



Odongo & another v National Irrigation Authority & 4 others (Environment & Land Petition E001 of 2022) [2023] KEELC 181 (KLR) (17 January 2023) (Ruling)

Neutral citation: [2023] KEELC 181 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND PETITION E001 OF 2022
MN KULLOW, J
JANUARY 17, 2023
IN THE MATTER OF ARTICLE 22(1), 23(3), 70, 258(1) OF THE
CONSTITUTION OF KENYA, 2010.
AND
IN THE MATTER OF ENFORCEMENT OF BILL OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 25(1), 26,
27, 28,29,31, 40(3), 42,43,47, 54 & 57 OF THE
CONSTITUTION OF KENYA, 2010.
AND
IN THE MATTER OF CONTRAVENTION OF THE
CONSTITUTION AND LAW

BETWEEN

PRISCA ALUOCH ODONGO 1ST PETITIONER

BRIAN TABU ODONGO 2ND PETITIONER

AND

NATIONAL IRRIGATION AUTHORITY 1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL PLANNING 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT



RULING

1. The 1st respondent herein in response to the petition dated March 11, 2022 filed a notice of preliminary objection on September 16, 2022, based on the following grounds: -
 - a. This matter is *res judicata* as the honourable court had already pronounced itself in Homa Bay ELC Petition No 8 of 2021 (Formerly Migori ELC Petition No E001 of 2020 [Prisca Aluoch Odongo & others vs National Irrigation Authority & others](#)).
 - b. The jurisdiction of this honourable court has been wrongly and prematurely invoked as the prescribed forum for consideration of the grievances set out in the petition is the National Environmental Tribunal.
 - c. The petition as presented offends the doctrine of exhaustion of remedies as the petitioners neither sought nor obtained leave for exemption from the requirements of section 9(4) of the [Fair Administrative Actions Act](#).
 - d. The petition is an abuse of the court process and is therefore bad in law in so far as it relates to the respondents.
2. The preliminary objection was canvassed by way of written submissions. On a perusal of the court record I do note that only the petitioners filed their submissions dated January 3, 2023 which I have read and taken into consideration in arriving at my decision.

Analysis and Determination

3. The sole issue for determination before me is whether the notice of preliminary objection filed on September 16, 2022 is merited and I will proceed to discuss the same on account of;
 - i. Res judicata
 - ii. Exhaustion of remedies doctrine
4. Preliminary objection was described in the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 where Lord Charles Newbold P held 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
5. It is now well settled that a preliminary objection must be made on a pure point of law which is capable of disposing off the suit; it should neither contain contested factual details calling for evidence nor facts that call upon the court to exercise its judicial discretion in determining the same.
6. The 1st respondent has raised an objection on this court’s jurisdiction to hear and determine the petition as filed on account of *res judicata* and the exhaustion of remedies doctrine. The Supreme



Court of Kenya in the case of [Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 others](#), Civil Appl No 2 of 2011, in addressing the issue of jurisdiction held that: -

“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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings... 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.”

7. I will now proceed to address the grounds set out in the preliminary objection in determining whether the same is merited or not as hereunder;

8. The 1st respondent contends that the suit as filed amounts to res judicata. It is his claim that the matter has been heard and determined by a court of competent jurisdiction *vide* Homa Bay ELC Petition No 8 of 2021 (Formerly Migori ELC Petition No E001 of 2020 [Prisca Aluoch Odongo & others vs National Irrigation Authority & others](#)).

9. The petitioners on the other hand submitted that even though they had previously filed Homabay ELC No 8 of 2021 (Formerly Migori ELC Petition No E001 of 2020; the said petition was struck out and was never heard and determined on merit. That the court in Homabay Petition ELC No 8 of 2021 struck out the petition without hearing and finally determining the questions of violation of rights and freedoms and the redress sought in the petition.

10. Section 7 of the [Civil Procedure Act](#) defines the doctrine of res judicata as follows: -

“No court shall try any suit 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.”

11. The court in the [Estate of James Karanja alias James Kioi \(Deceased\)](#) [2014] eKLR in discussing the conditions that must be met in a claim of *res judicata* stated as follows: -

“For the doctrine of res judicata to apply, three basic conditions must be satisfied. The party relying on it must show: -

- a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated.
- b) The matter in issue in the latter suit must have been directly and substantially in issue in the former suit.
- c) That a court competent to try it had heard and finally decided the matters in controversy between the parties.”



12. Further, the court in *Suleiman Said Shabbal vs Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR in addressing what amounts to *res judicata* held as follows: -

“To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

13. Guided by the above mentioned decisions; this court is of the considered view that the issue of *res judicata* does not arise. I have had the benefit to read the judgement by my brother Ong’ondo J delivered in Homabay ELC Petition No 8 of 2021 and it is apparent at page 20 paragraph 57; the learned judge reserved the constitutional issues arising in the said petition. The court further stated that it would determine the reserved constitutional issues after the outcome of the decision of the statutory bodies. The court subsequently went ahead and struck out the petition dated September 25, 2020 and amended on February 2, 2021.

14. It is therefore my finding that the dominant cause of action in the present petition is the infringement of the petitioner’s rights under articles 40,42,43 and 47 of the *Constitution*; issues of violation of constitutional rights and freedoms were not decided on merit in final determination of the controversy between the parties, the same were reserved and the petition struck out. To this extent therefore, the preliminary objection does not succeed.

15. On grounds 2 and 3; the 1st respondent objects the jurisdiction of this court on account of the doctrine of exhaustion of remedies. It is his claim that the jurisdiction of the court was wrongly and prematurely invoked as the prescribed forum for consideration of the grievances set out in the petition is the National Environmental Tribunal. He further claims that the petitioners have not sought leave for exemption from the requirements of section 9(4) of the *Fair Administrative Actions Act*.

16. The petitioners in response to the said assertions submitted that there is no alternative statutory remedy available as alleged by the 1st respondent. They maintained that the only available forum is this court and reiterated the jurisdiction of this court as provided under article 162 (2) (b) as read with article 159 (2) (b) of the *Constitution*.

17. Section 129 of the *EMCA* on appeals to the tribunal outlines the jurisdiction/ mandate of the National Environment Tribunal and the matters that should be determined by tribunal. It states as follows:

(1) Any person who is aggrieved by—

- (a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;
- (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;
- (c) the revocation, suspension or variation of his licence 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.



18. Section 9 (4) of the *Fair Administrative Actions Act* on the other provides as follows:
 - (4) Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
19. Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure must strictly be followed before the aggrieved party can file the claim in court. See the case *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR,
20. Section 129 of the *EMCA* Act is in respect to the grant of a license or permit, the refusal to grant the license or the transfer of the license under the Act. I have looked at instant petition as filed and it is evident that the same has not raised any issue related to the licences under the Act as envisaged by section 129 above. The petitioners herein basically seek compensation of their land, a declaration that their rights as provided under articles 22,23,26, 40,42,43,47,70 have been violated, remedies for the said violation of their rights and compensation for their land parcels.
21. Consequently, it is clear that the National Environment Tribunal does not have the original jurisdiction to determine the said issues and further award the remedies sought. Article 162(2) (b) of the *Constitution* as read with section 13 of the *Environment and Land Court Act*, vests this court with the requisite jurisdiction to hear and determine the petition herein.
22. In the circumstances, it is my finding that the exhaustion of remedies doctrine does not arise in the instant case. Grounds 2 and 3 of the preliminary objection are therefore dismissed.

Conclusion

23. The totality of the foregoing is that the 1st respondent's notice of preliminary objection filed on September 16, 2022 lacks merit and is hereby dismissed with costs to the petitioners. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON THE 17TH DAY OF JANUARY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -

Non- Appearance for the Petitioners

Non- Appearance for the Respondents

Court Assistant - Tom Maurice/ Victor

