Diani Properties Limited t/a Diani Sea Lodge v University of Nairobi-Moana Research Station for Marine Studies & 2 others (Petition E002 of 2023) [2024] KEELC 5465 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5465 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

PETITION E002 OF 2023

AE DENA, J

JULY 23, 2024

BETWEEN

DIANI PROPERTIES LIMITED T/A DIANI SEA LODGE ..... PETITIONER

AND

UNIVERSITY OF NAIROBI-MOANA RESEARCH STATION FOR MARINE STUDIES ..... 1ST RESPONDENT

THE COUNTY GOVERNMENT OF KWALE ..... 2ND RESPONDENT

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3RD RESPONDENT

RULING

The Petition

1. This petition was filed before court on 29/9/2023. It is the Petitioner's case that they are the registered proprietors of land parcels number Kwale/Diani Beach/126 and Kwale/Diani Beach/127 which operates a hotel designated as Diani Sea Lodge. The properties are adjacent to the 1st Respondent's parcel and which has an open end beach area just as the Petitioner's properties have. It is averred that the 1st Respondent has permits and holds entertainment events with loud music powered by speakers and system equipment. That the said events cause disruptions to the Petitioner's clientele especially at night when guests are preparing to sleep.

2. According to the Petitioner, the 1st Respondent's actions are an abuse to its right to a clean and healthy environment and seek for protection from the court. The Petitioner prays for orders listed in the petition as prayers 1 to 4 and which include an order compelling discontinuance of the noise pollution by the 1st Respondent and for the 2nd and 3rd Respondents to be compelled to prosecute the 1st Respondent in the event that they breach the regulations set against noise pollution.

Preliminary Objection

3. In response to the petition, the 3rd Respondent filed a preliminary objection based on the following grounds;-

    a. The Petitioner has not exhausted the alternative redress mechanisms available under the *Environmental Management and Coordination Act* No 8 Of 1999 as read together with *Environmental Management and Coordination [Noise and Excessive Vibration Pollution] [Control] Regulations 2009* in that the Petitioner filed suit prior to lodging a complaint with the 3rd Respondent regarding the alleged noise pollution.

    b. Under regulation 25[1] of the *Environmental Management and Coordination [Noise and Excessive Vibration Pollution] [Control] Regulations 2009* an environmental inspector has the mandate with the approval of the Director General in consultation with the relevant lead agency to issue an improvement notice directing that any of the actions stipulated under the said regulations be complied with in instances when the environmental inspector has reasonable cause to believe that any person is emitting or likely to emit noise or excessive vibration in any area in excess of the maximum permissible levels.

    c. No improvement notice has been issued by the 3rd Respondent under regulation 25[1] of the *Environmental Management and Coordination [Noise and Excessive Vibration Pollution] [Control] Regulations 2009* and hence the instant petition is premature.

4. The preliminary objection was dispensed by way of written submissions. All the parties filed and exchanged their submissions. I have read and considered the Preliminary Objection and the Written Submissions filed by the parties herein.

Determination

5. The primary issue for determination is whether or not the Notice of Preliminary Objection dated 5/3/2024 is valid and whether the same has merit.

6. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observations as relates to Preliminary Objections:

> " ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

7. The Tanzanian Court of Appeal sitting in *Dar es Salaam, in Karata Ernest & others v Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), persuasively put the issue of preliminary objections in a more concise manner: -

> "At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the

enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings".

8. Arising from the foregoing caselaw, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposing party are correct. A preliminary objection can therefore not succeed if any fact has to be ascertained. The Preliminary Objection raised by the Respondent herein relates to the jurisdiction of this court to hear and determine the instant petition based on provisions of law namely *Environmental Management and Coordination Act* No 8 Of 1999 as read together with *Environmental Management and Coordination [Noise and Excessive Vibration Pollution] [Control] Regulations 2009* and regulation 25[1] of the *Environmental Management and Coordination [Noise and Excessive Vibration Pollution] [Control] Regulations 2009.* The same is therefore raised on points of law that emerge from the pleadings filed by the parties. It satisfies the requirements for a preliminary objection to be sustainable and is hence valid.

9. The second issue for determination is whether the preliminary objection has merit. The 3rd Respondent has referred the court to section 129[e] of the *Environmental Management and Coordination [Noise and Excessive Vibration Pollution] [Control] Regulations 2009* which provides that any person dissatisfied by the decision of the 3rd Respondent can lodge a complainant at the National Environmental Tribunal. My understanding of this provision is that a party first ought to lodge a complaint with the 3rd Respondent and if dissatisfied with its findings, appeal against the same at the National Environmental Tribunal. Based on the foregoing, it is clear that the Petitioner has not exhausted the available remedies in resolution of the dispute of this nature before invoking the jurisdiction of this court.

10. In making this finding, I am guided by the dictum in *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd,* [2011] eKLR, where the Court of Appeal observed: -

> " ... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."

11. Further, the Court of Appeal decision in *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR where the Court held that:

> " There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the *Act*. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and

appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance. In terms of Republic v National Environment Management Authority (*supra*), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it".

12. Lastly, in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR the Court held as follows;

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts".

13. I do not wish to usurp the powers of the National Environmental Tribunal at this point. For that reason, it is this courts finding that the preliminary objection herein is merited. The same is therefore upheld. The petition herein is therefore struck out. I make no orders as to costs.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 23RD DAY OF JULY 2024.

A.E DENA

JUDGE

Alinaitwe Holding brief for Mr. Osodo for the Petitioners

Mr. Nyaga for the 1st Respondent

Ms. Muyai for the 3rd Respondent

Mr. Daniel Disii – Court Assistant