



**Otieno & another v National Environment Management Authority & another (Tribunal
Appeal 24 of 2023) [2023] KENET 1369 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KENET 1369 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 24 OF 2023
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
NOVEMBER 30, 2023**

BETWEEN

MARK ODHIAMBO OTIENO 1ST APPELLANT

SILVER BAY MANAGEMENT LIMITED 2ND APPELLANT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT**

PARK LANE TOWERS LIMITED 2ND RESPONDENT

RULING

A. Introduction

1. Coming up before us for determination is a Notice of Preliminary Objection dated 27th October, 2023 and the Intended Interested party's application for enjoinder dated 21st October, 2023.
2. The crux of the notice of preliminary objection dated 27th October, 2023 is as follows:
 - a. That this Tribunal lacks jurisdiction to hear and determine the matters raised in this Appeal and the Application for the reasons that the same is statute barred thus incompetent, fatally and incurable defective for failing to comply with the Mandatory Provisions of Section 6 of the [Civil Procedure Act](#), CAP 21;
 - b. That this Tribunal lacks jurisdiction to hear and determine the application for reason that the same is statute barred offending the mandatory provisions of section 129 (1) of the Environmental Management and Coordination Act; and
 - c. That the appeal is misconceived, bad in law and an abuse of the Courts process.



3. A brief background of the case is that the Appellant herein instituted this Appeal vide the Notice of Appeal dated 21st August, 2023 and filed on 25th August, 2023, on the ground that there was no proper and/or meaningful public participation and other grounds stated therein.
4. Having reviewed the pleadings herein the issues are hereby framed as follows:
 - a. Whether this tribunal has jurisdiction to hear this appeal in light of the grounds raised by the 2nd Respondent vide their Preliminary Objection dated 27th October, 2023; and
 - b. Whether the intended interested party has locus to be enjoined in the appeal dated 21st August, 2023.

ANALYSIS DETERMINATION

(a) Whether this tribunal has jurisdiction to hear this appeal in light of the grounds raised by the 2nd Respondent vide their preliminary objection dated 27th October, 2023.

5. Having read the Preliminary Objections and the Written Submissions filed by the parties herein, the primary issue for determination is whether the Notice of Preliminary Objection dated 27th October, 2023 has merit.
6. It is important to note that the Appellants have not filed any submissions in support or in opposition to the 2nd Respondents Preliminary Objection.
7. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. (1969) EA 696, where the Court held as follows:

“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... 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”.
8. In view of the foregoing, this Tribunal shall seek to establish whether the grounds outlined in the Preliminary Objection herein, have meet the threshold set out in the aforementioned case.
9. The first ground contends that the Tribunal lacks jurisdiction to hear and determine the matters raised in this Appeal and the Application in view of the provisions of Section 6 of the *Civil Procedure Act*, Cap, 21 which provides as follows:

“6. . Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



10. In their submissions the 2nd Respondents allege that there is a similar case between the parties herein being MSA/ELC NO. E017 of 2023 PARKLAND TOWERS LIMITED VS IBRAHIM ODHIAMBO ONYANGO which is pending before Lady Justice Nelly Matheka and that there exist interim injunctive orders within this restraining the Appellants herein from interfering with the 2nd Respondents project. The upshot of this ground is that the matter herein is sub-judice.
11. Numerous decisions have put the issue in perspective. In the case of Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2002) e KLR, the Supreme Court of Kenya held;

“The purpose of sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-----When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”

12. Having reviewed the pleadings, and more so, the 2nd Respondents Replying Affidavit we see no evidence of the mentioned suit for us to interrogate the same. Neither pleadings nor orders have been attached to give credence to the fact that the suit is sub-judice.
13. In absence of evidence this Tribunal has no parameters to establish that there is more than one suit over the same subject matter and that the same is pending before a court of competent jurisdiction. In any event in ELC CASE NO. E037 OF 2021 CYRUS MUCEBIU IRUNGU VERSES MARTHA WANJIRU IRUNGU & JIANGXI TRANSPORT ENGINEERING GROUP LTD when faced with a similar issue, the court opined as follows, “the issue of sub-judice does require the ascertaining of facts or probing of evidence in the two earlier suits mentioned by the 1st defendant which this honourable court is not privy to. It therefore follows that the issue of sub-judice is not a pure point of law capable of being considered as a preliminary objection properly raised and does not meet the litmus test of what in law amounts to a preliminary objection.”
14. We associate with this reasoning, that where facts and evidence must be probed by the Tribunal by looking at the evidence on record then same cannot be a pure point of law capable of being raised in a preliminary objection.
15. In the case of MARGARET WACHU KARURI Vs JOHN WAWERU RIBIRO (2021) e K.L.R, the Court was faced with a similar question whether sub-judice can be raised as a preliminary point and held as follows;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to



a preliminary objection, and thus the preliminary objection is not merited. Consequently, this Court finds and holds that the notice of preliminary objection dated 30th August, 2019, by the defendant/objector is not merited and the same is dismissed entirely with costs to the plaintiff/Respondent”. We agree entirely with the reasoning in the above decision which in all fours marries with the instant case before us and to this end dismiss this ground.

16. The Second ground contends that the Tribunal lacks jurisdiction to hear and determine the matters raised in this Appeal and the Application in view of the provisions of Section 129 (1) provides as follows:

“

“ 1) Any person who is aggrieved by—

- a. the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
- b. the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
- c. the revocation, suspension or variation of the person’s licence under this Act or its regulations;
- d. the amount of money required to be paid as a fee under this Act or its regulations;
- e. the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations,

May within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.”

17. With respect to the Appeal herein, we note that the Licence that has been placed before this Tribunal is dated 27th June; 2023 and the appeal before is dated 21st August, 2023 and filed on 25th August, 2023. A quick calculation shows that the appeal was filed within the 60 day timeline provided for in the Act. The conclusion herein is that the appeal was filed in compliance with section 129(1) of the Act.
18. Accordingly, it is our finding that the Preliminary Objection dated 27th October, 2023 by the 2nd Respondent lacks merit and the same is dismissed entirely.

(b)Whether the intended interested party has locus to be enjoined in the appeal dated 21st August, 2023.

19. The Intended Interested parties filed an application dated 21st October, 2023 and it inter alia seeks for the enjoinder of the interested party to help the court better determine the issues in the appeal.
20. Joinder of parties is provided for in Order 1 Rule 10(2) of the Civil Procedure Rules as follows: -(2)The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in



order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

21. In the case of Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others [2014] eKLR the Supreme Court set out the factors to be considered for joinder of Interested parties which are as follows –

- (a) What is the intended interested party's stake and relevance in the proceedings? And
- (b) Will the intended interested party suffer any prejudice if denied joinder?

22. Further, we also place reliance on the case of Francis Karioko Muruatetu & Another Vs Rep (2017) eKLR, where the Supreme Court of Kenya outlined the requisite elements to being joined as an interested party to a suit when it held that;

“(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

23. Having analysed the Intended Interested Parties' submissions and the response by the 2nd Respondent, it is clear that the Intended Interested Parties have a stake in the outcome of this appeal and there is need for them to be joined to this appeal as orders may be made in this suit that would affect them. It is therefore a necessary party as its joinder is necessary for purposes of determining all the issues in the appeal.

ORDERS

- 24. The Notice of Preliminary Objection dated 27th October, 2023 is dismissed.
- 25. The Intended Interested Parties' application for joinder is hereby allowed.
- 26. Costs shall be in the cause.

DATED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023

EMMANUEL MUMIA..... CHAIRPERSON



WINNIE TSUMAVICE- CHAIRPERSON
KARIUKI MUIGUA.....MEMBER
DUNCAN KURIA.....MEMBER
RONALD ALLAMANO.....MEMBER

