



Sunlodges Kenya Limited (Suing on its Own Behalf and on Behalf of the Residents of Ukunda Area, Kwale County) v Alliance Developments Limited t/a Safari Beach Hotel & 2 others (Environment & Land Petition E001 of 2023) [2024] KEELC 85 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 85 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION E001 OF 2023**

AE DENA, J

JANUARY 24, 2024

BETWEEN

SUNLODGES KENYA LIMITED (SUING ON ITS OWN BEHALF AND ON BEHALF OF THE RESIDENTS OF UKUNDA AREA, KWALE COUNTY) PETITIONER

AND

ALLIANCE DEVELOPMENTS LIMITED T/A SAFARI BEACH HOTEL 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND RESPONDENT

COUNTY GOVERNMENT OF KWALE 3RD RESPONDENT

RULING

1. The preliminary objection subject of this ruling has been raised in response to the petitioner’s application dated 11/9/2023. The objection is raised upon the grounds that; -
 1. This honourable court lacks the jurisdiction, as a court of first instance, to hear and/or determine the issues raised in the petition herein.
 2. The instant petition offends the provisions of section 129 of the *Environmental Management and Coordination Act* No 8 of 1999 which strictly provides for reference of matters captured in the petitioner’s pleadings to NEMA tribunal.
 3. In light of the above, the petitioners suit offends the doctrine of exhaustion contrary to section 159[2][c] of the *Constitution* of Kenya.



4. The Petitioner further lacks the locus standi to file the instant petition and application and as such the entire set of pleadings ought to be dismissed with costs.
 5. The petition in its entirety is therefore incompetent, an abuse of court process and ought to be dismissed with costs to the 1st Respondent.
2. The preliminary objection was canvassed by way of written submissions as follows;

1st Respondent's Submissions

3. The objector raises three issues for determination as highlighted here below;

Whether this honourable court has jurisdiction as a court of first instance to hear and/or determine the issues raised in the petition
4. It is submitted that Section 129 of the *Environmental Management and Coordination Act* [EMCA] grants the National Environmental Tribunal [NET] the original jurisdiction to hear and determine disputes relating to the petitioners claim specifically in issuance and/or grant of licenses by the 2nd and 3rd Respondents to the 1st Respondents for operation of businesses.
5. The 1st Respondent submits that the Petitioner seeks for the 2nd and 3rd Respondents to be prohibited from issuing licences. That the dispute is majorly to bar the 1st Respondent from operating its business through revocation of its licenses. That the dispute ought to be first dealt with by the National Environment Tribunal (NET) as the same arises from an exercise by NEMA as per its mandate stipulated in the EMCA. The court is referred to the holding in *Wakenya Pamoja Sacco v Stephen Ogamba* Kisii HCCC No 8 of 2008 where it was held 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 them.
6. The 1st Respondent lists the provisions of law under EMCA that mandate the 2nd Respondent to manage and ensure the environment is not degraded and that it has a duty of ensuring compliance with the *Act* and regulations made thereunder. The 1st Respondent posits that the petitioner is to either challenge the decision by the 2nd and 3rd respondents before the Standard and Enforcement Review Committee established under the *Act* or to prefer an appeal before filing the petition before this court.

Whether the petition offends the doctrine of exhaustion

7. It is further submitted the doctrine of exhaustion requires a party must exhaust all available remedies before instituting a suit in court as was stated in *Robert Khamal Situma & 8 Others v Acting Clerk of the Nairobi City Council Assembly* [2022] eKLR. That EMCA has prescribed a procedure for handling of grievances and/or disputes which arise from application of the regulations made under it. Counsel refers to the holding *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR that where a dispute resolution mechanism exists outside court the same ought to be exhausted before the jurisdiction of the court is invoked.

Whether the petitioner has the requisite locus standi to file the instant petition

8. Referring to clause 1.1.6 of the Management Agreement between the owner of the hotel and the Petitioner which indicates that the petitioner is barred from bringing suits in the name of the owner unless with prior consent, it is submitted that the petition has not been instituted in the name of the owner of the hotel which invalidates the petition. The 1st Respondent prays that the instant petition together with the accompanying application be dismissed with costs.



Petitioners Submissions

9. The Petitioner identifies two issues for determination discussed as follows;

Whether the petition dated 11/9/2023 offends the provisions of Section 129 of the Environmental Management and Coordination Act No 8 of 1999

10. It is submitted on behalf of the Petitioner that the 1st Respondent has misconstrued the Petitioner's pleadings and seems to suggest the Petitioner is challenging the decision of the authority to grant licenses or refusal which is not the case. It is clarified that the Petitioner is challenging NEMAs indecision and failure to conduct periodic environmental audit and monitoring has affected the petitioner's right to a clean and healthy environment hence this petition. That the 1st Respondent's preliminary objection is premised on Subsection 1[a] which creates an avenue for appealing against the Authority's decision to grant or refusal to grant licenses or transfer of licences. That consequently the provisions of section 129 of EMCA are inapplicable in the instant matter. Reliance was placed in *Joseph Ojwang Oundo V National Environmental Management Authority & 8 Others* [2015] eKLR where the court held that since there had been no decision to be appealed against by the tribunal therein the ELC was the proper channel to issue injunctive orders against construction of a sugar company.

Whether this court has jurisdiction as a court of first instance to hear and determine the issue raised in the petition.

11. It is submitted that the issue of a right to a clean and healthy environment can only be determined before this court pursuant to the provisions of Section 13[1] of the *Environment and Land Court Act*. That in as much as the NET has jurisdiction to entertain appeals from decisions made by NEMA, such jurisdiction does not oust the exclusive jurisdiction of the ELC to entertain this petition as a court of first instance. Reliance is placed on the holding in *Agatha Jeruto Kimaswai v Attorney General & 3 Others* [2021] eKLR. The court is further referred to the holding in *Taib Investment Ltd v Fabim Salim Said & 5 Others* [2016] eKLR where it was held that in a suit where the court is tasked with making a determination on environmental and developmental issues and the same cannot be dealt with separately, it is the ELC with the requisite jurisdiction to deal with the same. The court is urged to find that 1st Respondents preliminary objection is without merit and dismiss it with costs.

Petitioners Supplementary Submissions

12. The petitioner filed with leave of this court supplementary submissions to the 1st respondent's submissions. It is urged that the petition is brought by the petitioner on its own behalf and on behalf of the residents of Diani Area Kwale County. That the issue of locus standi is not a pure point of law and cannot be disposed of by way of written submissions since issues of locus are evidential and not pure points of law. That the Petitioner has the requisite locus standi by virtue of Articles 22 and 258 of the *Constitution*.

13. No submissions are on record on behalf of the 2nd and 3rd Respondents.

Analysis and Determination

14. Having considered all the foregoing, the main issue for determination is whether this court is clothed with the requisite jurisdiction to determine the instant dispute.

15. But first and foremost is whether the objections herein are on pure points of law. In Civil Suit No 85 of 1992, *Oraro v Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the



position in *Mukisa Biscuit v West End Distributors* 1969) EA 696,) stated as follows on the operation of a preliminary objection: -

I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the

16. The preliminary objection herein questions this court’s jurisdiction to handle this petition. It is well settled that jurisdiction is the backdrop against which the court is mandated to engage in determination of any matter brought before it, without which the court has no business proceeding with the matter. The Court of Appeal stated in Nakuru Civil Appeal No 119 of 2017 *Public Service Commission & 2 others v Eric Cheruiyot & 16 others* consolidated with Civil Appeal No 139 of 2017 *County Government of Embu & Another v Eric Cheruiyot & 15 others* (unreported) in a decision rendered on 8th February, 2022 expressed itself on the doctrine of jurisdiction in general as follows:

“Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows: By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

17. The objection on jurisdiction is largely based on the provisions of sections 125 and 129 of the *EMCA*, as well as section 13 of the *Environment and Land Court Act*. The court’s attention has been drawn to the provisions of section 125 of the said *Act* which establishes the National Environment Tribunal and stipulates its composition and mandate. The court has also been referred to section 129 of *EMCA* where it is stated that NET is conferred with original jurisdiction to determine the matters raised by the Petitioner especially licensing and therefore this petition ought to have been filed before the NET. Section 13 of the *ELC Act* is on the jurisdiction of this court which is contested. Guided by the dictum of the Court Appeal above, it is clear that the allegation that this court lacks jurisdiction is indeed a pure point of law. It is this court’s finding that the preliminary objection on this point is properly raised.
18. Having satisfied myself that the preliminary objection on the point of jurisdiction is properly raised, I will embark on the merits of the said preliminary objection. I find it necessary to quote verbatim the provisions of the law upon which this objection is anchored.



19. Section 125 of EMCA establishes the National Environment Tribunal including its composition. Section 129 of EMCA provides for the jurisdiction of the NET as follows:-

Appeals to the Tribunal

1. Any person who is aggrieved by—
 - a. the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
 - b. the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - c. the revocation, suspension or variation of the person's licence under this Act or its regulations;
 - d. the amount of money required to paid as a fee under this Act or its regulations;
 - e. the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
2. 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.
3. Upon any appeal, the Tribunal may—
 - a. confirm, set aside or vary the order or decision in question;
 - b. exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
 - c. make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;
 - d. if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
 - e. if satisfied upon application by any party, review any orders made under paragraph (a).
4. Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal,



issue fresh orders maintaining the status quo in accordance with subsection (3)(a).

20. The jurisdiction of the Environment and Land Court is found in section 13 of the *Environment and Land Court Act* of 2012 which provides that the court shall hear disputes relating to: -
- a. Environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Compulsory acquisition of land;
 - c. Land administration and management;
 - d. Public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. Any other dispute relating to environment and land.
21. Guided by the above cited provisions of the law and judicial precedents I will now embark on the merits of the preliminary objection on jurisdiction. According to the 1st Respondent the EMCA and the *Noise Control Regulations* has created an elaborate legal framework to deal with the Petitioners claim which claim is that the 1st respondent have contravened the *Environment Management and Coordination (Noise and Excessive Vibration Pollution control) Regulations* 2009. The court is referred to sections 7,101,102, 108, 117 of *EMCA* and Regulation 18 of the *Noise Control Regulations*. Referring to paragraph 36 of the petition it is stated that the Petitioner is well aware of NEMA's decision which permitted the 1st Respondent the business. It is stated that the Petitioner had two options to challenge NEMAs decision before the Standards and Enforcement Review Committee or to prefer an appeal under section 129 of *EMCA*.
22. My next port of call is the petitioner's pleadings. The complaint by the Petitioner is that in the course of carrying out its activities, the 1st Respondent has engaged in playing loud music and whose vibrations amount to noise pollution. That the said activities have led to endangering the comfort of the Petitioners clientele and are hence against the provisions of the *Environment Management and Coordination [Noise and Excessive Vibration Pollution Control] Regulations 2009*. It is also averred that the regulators have failed to discharge their mandate to ensure compliance with the *Environment Management and Coordination (Noise and Excessive Vibration Pollution control) Regulations 2009* and have issued Licences without due regard to an EIA of the 1st respondents business and have further failed to monitor the same. Clearly the Petitioner is saying he has been and continues to be aggrieved by issuance of a licence by the 2nd Respondent.
23. It is trite that where a specific procedure has been provided for the resolution of particular grievances, the concerned parties are obligated to exhaust such mechanism as was held in The Speaker of the National assembly Vs. Hon. James Njenga Karume in Civil Application No Nai 92 of 1992 cited by 1st Respondent. Also see Samson Chembe Vuko v Nelson Kilumo & 2 others [2016] eKLR, where the court held that;
- “It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.”
24. Based on the provisions of Section 129(1) (a) the first port of call ought to have been the NET. It is urged by the Petitioner that these provisions do not apply. I respectfully disagree with Counsel for the Petitioner since the Petitioner has clearly complained about the issuance of a licence (see paragraph 36)



of the Petition. They cannot change their position and state there is no licence. It is trite parties are bound by their pleadings.

25. Having stated that section 129(1)(a) applies and looking at the totality of the petition including the orders sought there is still a hurdle to surmount. I say so because the petition presents what appears to me a mixture of issues. The Petitioner prays for the following orders;
- a. A declaration that the 1st Respondent has violated the Petitioners right to property and right to clean and healthy environment and economic and social rights as enshrined in articles 40,42 and 43 respectively.
 - b. A declaration that the 1st Respondent has erected unlawful structures next to the ocean village without first securing the requisite NEMA approval and the development permission under the Physical Planning and Land Use Act
 - c. A permanent injunction do issue against the 1st Respondent their servants, agents, representatives, tenants and/or any other persons acting on their stead prohibiting them from further operation of live music, streamed music and/or any other kind of noise that would destruct the quiet and peaceful possession of the petitioner and its guests.
 - d. A permanent injunction do issue against the 1st Respondent, their servants agents, representatives, tenants and/or any other persons acting on their stead prohibiting them from further operation of live music, streamed music and/or any other music within safari beach hotel situated in Diani along beach road Kwale County.
 - e. A permanent injunction do issue against the 2nd and 3rd Respondents, their servants agents, representatives, tenants and/or any other persons acting on their stead prohibiting them from issuing licences or approvals allowing the carrying out of loud live music and loud streaming streamed within the vicinity of the petitioners ocean village club.
 - f. Damages for nuisance
 - g. Costs.
26. Firstly I will deal with prayer (a) where the Petitioner craves for a declaration that its right to clean and healthy environment has been infringed. I have isolated this prayer for the reason that the NET would not be seized of jurisdiction to entertain issues of infringement of rights under *the Constitution*. The reasoning behind this proposition has been aptly explained by the Supreme Court of Kenya in SC Petition No. E007 of 2023 Abidha Nicholus -Vs- The Attorney General & 7 Others in the following dictum; -
1. But the above decisions do not unravel the conflict alluded to above because, under Article 165(1)(c) of *the Constitution*, the High Court has the jurisdiction to determine whether a right or fundamental freedom outlined in the Bill of Rights has been denied, violated, infringed upon, or is under threat. In that context, Article 165(5)(b) imposes limitations on the High Court's jurisdiction concerning matters falling within the purview of the courts specified in Article 162(2) which provides that;

“Parliament shall establish courts with the status of the High Court to determine disputes relating to

(a) employment and labour relations; and



(b) the environment and the use and occupation of, and title to, land.”

2. Consequently, Article 165(2)(b) mandates the establishment of courts possessing the status of the High Court to inter alia and of relevance to the appeal before us, address issues related to the environment, as well as the utilization and ownership of land with Parliament assuming the responsibility to delineate the functions and jurisdiction of that court as stipulated in sub article (3).
3. In this context, and in the exercise of these powers, Parliament enacted the Environment and Land Act 2011, (No. 19 of 2011) and by Section 4 thereof established the ELC. Its jurisdiction is as provided for in Section 13 with Section 13 (1) specifically outlining that the court ‘shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 163(2)(b) of the Constitution’. Section 13(2) then grants express and original jurisdiction in matters;
 - a. relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.

And further provides;

“Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution”.

4. These provisions must be read in contrast to those in EMCA which provide for instances where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA and which disputes ought to be lodged with and/or addressed by NET, which is established pursuant to the provisions of Section 125 of the said Act. Redress for constitutional violations is not part of that mandate. (emphasis is mine).
27. Clearly therefore the issue of a right to a clean and healthy environment can only be determined before the Environment and Land Court. This is supported by Article 70 of the Constitution of Kenya 2010. Article 70 of the Constitution of Kenya provides for Enforcement of environmental rights as follows: -
- (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
 - (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate-



- a. To prevent, stop or discontinue any act or omission that is harmful to the environment;
 - b. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;
- Or
- c. To provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

28. As to prayers ((d), (e) the question would be does the NET have powers to issue orders of permanent injunction as sought. My perusal of the Section 129(3) reveals that an order of status quo can issue but these are required to lapse at the determination of the appeal before it. However this court has powers to issue various reliefs. _Section 13(7) of the [Environment and Land Court Act](#) is to the effect that;-

In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

SUBPARA (a)

Interim or permanent preservation orders including injunctions; (b) Prerogative orders;

SUBPARA (c)

Award of damages;

SUBPARA (d)

Compensation;

SUBPARA (e)

Specific performance;

SUBPARA (f)

Restitution;

SUBPARA (g)

Declaration; or

SUBPARA (h)

Costs.

The above is also buttressed by article 70 of [the Constitution](#) which confers powers to the High Court to make orders to prevent, stop or discontinue any act or omission that is harmful to the environment; To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment and compensation for any victim of a violation of the right to a clean and healthy environment.

29. From the above discussions my view would be even if the provisions of section 129(1)(a) herein were to apply it is rather obvious that the issues raised by the Petitioner cannot be severed to be heard by the Tribunal and the Court. On this I am in agreement with the dictum of Angote J in the case of Taib Investment Ltd vs Fahim Salim Said & 5 Others [2016] eKLR quoted by the Petitioner, where it was 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 all those issues

30. Also see the recent decision of the Supreme Court in SC Petition No E007 of 2023 *Abidha Nicholus v The Attorney General & 7 Others*

31. I have noted the objector's point that the Petitioner has no locus standi which impugns this court jurisdiction to adjudicate this petition. Let me state that for me lack of locus standi does not necessarily mean lack of jurisdiction in the strict sense of the definition of locus standi as well as jurisdiction. The term locus standi was well defined in the case of *Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No 464 of 2000*, as follows: -

“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of *Alfred Njau and Others v City Council of Nairobi [1982] KAR 229*, the Court also held that: -

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

32. Article 70 of the *Constitution* of Kenya 2010 provides for Enforcement of Environmental rights and is to the effect that for the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury. The effect of this is to oust the requirement of locus standi.

33. Additionally Section 3 (3) of EMCA which states that if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to this court and this court may make such orders, among others, to prevent, stop or discontinue any act or omission deleterious to the environment; to 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 to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses.

34. Arising from the foregoing it is proper and lawful to state that any person can institute proceedings on his/her own behalf or on behalf of others in matters touching on environmental degradation and pollution. In the event that the owner did not consent to the filing of the petition, which has in any case not been brought up by the said owner, then the Petitioner is also within its right to file the petition on behalf of the residents of Diani. I find that the Petitioner therefore has the locus to institute the petition herein.

35. The upshot is that this court has jurisdiction to hear and determine this petition hence the preliminary objection is dismissed with costs to the Petitioner.

Orders accordingly

RULING DATED SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY 2024

A.E DENA

JUDGE



Mr. Kogo holding brief for Mbuya for the Petitioner

Ms. Wamuyu holding brief for the 1st and 2nd Respondents

Mr. Daniel Disii – Court Assistant

