



**Maasai Mara Landowners Conservancy Limited & another v Losokwan Camp Limited
(Land Case E010 of 2024) [2024] KEELC 4946 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
LAND CASE E010 OF 2024
CG MBOGO, J
JUNE 24, 2024**

BETWEEN

MAASAI MARA LANDOWNERS CONSERVANCY LIMITED 1ST PLAINTIFF

OLD BOMA LIMITED 2ND PLAINTIFF

AND

LOSOKWAN CAMP LIMITED DEFENDANT

RULING

1. The defendant herein filed a Notice of Preliminary Objection dated 27th May, 2024 challenging the Notice of Motion Application dated 21st May, 2024 and the Plaint on the following grounds: -
 - a. This honourable court is divested of jurisdiction to entertain the plaintiffs' suit and motion dated 21st May, 2024 which were filed before this honourable court in breach of Sections 125 and 129 of the *Environment Management and Coordination Act*.
 - b. The suit as lodged is incompetent and premature as the plaintiff has not exhausted the dispute resolution mechanism established under Section 32 (a)(i) and 125 of the Environment Management and Coordination Act EMCA, and hence the ELC court's jurisdiction not invoked in its appellate jurisdiction is forums non conveniens ab initio.
2. This notice of preliminary objection was canvassed by way of written submissions. The defendant filed its written submissions dated 27th May, 2024 where it raised two issues for determination as follows: -
 - a. Whether this honourable court has jurisdiction to entertain this suit and motion.
 - b. Who should bear the costs of the proceedings.
3. On the first issue, and while relying on the cases of *Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 Others* [2013] eKLR and *Kibos Distillers Limited & 4 Others versus Benson Ambuti Adega & 3*



- Others* [2020] eKLR, the defendant submitted that the plaintiffs have lodged their claim in the wrong forum as clearly pleaded in paragraph 8 and 9 of the plaint.
4. Further, the defendant submitted that the doctrine of exhaustion mandates the plaintiffs to exhaust the dispute resolution mechanism provided by the Environmental Management & Coordination Act before resorting to this court. Reliance was placed on the cases of *Speaker of National Assembly versus Karume* [1992] KLR, *Geoffrey Muthinja & Another versus Samuel Muguna Henry & 1756 Others* [2015] eKLR, and *William Odhiambo Ramogi & 3 Others versus Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested parties)* [2020] eKLR. The defendant submitted that the plaintiffs are bound to invoke the laid down processes in the *Environmental Management & Coordination Act* regarding the wildlife corridor that is allegedly being interfered with pursuant to Section 129 (1) and (2) of the *Act*.
 5. The defendant while further relying on the case of *National Environmental Tribunal versus Overlook Management Limited & 5 Others* [2019] eKLR and *Borbor & 2 Others versus National Environment Management Authority* (Environment and Land Judicial Review Case 2 of 2022) [2022] KEELC 3947 (KLR) (28 July 2022) (Ruling) submitted that this court's sole jurisdictional basis under the Act would be under Section 130 as a second appellate court. To buttress on this submission, the defendant relied on the cases of *Bridge Gate Holding Limited versus National Environment Management Authority & Another* [2015] eKLR, *Samson Chembe Vuko versus Nelson Kilumo & 2 Others* [2016] eKLR, *Michael Moragia Nyachae versus Baddies Kisii Limited & 2 Others* [2016] eKLR, *Orata International Limited versus National Environment Management Authority* [2019] eKLR, *Joseph Ojwang' Oundo versus National Environment Management Authority & 8 Others* [2015] eKLR and *International Centre for Policy and Conflict & 5 Others versus Attorney General & 5 Others* [2013] eKLR.
 6. The defendant submitted that the issues raised in this suit fall under the ambit of the Public Complaints Committee established under Section 31 of the Act, with appeals lying to the National Environmental Tribunal. Reliance was placed in the case of *Gitei & 18 Others versus Kenya Rural Roads Authority & Another* (ELC E008 of 2023) [2024] KEELC 3322 (KLR) (24 April 2024) (Ruling).
 7. The defendant further submitted that Section 78 of the *Physical and Land Use Planning Act* provides for an appeal avenue before the County Physical and Land use Planning Liaison Committee clothed with the jurisdiction to hear appeals against decisions made by the planning authority, and in this case, no complaint was made by the plaintiffs to the Narok County under the said legislation. To buttress on this submission, the defendant relied on the case of *Whitehorse Investments Limited versus Nairobi City County* [2019] eKLR.
 8. On the second issue, the defendant submitted that the suit and the notice of motion application herein fails and should be dismissed with costs.
 9. The plaintiffs did not file their written submissions. Be that as it may, I have considered the preliminary objection and the written submissions filed by the defendant herein. I am of the view that the issue for determination is whether this court has jurisdiction to hear this suit.
 10. The plaintiffs filed a plaint dated 21st May, 2024 seeking the following orders: -
 1. A declaration that the defendant has no right whatsoever to erect or construct a camp on the said parcel of land which is a wildlife corridor/habitat.
 2. An eviction order against the defendant himself or his agents or servants.



3. A permanent order of injunction to restrain the defendant by himself, his agent or servant from entering upon, remaining upon or in any way interfering with the plaintiffs use and occupation of the suit plots.
 4. Cost of the suit.
 5. Any other relief that this honourable court may deem fit.
11. In the plaint, the plaintiffs pleaded in paragraph 6 as follows: -
- “On or about April, 2024, Losokwan Camp Limited without the consent of the conservancy and against the approved plan that enhance wildlife survival started threatening to erect a camp right at the heart of the wildlife corridor and habitat.”
12. Paragraph 7 reads: -
- “The defendant went ahead to mobilise for materials to set up the camp and have trespass the leased parcels for the plaintiffs without consent threatening the security of wildlife and abusing the quiet property right of the plaintiffs.”
13. Paragraph 8 states: -
- “The actions of the defendant in setting up the camp is not permitted and Narok, Nema office has cancelled the construction of the same on 19/4/2024 and they have no known right from the conservancy either and is meant to further wildlife threat and unfounded fetter on the plaintiffs right to property.”
14. Paragraph 9 reads further: -
- “The plaintiffs have severally rebuffed the acts of the defendant who have insistently bombarded them with threat of constructing the camp by force regardless of a stop order by NEMA and Authority by the conservancy against their approved plan. However, on the 18th May, 2024, the defendant started to fully construct the camp.”
15. The plaintiffs pleaded particulars of threat to wildlife and trespass under paragraph 10 as follows: -
- i. Constructing a camp on the wildlife corridor despite being stopped by agencies like NEMA creating a real risk for the survival of wildlife.
 - ii. Trespassing on the leased property of the plaintiffs and denying them a quiet enjoyment of their property.”
16. In their notice of motion application, the plaintiffs sought a temporary order of injunction preventing the erection and construction of a camp by Losokwan Camp Limited within the wildlife corridor being set up by the respondent in Lemek Conservancy. The application is supported by the of Robert Nabaala, the secretary of the 1st plaintiff. In paragraph 3 of his supporting affidavit, the 1st plaintiff deposed that the conservancy has a working plan approved by the members and which plan is used by NEMA to approve camp construction. In paragraph 6, the 1st plaintiff deposed that they reported the matter to the National Environment Authority (NEMA) who released a stop letter to the defendant. He deposed that the defendant halted the said construction for some time only to resurface 2 days later



and undertake construction without the approval of the conservancy and NEMA which makes the said construction an illegality and an obstruction to wildlife migration and its habitat.

17. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd* (1969) EA 696 to mean: -

per Law, JA

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Newbold, P stated 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

18. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct.
19. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, 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.”

20. It is also this court’s opinion that in determining a preliminary objection, the court will consider that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another versus 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.”

21. In this case, I am satisfied that the preliminary objection raised by the defendant raises a pure point of law, and which can be deduced from the pleadings.
22. Having said the above, and from the pleadings, it can be seen that the plaintiffs herein are displeased with the ongoing construction by the defendant whom they claim has defied the directives by NEMA and which is a threat to wildlife conservation as the construction is along the wildlife corridor.



23. The Supreme Court in *Samuel Kamau Macharia and another v Kenya Commercial Bank and 2 Others*, Application No. 2 of 2011, pronounced itself on jurisdiction thus:

“(68) A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

24. Section 32 (a) (i) of the *Environmental Management and Coordination Act* provides that: -

“the functions of the complaints committee shall be

a. To investigate-

i. Any allegations or complaints against any person or against the authority in relation to the condition of the environment of Kenya...”

25. Further, section 129 of the *Environmental Management and Coordination Act* states;

“(1) Any person who is aggrieved by—

(a) a refusal to grant a license or to the transfer of his license under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his license under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his license 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.

(2) 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.”

26. The above provision of the law provides an avenue for any party to challenge any action that is against the directives issued by National Environment Management Authority. Upon analysis of the plaint and particularly paragraphs 6 to10, the plaintiffs in this case should have first and foremost lodge a



complaint with the body mandated to do so, which is NEMA before coming to this court. This court would then only exercise its appellate jurisdiction once the parties have exhausted the revenues available for resolution of their dispute.

27. Arising from the above, the notice of preliminary objection dated 27th May, 2024 is hereby upheld. This court lacks jurisdiction to hear and determine the instant application and suit, the same is hereby struck out with costs to the defendant. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JUNE, 2024.

HON. MBOGO C.G.

JUDGE

