Does the Environment Management Coordination Act oust the jurisdiction of this Court?
- iv. Whether NET is a sufficient and efficacious in addressing the issues raised by the Petitioners.

Analysis and Determination

Whether this suit challenges NEMA’s decision to issue an EIA licence to the 2nd Respondent

19. It is common ground that in the instant suit the Petitioners are challenging the issuance of a licence to the 2nd Respondents by the NEMA.

Whether legislation provides for a remedy and if the Petitioners have pursued the same

20. Section 129(2) EMCA provides that Net has the mandate to hear appeals from NEMA and confirm, vary or set aside the said decision. It is not in dispute that the Petitioner has filed an appeal at NET challenging the issuance of the Licence to the 2nd Respondents and the same is pending for NET's Ruling.

21. What is interesting is that the Petitioners have, in addition to the matter before Net, instituted this suit challenging the issuance of the licence. They also seek declaratory orders in respect of alleged infringement of various rights and fundamental freedoms enshrined in the Constitution. The Petitioners' counsel has submitted that the reason for doing this is because the jurisdiction of NET is limited to confirming, varying or setting aside a Licence and thus it does not provide for an adequate and efficacious remedy to a party seeking the determination of Constitutional questions such as the ones raised by the Petitioners. The Petitioners have also argued that this court has both original and appellate jurisdiction in all matters environment and land. They have relied on the case of **Ken Kisiang'a V Daniel Kiplangat Kirui & 5 Others (2015) eKLR** where Munyao J in elaborating on the issue of this Court's jurisdiction with regard to matters emanating from NEMA observed as follows:

“It will be seen from the provisions of EMCA, which I have set out above, that the jurisdiction of the Tribunal is limited to hearing appeals from decisions of NEMA. NEMA is established by section 7 of EMCA and its mandate as provided by section 9 of EMCA, is to exercise general supervision and coordination over all matters relating to environment. Part of this mandate is to grant Environmental Impact Assessment Licences (EIA), for under section 58 of EMCA, no person should proceed with a project before obtaining an EIA Licence. NEMA can of course grant or decline to grant an EIA Licence. It may be that a person is aggrieved by this decision, and the reason that NET was created, was to provide an avenue for a person who wishes to challenge the decision of NEMA. This is done in the form of an appeal against the decision of NEMA. The Tribunal can confirm, vary or set aside such decision. If a person is aggrieved by a decision of the Tribunal, the statute provides that he can pursue an appeal to the High Court, which provision must now be read to mean the Environment and Land Court.

EMCA was passed in 1999 when the ELC did not exist. The ELC came into being after the Constitution of Kenya 2010, and was created by the ELCA which was assented to on 27th August 2011 and came into force on 30th August 2011. It will be observed that as provided by the Constitution at Article 162 (2) (b) the ELC has the mandate to hear disputes relating to environment and the use and occupation of and title to land. Section 13 (1) of ELCA which elaborates the jurisdiction of the Court, provides that the ELC has both original and appellate jurisdiction to hear all disputes relating to environment and land. Such disputes will include as provided in section 13 (2) (a) disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure boundaries, rates, rent, valuations, mining minerals and other natural resources. Section 13 (2) makes it clear that what is set out in (a) to (d) above is not conclusive, and provides that the ELC can hear any other dispute relating to environment and land.

It will be seen from the above that ELC has an extremely expansive jurisdiction. Indeed, in my view as long as a dispute can be categorized as being a dispute over the environment or land, the ELC has unlimited jurisdiction. This jurisdiction is both original and appellate. One can therefore not be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the Respondents that the ELC has no jurisdiction in a matter concerning the issuance or rejection of an EIA licence. True, a person aggrieved by the decision has the avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading filed in the ELC as a Court of first instance. If the ELC feels that the matter can be determined by NET, it can refer the matter to NET for determination, and wait to sit on appeal over the decision of NET. But such deferral to NET would not be a statement that the ELC has no jurisdiction over the matter”

22. I fully associate myself with the above reasoning which also addresses the question as whether the jurisdiction of the ELC is ousted by the provisions of EMCA.

23. I therefore find and hold that the ELC has jurisdiction to entertain this Petition, more so because, in addition to challenging the issuance of the EIA licence, it raises Constitutional issues touching on the infringement of the Petitioners' right to a clean and healthy environment *inter alia*. These are clearly matters that NET cannot address, given its limited mandate.

Whether NET has failed to address the issues raised by the Petitioners.

24. It has been submitted by both the Petitioners and the Respondents as well as the 4th Interested Party that the appeal filed by the Petitioners at NET is still pending for ruling. It must however be noted that NET only has the mandate to confirm, vary or set aside the EIA licence issued by NEMA. It will not address itself to the other issues raised by the Petitioners and herein lies the Petitioners' dilemma. This explains why they have instituted this Petition. I must however point out that I cannot help wondering why they did not just choose to institute the case in this court instead of commencing what appears to be two parallel processes. I must agree with counsels for the Respondents and the 4th Interested Party that this amounts to an abuse of the process of the Court.

25. Be that as it may, and in the interest of justice, I am reluctant to dismiss this Petition as urged by the Respondents, reason being that the Petitioners still have the option to withdraw the matter at NET before delivery of the Ruling. If they exercise that option then this Court would be able to hear and determine all the issues raised in the Petition in order to put the matter to rest, once and for all. I therefore dismiss the Preliminary Objection and order that this suit be stayed pending the outcome and/or withdrawal of Net 003/2018.

Dated, signed and delivered at Kericho this 18th day of June 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Meingati for the 4th Interested Party and holding brief for Miss Sakami for the 1st Respondent.
2. Mr. Eric Mutua for the 2nd Respondent and Mr. Oyomba for the Petitioner.
3. Court assistant – Rotich