



**Coldstone Investment Limited v Director General National Environment  
Management Authority & another (Tribunal Appeal 15 of 2023)  
[2023] KENET 485 (KLR) (Civ) (1 September 2023) (Ruling)**

Neutral citation: [2023] KENET 485 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
CIVIL**

**TRIBUNAL APPEAL 15 OF 2023**

**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI  
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**

**SEPTEMBER 1, 2023**

**BETWEEN**

**COLDSTONE INVESTMENT LIMITED ..... APPELLANT**

**AND**

**DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KHALEEJ TOWERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is for determination is the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated May 9, 2023. The said objection is predicated on the grounds that the Honourable Tribunal lacks jurisdiction to hear the Appellant's application dated May 5, 2023 and that the Appeal to the Tribunal is contrary to the provisions of EMCA.
2. When parties appeared before us on August 4, 2023 we directed that the Preliminary Objection be canvassed by way of written submissions. Pursuant to the said directions, the 2<sup>nd</sup> Respondent filed its submissions dated May 9, 2023 while the Appellant filed its submissions dated August 3, 2023.

**Issues for Determination**

3. Having considered the Preliminary Objection, the Appellant's submissions, the 2<sup>nd</sup> Respondent's submissions and all documents filed by parties, it is our view that the only issue that presents itself for determination is whether the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated May 9, 2023 is merited.



4. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696, 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 a 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop’
5. Thus, a preliminary objection must be based on a pure point(s) of law. As already indicated hereinabove, the 2<sup>nd</sup> Respondent’s Preliminary Objection challenges the jurisdiction of the Tribunal to hear and determine the Appellant’s Application dated 5<sup>th</sup> April 2023. Jurisdiction is a pure question of law. As such, contrary to the Appellant’s submissions, it is our finding that the 2<sup>nd</sup> Respondent’s Preliminary Objection raises a pure point of law.
6. However, at this point, we think it is prudent to point out that the preliminary objection does not state why the Tribunal does not have jurisdiction in respect to the Appellant’s Application. Be that as it may, it is a well settled principle that when the issue of jurisdiction is raised, it is incumbent upon the Court to deal with that question first and as was correctly observed by Nyarangi JA, jurisdiction is everything and without it a Court of law must down its tools - See [\*Owners of the Motor Vessel ‘Lillian S’ v Caltex Oil \(Kenya\) Ltd\* \[1989\] KLR 1](#).
7. It is therefore incumbent upon us to determine whether the Tribunal has jurisdiction with respect to the Appellant’s Application. In that regard, we are guided by the holding of the Supreme Court in the case [\*Samuel Kamau Macharia v Kenya Commercial Bank & 2 others\* \[2012\] eKLR](#) where the Court held that the jurisdiction of the Court flows from either constitution or legislation or both. The Court stated as follows:
 

‘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.’
8. The jurisdiction of the Tribunal emanates from Section 129 of [\*EMCA\*](#) which provides as follows:
 

Appeals to the Tribunal

  - (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 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.
- (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents 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.
- (3) Upon any appeal, the Tribunal may—
  - (a) confirm, set aside or vary the order or decision in question;
  - (b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
  - (c) make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;
  - (d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
  - (e) if satisfied upon application by any party, review any orders made under paragraph (a).
- 9. We note that from its Application, the Appellant’s main complaint is that despite being issued with an improvement notice and an improvement notice, the 2<sup>nd</sup> Respondent has failed to comply with the said notices. Further, the 1<sup>st</sup> Respondent has failed to enforce the improvement notice issued against the 2<sup>nd</sup> Respondent to cease any further constructions.
- 10. In our view, the alleged failure to enforce the improvement notice can be taken to be a decision of the 1<sup>st</sup> Respondent, which brings the same within the ambit of Section 129(2) of the Act, and consequently within the confines of the jurisdiction of the Tribunal. Being aggrieved by the decision of the 1<sup>st</sup> Respondent, the Appellant has the right to approach this Tribunal for appropriate redress.
- 11. With regards to the orders sought, we note that the Appellant is principally seeking that the 1<sup>st</sup> Respondent be ordered to enforce the improvement notice made against the 2<sup>nd</sup> Respondent, and injunctive orders restraining the 2<sup>nd</sup> Respondent from continuing with acts and omissions in the suit property that constitute harm to the environment within the meaning of EMCA. In our view, the Tribunal is empowered by Section 129(3) to issue these orders.
- 12. More specifically, Section 129 (3) of the Act confers power upon the Tribunal to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. While interrogating the powers of the Tribunal under the said provision, the Court of Appeal in the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR*, held as follows:
 

‘In addition, Section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider the prayer Nos. 1, 7, 8, 9 and 10 in the petition’
- 13. We note that in its submissions, the 2<sup>nd</sup> Respondent submits the Tribunal does not have jurisdiction on account of the Appellant having raised a claim of infringement of the right to clean and healthy



environment. In our view, the jurisdiction of the Tribunal cannot be ousted merely because a party has alleged violation of a constitutional right. Indeed, the Court of Appeal in the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adegwa & 3 others*, supra held as follows;

‘It was never the intention of the Constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court.’

14. Along the same breadth, in the case of *Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR*, it was held that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. Consequently, it is our finding that the jurisdiction of the Tribunal cannot be ousted merely because the Appellant has alleged violation of their right to clean and healthy environment.
15. Furthermore, the Tribunal as a creature of a statute must, in discharging its mandate, uphold and defend the constitution and the law. That calling is expressly so provided for in Article 3 of the Constitution to the extent that every person, as defined in Article 260 of the Constitution, has an obligation to respect, uphold and defend the constitution. We are in agreement and bound by the decision of Mrima J in the case of *Stephen Moseto Mirambo & another vs IEBC & others constitutional Petition No E488 of 2021 Consolidated with Petition No E465 of 2021*, where the Learned Judge held as follows:

‘This Court, therefore, takes great exception to the position that Tribunals, quasi-judicial bodies, state organs or any other person, except Courts of law, cannot determine whether the Constitution and the law is infringed. That cannot, by any shred of imagination, be correct. The reason is simple. Article 3 of the Constitution and in mandatory terms, obligates every person, as defined in Article 260 of the Constitution, to respect, uphold and defend the constitution.

In discharging the said constitutional-calling, the persons, which include Tribunals and quasi-judicial bodies, must apply the Constitution and the law. A body which applies the Constitution and the law definitely has the capacity to understand and ascertain whether the very Constitution and the law it is supposed to uphold it is infringed. That can only be the reasonable rationale since the converse is to suggest that the persons do not understand and cannot therefore respect, uphold and defend the Constitution and the law. Such a finding will be in itself unconstitutional.’
16. We further note that in its submissions, the 2<sup>nd</sup> Respondent alleges that the Appellant has also lodged another suit in the Chief Magistrates Court being CASE NO E444 OF 2022 seeking similar orders as the ones sought herein. In our view, this is a question of fact which should be proved through evidence and as such, the same cannot be properly raised in a preliminary objection.
17. In any case, the allegation that there is another pending suit is not one of the grounds upon which the preliminary objection is based. As such, the same cannot be raised for the first time in submissions.
18. With respect to the other ground upon which the preliminary objection is predicated, the 2<sup>nd</sup> Respondent alleges that the Appeal to the Tribunal is contrary to the provisions of EMCA. The 2<sup>nd</sup> Respondent has not cared to highlight which provisions have been contravened by the appeal and provide particulars thereof. We have also gone through the 2<sup>nd</sup> Respondent’s submissions but we have not seen any explanation in that regard. Consequently, we are unable to determine this ground of objection and therefore the same fails.
19. In the end, the order which commends itself is the dismissal of the 2<sup>nd</sup> Respondent’s Notice of Preliminary Objection dated May 9, 2023 with no orders as to costs.



**DATED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2023**

**EMMANUEL MUMIA.....CHAIRMAN**

**WINNIE TSUMA.....VICE-CHAIR**

**KARIUKI MUIGUA.....MEMBER**

**DUNCAN KURIA.....MEMBER**

**RONALD ALLAMANO.....MEMBER**

