



**Erdemann Property Limited v National Environment
Management Authority & 3 others (Tribunal Appeal 17 of 2021)
[2023] KENET 201 (KLR) (Environment and Land) (18 April 2023) (Ruling)**

Neutral citation: [2023] KENET 201 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
ENVIRONMENT AND LAND
TRIBUNAL APPEAL 17 OF 2021**

**MOHAMED S BALALA, CHAIR, BAHATI MWAMUYE,
WAITHAKA NGARUIYA & KARIUKI MUIGUA, MEMBERS**

APRIL 18, 2023

BETWEEN

ERDEMANN PROPERTY LIMITED APPELLANT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT**

LONDON DISTILLERS (K) LIMITED 2ND RESPONDENT

GALOT INDUSTRIES LIMITED 3RD RESPONDENT

**MACHAKOS COUNTY GOVERNMENT, DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES 4TH RESPONDENT**

RULING

1. Before the Tribunal are two Notices of preliminary objection by the 3rd Respondent and the 1st respondent dated November 15, 2020 and September 19, 2021 respectively. Both Notices of Preliminary Objection (P.Os) seek the dismissal of the Appeal on the grounds that this Appeal is sub judice to NET Appeal No. 002 of 2020, *Denvic Property Managers Limited vs National Environment Tribunal (sic) & Others* (Net Appeal No. 2 of 2020). The 3rd Respondent has an extra ground in which it states that the instant Appeal has been overtaken by events as the 2nd Respondent has already filed NET Appeal No. 21 of 2021 *London Distillers (K) Ltd vs National Environment Management Authority & 2 Others* (Net Appeal 21 of 2021).



2. According to the 1st respondent, the Appellant is engaged in abuse of court process as it was alive to the ongoing proceedings touching on the same issues raised in the instant Appeal.
3. The Tribunal granted orders that parties do file written submissions to the P.Os. The 1st Respondent filed its submissions on September 20, 2021 while the Appellant filed its submissions on January 7, 2022 but the other parties did not file any submissions on the objections.
4. In *Mukisa Biscuit Manufacturing Company Limited vs Westend Distributors Limited* 696 (1969) E.A (4), Law J.A and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701 held as follows:

Law, J.A.:

“So far as I am aware, a preliminary objection consists of a pure 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 on 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.”

Newbold, P.:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising points by way of preliminary objection does nothing but unnecessarily increases cost and, on occasion, confuse the issues. This improper practice should stop.”

5. The P.Os seek that the Tribunal does strike out the instant Appeal on the basis that the same is sub judice Net Appeal No. 2 of 2020 and Net Appeal No. 21 of 2021.
6. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the Learned Justice Mativo (as he then was) stated as follows:

“19. In order to check this very problem, there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”

7. A plea that the instant appeal is sub judice presupposes that the Tribunal has sighted the other suits or material to show that Net Appeal No. 2 of 2020 and Net 21 of 2021 are similar or substantially similar to the instant suit. The Tribunal has perused its record and has not found any pleadings for the two Appeals cited by the 1st and 3rd Respondents in their P.Os. The said P.Os require the Tribunal to investigate into matters of fact and that by itself violates the principles of determining such objections. In any event, the parties have not filed the responses to the Appeal of fact to enable the Tribunal proceed on the premise that all facts as pleaded are correct thus consider them and render its decision. Such matters of fact as raised by the Respondents in their P.Os may also be raised by way of written Applications to enable the parties annex the relevant documents to support their positions but in this case, the two Respondents chose to approach the Tribunal by way of P.Os which inevitably limits their scope of litigation.



8. The upshot of the above is that the Tribunal dismisses the two Notices of preliminary objection filed by the 1st and 3rd respondents and makes the following orders:
- a. The notice of preliminary objection dated November 15, 2020 and filed on even date by the 3rd Respondent is dismissed;
 - b. The notice of preliminary objection dated September 19, 2021 and filed on even date by the 1st Respondent is dismissed;
 - c. There shall be orders as to costs;
 - d. The appellant to fix a date at the registry for the pre-trial conference of the Appeal within the next 30 days, failure to which the Appeal shall stand dismissed for want of prosecution.

DATED and DELIVERED at NAIROBI, This 18th DAY of April 2023.

Mohammed BalalaChairperson

Bahati Mwamuye.....Member

Waithaka Ngaruiya.....Member

Kariuki Muigua.....Member

