REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT BUSIA

PETITION CASE NO. 8 OF 2014

JOSEPH OJWANG' OUNDO.....PETITIONER

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

AFRICA POLYSACK LIMITED.....2ND RESPONDENT

BUSIA SUGAR INDUSTRIES LIMITED.....3RD RESPONDENT

AND

WATER RESOURCES MANAGEMENT AUTHORITY....1ST INTERESTED PARTY

LAKE VICTORIA NORTH WATER BOARD.....2ND INTERESTED PARTY

COUNTY GOVERNMENT OF BUSIA.....3RD INTERESTED PARTY

KENYA SUGARCANE GROWERS ASSOCIATION.....4TH INTERESTED PARTY

BUHAYO COUNCIL OF ELDERS.....5TH INTERESTED PARTY

HON. AMOS WAKO SENATOR BUSIA COUNTY.....6TH INTERESTED PARTY

RULING

[1] When this matter came for hearing on 17/12/2014, two consents were entered into by all the Parties to this suit. One that Honourable Amos Tshisilwa Wako the Senator of Busia County be joined in this suit as a sixth defendant. The second consent was that this Court determines whether it has jurisdiction to entertain this suit.

[2] Mr. Ashioya learned Counsel for the 2nd and 3rd respondents raised the issue of jurisdiction and argued that this Court lacks jurisdiction. That by dint of article 162(4) of the Constitution of Kenya, the Constitution provided for Subordinate Courts and tribunals. He argued that among the Subordinate Courts is the National Environmental Management Authority (NEMA) whose activities is the issuance of Impact Assessment License. That the activity like the one envisaged by the applicants herein, it is the authority under section 63 that has the mandate to issue the same.

[3] The advocate argued that section 68 of EMCA created a tribunal with jurisdiction to deal with any refusals and denials to issue licenses by NEMA. He further argued that the respondent should have gone to the said tribunal. He went on to say that this Court has no jurisdiction. That the issue before the Court was about license issued to the 2nd and 3rd respondents by the 1st respondent and that the issue was exhaustively dealt with by the Busia high Court in Petition No.1 of 2014. The counsel argued that there was a judgment of the Court and that if the Petitioners herein were dissatisfied they had a remedy in resulting to the tribunal.

[4] The 2nd and 3rd respondents relied on *Busia HCC No.8 of 2011, Nakuru Petition No.26 of 2014, Kisumu High Court Civil Case No.22 of 2011 and the Trindad and Tobago case of Belafonte –Vs- the Attorney General* where it was held that where a statute establishes a clear mode for a Party to seek relief, litigants are strongly advised to pursue Statutory relief and that Constitutional relief should not be resulted to except on exceptional circumstances. They argued that the matter was improperly before the Court and that the same should be dismissed.

[5] Mr. Makokha for the 3rd Interested Party supported the preliminary objection and argued that this matter is resjudicata. He took the Court through the requirements of section 7 of Cap. 21. He submitted that the Petitioners and the respondents on petition No.1 and this petition were the same. He further argued that the issue in the two suits is the same, being the issuance of Environmental Impact Assessment License No.0020469 to the respondents by NEMA. He stated that this was an issue in which Justice Tuiyot made a decision in Busia Petition No. 1 of 2014, a decision that the Petitioners have not appealed. He therefore argued that, the issue was dead and that it could only be resurrected on appeal. Mr. Makokha argued that Justice Tuiyot referred to section 126(1) of Environment Management and Coordination Act (EMCA) which refers to "*any person"* aggrieved and that the applicants fall under the category of "*any person"*. That if the petitioner was not satisfied with the decision of NEMA in issuing the EIA license, there is provided a mechanism of appeal to the tribunal and not to this court. He argued therefore that this court lacked jurisdiction.

[6] Mr. Ipapu learned Counsel for the 4th and 5th Interested Parties supported the preliminary objection. He contended that National Environmental Tribunal is created by dint of the Constitution creating Courts and tribunals and that the provisions of EMCA tribunal are binding on all people of the Republic of Kenya and that once a license is granted the only remedy for an aggrieved Party is to appeal.

[7] Mr. Samba for the Petitioner said that article 70 of the Constitution provides for the enforcement of rights. He contended that article 162 (2)(b) of the Constitution provides for the Environment and Land Court with the status of High Court with powers to hear disputes relating to the environment as in this Case. He argued that section 4 of the Environment and Land Court Act provides for ELC as a superior Court and that Section 13(3) provides that nothing in the Act shall prevent the Court to determine denials of fundamental freedoms.

[8] He further argued that section 129 of EMCA only applies to a party whose licence has been denied. He went on to say that the applicant in this petition was not an applicant in the previous petition. He stated that the Petition herein raises other issues that are not within the jurisdiction of NEMA or its tribunal. He stated that the Petition raises issues of water obstruction. He argued that this Court was the proper forum for determining this dispute.

[9] On jurisdiction he argued that the said issues in the two petitions are different. He also contended that the parties are different. He relied on *Kakamega HCCC 233 of 2012 John Malanga and 5 others* –Vs- *West Kenya,* which held that parties must be the same. He also referred the Court to *Nairobi ELC No.878 of 2013 Hon. Mike Mbuvi* –Vs- *Registered Trustees of National Christian Council of Kenya* and *3 others**[1]* which held that for the matter to be resjudicata, the parties and issues must be the same. He argued that the petition herein is not a replica of Petition No.1 of 2014. He stated that they are interrogating the propriety and validity of EIA No.0020469 issued to the 3rd respondent and applied for by the 2nd defendant. He applied for the preliminary objection to be dismissed with costs.

[10] Mr. Kimei for the 1st and 2nd Interested Parties opposed the preliminary objection. He took the Court through the requirements on resjudicata doctrine. He also cited the parties of petition No.1 and the parties of this petition and the issues in both petitions and urged the Court to find that petition 1/2008 is different from the petition in this case. He said that this Court has jurisdiction to hear the case. He asked for preliminary objection to be dismissed.

[11] The issues for determination are;

a. Whether this Court has jurisdiction?

b. Whether this case is resjudicata?

[12] Does this court have jurisdiction and mandate to hear this case? The ELC Court is a Court with the status of the high Court established by Parliament under Article 162(2)(b) of the Constitution of Kenya to deal with matters of environment, use and occupation and title to land. It is therefore a Court that has special jurisdiction to deal with matters of environment and land. A question begs whether it is also the only Court that has exclusive jurisdiction to deal with the aforementioned matters.

[13] Article 162(3) of the Constitution empowers Parliament to determine the jurisdiction of the Environment and Land Court. To determine whether the Environment and Land Court has the exclusive jurisdiction to hear and determine matters related to environment one has to turn to the provisions of the Environment and Land Court Act[2] to determine what jurisdiction Parliament granted this Court.

[14] Section 13(1) of the Act provides that:

> *"the Court shall have **original** and **appellate** jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any law applicable in Kenya." (Emphasis mine)*

[15] From the above section it is apparent that the ELC has got exclusive jurisdiction of environment and land matters viz a viz other superior courts created by the Constitution and it is apparent from the Environment and Land Act No. 19 of 2011 that as regards the subordinate courts and tribunals it has no exclusive jurisdiction since it can also sit as an appellate Court over the same issues. Section 13(4) of the Act goes ahead to state where and how the ELC can exercise the appellate jurisdiction. The section provides:

> *"in addition to the matters referred to in subsection (1) and (2), the Court shall exercise appellate jurisdiction **over the decisions of subordinate Courts or local tribunals** in respect of matters falling within the jurisdiction of the Court". Emphasis mine.*

[16] Article 169(1) of the Constitution reveals that subordinate Courts include inter alia any other Court or local tribunal as may be established by an Act of Parliament other than the Courts established under Article 162(2).

[17] From the above section of the Act it is apparent that the ELC has jurisdiction to deal with environment matters. However, this does not take away the jurisdiction of subordinate courts and the local tribunals to hear environment matters as well.

[18] A look at section 24(2) of the ELC Act, the Chief Justice has powers to make rules to regulate the practice and procedure, in tribunals and subordinate Courts on matters related to land and environment. [3] It follows therefore, that the subordinate courts and tribunals can deal with those matters where the Act and respective jurisdiction allow .

[19] Having established that the ELC has jurisdiction and so does the subordinate courts and the local tribunals a question begs in such instances where different courts have jurisdiction over the same matter which court should address the matter? In this case which arena should the dispute involving the EIA be addressed?

[20] In the case of *Philemon Donny Opar v Orange Democratic Movement & 2 others (2013)* eKLR[4] court 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. (Emphasis and underlining mine)*

[21] A similar position was held by the Court of Appeal in the case of *Speaker of the National Assembly vs Njenga Karume (2008) 1 KLR 425* it held:

> *Where there is a clear procedure for the redress of any particular grievance by the Constitution or an Act of parliament, that procedure should be **strictly** followed. (Emphasis and underlining mine)*

[22] While acknowledging this proposition but distinguishing the circumstances Lady Justice Pauline Nyaweya in the case of *Wainaina Kenyanjui & 2 others vs Andrew Ng'ang'a ELC Suit no. 214 of 2013* [5]stated:

> *This court has exclusive jurisdiction in matters relating to the use, occupation and title to land and the environment under Article 162(2) (b) of the Constitution. However, despite this exclusive jurisdiction this court will defer to statutory provisions which provide effective remedies and procedure to a dispute that is before it, and may require that such remedies and procedures be exhausted first in appropriate circumstances.* (Underlining mine)

[23] In that case counsel for the plaintiff submitted that the defendant had breached section 58 of the EMCA by failing to prepare the EIAR and also failing to obtain approval from NEMA of which Justice Pauline Nyamweya had this to say:

> *However, in the present case no decision has been made by the named authorities that can be subject of an appeal and the application of the procedures laid down in the two statutes. Arising from the perceived in action by the concerned authorities, the plaintiff has opted to come to this court for relief and rightly so, as section 13(7) of the ELC Act specifies that interim or permanent preservation orders including injunctions can be given by this court in the exercise of its jurisdiction.*

[24] The court in Wainaina Kenyanjui's case (ibid) acted since there was no decision that could be subject of appeal. In this case there was a decision made by NEMA of granting the Respondents license to carry on with activities of constructing the Sugar Company at Busia. The Plaintiff came to question the authenticity of the license and the procedure of issuance. In this case therefore, the right arena to air the dispute was in the National Environment Tribunal which under Section 129 of the EMCA is accorded power to hear and determine appeals arising from the decisions made by authorities given powers under the Act.

[25] To my mind therefore, it would be inappropriate for the plaintiffs to address issues of license in this court whereas they have not exhausted the available statutory remedy which is provided under section 129 of the EMCA.

[26] In *Jeremiah Nyandusi Abuga & 17 others vs City Council of Nairobi ELC Case No. 145 of 2012* court held:

> *"While section 38 of the Physical Planning Act which requires appeals to be made to the liaison committee in the first instance cannot oust the original jurisdiction of the High court granted by the Constitution under Article 165(3), the Court of Appeal in **Speaker of the National Assembly vs Njenga Karume (2008) 1KLR 425**, held that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament that procedure should be **strictly** followed…It is thus my finding that the plaintiffs have not exhausted the available procedural mechanism for the resolution of the dispute herein, before moving this court."* (Emphasis and underlining supplied)

[27] In the present case whereas section 129 cannot oust the exclusive jurisdiction of ELC to deal with issues of license which is an issue of use and occupation of land, redress should first be sort in the National Environment Tribunal.

[28] The National Environment Tribunal is established under section 125 of the EMCA Act. Section 126

provides for proceedings of the tribunal. Section 126(2) provides that;

> *"The Tribunal shall, upon an* ***appeal made to it in writing by any party or a referral made to it by the Authority on any matter relating to this Act****, inquire into the matter and make an award, give directions, make orders or make decisions thereon, and every award, direction, order or decision made shall be notified by the Tribunal to the parties concerned, the Authority or any relevant committee thereof, as the case may be."* (Emphasis and underlining supplied)

[29] Any matter relating to the EMCA Act is therefore dealt with by the tribunal and since the allocating of the impact assessment license is a matter falling under this Act[6] the best forum to address it is in the National Environment Tribunal. Section 129 of the EMCA accords the National Environment Tribunal power to hear and determine appeals arising from the decisions made by authorities given powers under the Act.

[30] Is this matter resjudicata? This Court has to decide whether this matter is resjudicata. Section 7 of the Civil Procedure Act provides as follows:

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".*

[31] This issue was dealt with by the Court of Appeal in *Ukay Estate Ltd and another Vs. Shah Hirji Manek Ltd 1&2 others on Civil appeal No.243 of 2001.*

> *"The key phrase in both section 7 of the Civil Procedure Act (Cap.21) and explanation 4 of that section on the doctrine of resjudicata is* ***"matter directly and substantially in issue".*** *Neither the section nor the explanation mention the term "cause of action" What the Court hearing the subsequent suit has to decide is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit."* (Emphasis supplied)

[32] In my attempt to find out whether the matter in Petition No.8 is directly and substantially in issue in Petition No.1 of 2014 I will set the parties and the prayers therein Petition No.1.

PARTIES

Joseph Owino Michesia – 1st Petitioner

Aggrey Hilla Sakala – 2nd Petitioner

-Vs-

NEMA – 1st respondent

Africa Polysack Limited – 2nd respondent

County Government of Busia – Interested Party

PRAYERS

1. Declaration that the commencement of operations of the 2nd respondent in respect of the project in developing a milling factory complex,Busia Sugar Factory Complex, in Busibwabo loation, Matayos sub-location in Busia County prior to the issuance of the Environment Impact license

from the 1st Respondent is unconstitutional and contravenes the provisions of Sections 58, 59,60,61, 62 and 63 of the Environmental Management and Co-ordination Act, 1999 and provisions of Regulations 17, 22, 23 and 24 of the Environmental (Impact Assessment and Audio) Regulations, 2003. Same as prayer 1 of Petition 8.

2. A Declaration that the Petitioners' right to a clean and healthy environment as guaranteed by Article 42 of the Constitution of Kenya has been violated by the action of the 2nd Respondent to commence operations of the Busia Sugar Factory prior to the issuance of and/or due to the irregular issuance of the Environment Impact license by the 1st Respondent. Same as prayer 4 of Petition 8.

3. An Order of prohibition stopping the operations of and/or work in the Busia Sugar factory complex by the 2nd Petitioner and/or and of the entity without the requisite Environment Impact license obtained after due process has been observed.

Petition 8

PARTIES

Joseph Ojwang' Oundo – Petitioner

NEMA – 1st Respondent

Africa Polysack Limited – 2nd Respondent

Busia Suga Industries Limited – 3rd Respondent

Water Resources Management Authority – 1st Interested Party

Lake Victoria North Water Service Board – 2nd Interested Party

PRAYERS

1. A Declaration that commencement of operations by the 3rd respondent in respect of the project in constructing a sugar factory complex in Busiwabo location, Matayos sub-county in Busia County prior to the issuance of environmental impact licence from the 1st respondent was unconstitutional, illegal and contravenes the provisions of sections 58, 59, 60, 61, 62 and 63 of the Environmental Management and Co-ordination Act,1999 and provisions of Regulations 17, 18, 22, 23 and 24of ENVIRONMENTAL (Impact Assessment and Audit) Regulations, 2003.

2. A Declaration that the commencement of discharge of effluent into the environment by the 2nd and 3rd respondents in respect of the project sugar factory complex in Busibwabo location, Matayos sub-county in Busia county without being granted a licence to discharge effluent by National Environment Management Authority and a corresponding licence from Water Resources Management Authority is illegal, unconstitutional and contravenes the provisions of Section 75 of the Environmental Management and Co-ordination Act, 1999 and provisions of Section 25 of the Water Act.

3. A Declaration that the commencement of abstraction of water from River Sio and its environs by the 2nd and 3rd respondent is illegal , unconstitutional and contravenes provisions of section 75 and Schedule 5 of the Water Act.

4. Declaration that the petitioner's right to a clean and healthy environment as guaranteed by Article 42 and 43 of the Constitution of Kenya has been violated by the action of the 1st respondent

in irregularly issuing the EIA licence to the 3rd respondent.

5. An Order of certiorari be issued to bring into this Honourable Court and quash the EIA licence No. 0020469 issued by the 1st respondent to the 3rd respondent.

6. An Order of permanent injunction restraining the 2nd and 3rd respondent from constructing a sugar factory on land parcel number Bukhayo/Ebisibwao/927 and or their current site and or along River Sio, Busia County.

[33] A perusal of the two Petitions reveals the following:-The 1st, 2nd and the interested party are all parties in Petition No.8 as 1st, 2nd and 3rd respondents, the Petitioners in Petition 1 of 2014 are replaced by Joseph Ojwang Oundo as Petitioner in Petition 8 of 2014, the first prayer in Petition 1 of 2014 is also the same prayer in Petition 8 of 2014 and the 2nd prayer in Petition 1 of 2014 is the same as prayer 4 of Petition 8 of 2014.

[34] Justice Tuiyot on Petition 1 of 2014 held that:

"any activities on the land prior to issuance of EIA licence contravened the law and in particular Regulation 4(1) of the Environmental (Impact Assessment and Audit) Regulations 2003" at Para 34 lines 10-13 and that answers prayers 1,2 and 3 of petition 8.

[35] The learned Judge further held that:

"the implementation of the project in the pre licence period was a threat to a clean and healthy environment. That it was an affront to the petitioners' right to a clean and healthy environment" at Para 41 lines 9-12 and that answers prayer 4 of petition 8.

[36] The learned Judge went on to hold that

"An EIA licence was subsequently issued on 19th December 2013. That licence is still valid. This Court has not been told that the implementation of the project post licence date is not in conformity with the terms and conditions of the licence. Neither is the Court told that it is being implemented in a manner that is deleterious to the environment. These may be no reasonable basis to stop the implementation of the project".

[37] This finding of fact by the learned Judge answers prayer No.5 of Petition 8 of 2015. As far as I am aware there has been no appeal to that finding of fact by the Judge. As a matter of fact all the five prayers in Petition 8 of 2014 have directly and substantially been dealt with by Petition No.1 of 2014.

[38] I listened to the able and persuasive arguments by Mr. Samba learned Counsel for the Applicants. He put up a good argument that on resjudicata, issues must be the same, that parties have to be the same and that the dispute must be done by a competent Court. In these two petitions, the issues are the same, in as far as I can see the land in question is the same. The Court obviously was a Court of competent jurisdiction. All the issues as I said earlier were very well dealt by Tuiyot J. There was no appeal preferred against his findings. What purpose would be achieved by rehearing the case only because the Petitioner here is different? My understanding of Petition number 1 of 2014 and Petition No. 8 of 2014 is that both Petitions are public spirited litigations. The Petitioners in Petition 1 of 2014 filed the petition on their own behalf and the public. That public included the Petitioner in Petition 8 of 2014.

[39] It would not be sincere for the petitioner in Petition 8 to say that his interest were not covered in that Petition. His Petition No.8 is asking for almost the same prayers as Petition No.1 of 2014 and it equally asks for remedies for himself and the people of Busia which includes Petitioners in Petition number 1 of 2014.

[40] I find that the issues in the current Petition were substantially the issues in Petition number 1 of

2014. Other than the Petitioner himself everything else was substantially the same. There was a full determination of those issues by the High Court in Busia thus there cannot be anything for this Court to determine in the petition herein. I find this matter is resjudicata by dint of petition No.1 of 2014 in Busia High Court.

[41] Petition No.8 is struck out. This being a public spirited litigation, I order that each party bears their own costs.

[42] I take this opportunity to thank all the advocates involved in this case for their courtesy, insight, resource and diligence.

DATED and DELIVERED at BUNGOMA this 10th day of June 2015

S. MUKUNYA

JUDGE

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[1] Gidion Mike Mbuvi vs Registered Trustees of National Christian Council of Kenya & 30 Others (2014) eKLR

[2] Act No. 19 of 2011

[3] Rules to operationalize this section were issued in the Gazette Notice No. 16268 of 9th November 2012

[4] Nairobi HC Petition 49 of 2013

[5] Wainaina Kenyanjui & 2 Others vs Andrew Ng'ang'a (2013)eKLR

[6] Section 7 of the EMCA establishes the National Environment Management Authority. Section 9 of the Act stipulates the functions of the Authority and though the issuance of the Environment Impact Assessment License has not been directly stipulated under the section it has been stipulated in other sections within the Act, Under section 64(1) of the Act it provides that: "The Authority may, at any time after the issue of an environmental impact assessment license……." Section 67(2) provides that: " Whenever an environment impact assessment license is revoked, suspended……..the holder thereof shall not proceed with the project which is the subject of the license until a new license is issued by the Authority." Section 2 of EMCA defines the word Authority as the National Environment Management Authority. (Underlining supplied)