



Nusu v National Assembly & 5 others; Law Society of Kenya (Interested Party) (Constitutional Petition E009 of 2023) [2023] KEHC 24602 (KLR) (30 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E009 OF 2023**

FR OLEL, J

OCTOBER 30, 2023

BETWEEN

PAUL LIHANDA NUSU PETITIONER

AND

THE NATIONAL ASSEMBLY 1ST RESPONDENT

THE STATE 2ND RESPONDENT

CABINET SECRETARY IN CHARGE OF FINANCE 3RD RESPONDENT

**CABINET SECRETARY IN CHARGE OF FOREIGN AFFAIRS 4TH
RESPONDENT**

HON ATTORNEY GENERAL 5TH RESPONDENT

AUDITOR GENERAL 6TH RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

RULING

A. Background

1. The 2nd Respondent did on 29th June 2023 filed a notice of preliminary objection based on the following grounds.
 - i. This court lacks jurisdiction to determine this matter because;
 - a). The East African Development Bank (EADB) is established by the treaty Amending and Re-enacting the charter of the EADB that was ratified in 1980 by the Government of Kenya,



Uganda and Tanzania. As such, the EADB is an International Organization such as United Nations Organizations (UNOs) and the organization of Africa Unity (OAU).

b). International organizations receive the same privileges immunities and exemptions as foreign governments in accordance with part II of the *privileges and immunities Act* Cap 179 of the Laws of Kenya. Their property and assets enjoy immunity from all judicial proceedings concerning acts carried out in the pursuit of their objet and purpose, except in cases in which the organization expressly waives that immunity.

c).The monies received by the East African Development Bank forms part of its assets and therefore pursuant to Article 45 of the charter establishing the EAOb, the same is immune from any interference even by the member states that establish it. Furthermore the EADB has immunity from all and any judicial proceedings.

d). This Honourable Court therefore lacks jurisdiction to issue any orders that would affect the objectives and functionality of the East African Development Bank.

2. In response to the said preliminary objection as filed, the petitioner did file a Replying Affidavit dated 6th July 2023 where he stated that the preliminary objection was founded on a misapprehension of the nature of the petition as filed. The said petition was concern with the manner in which *East African Development Bank Act* Cap 493A (revised 2014) was passed, reviewed or ratified by the 1st and 2nd Respondent and if the process was in compliance with provisions of *the constitution*. Further the petition challenged the constitutionality of certain provisions within the *East African Development Bank* Cap 493 A (revised 2014).
3. The issue of immunity enjoyed by the bank was irrelevant to this petition and proceedings. *The Constitution* of Kenya did not protect the said Act from being reviewed and/or have certain clauses examined to determine its constitutionality. Further immunity of the said bank did not extend to legislative acts of the 1st and 2nd Respondents and this court had jurisdiction to determine if they had acted within the confines of *the constitution* of Kenya 2010.
4. Finally, the High Court was clothed with jurisdiction under Article 165 (3) (d) of *the constitution* to hear and determine any question regarding the interpretation of *the constitution*. The preliminary objection was thus misplaced, frivolous and vexatious. The petitioner did pray that the same be dismissed.
5. The other Respondents did not file any pleadings in support/opposition to the said preliminary objection apart from the 6th Respondent who did file submissions in support of the same.

B. Submissions.

2nd & 6th Respondent Submissions

6. It was the 2nd Respondent's contention that this court lacks jurisdiction to hear and determine this suit on account of the immunity enjoyed by the East African Development Bank (hereafter referred to as EADB). *The Constitution* of Kenya under Article 2(5) and (6) was emphatic on the place of international law in Kenya's judicial setup. The charter of the EADB which Kenya ratified in 1980 formed part of the laws of Kenya and the said charter was domesticated by enactment of *EADB Act*, Cap 493A, to give legal effect to certain Articles of the charter.
7. The charter therefore had the force of Law in Kenya and under Article 42 it gave the bank immunity in its dealings within the member states territories. Reliance was placed on *Karen Njeri Kandie versus Allsane BA and Shelter Afrique* (Civil Appeal No. 20 of 2013) *Creative Print House Limited versus*



East African Development Bank (2015) eKLR and CA Tanzania Civil Appeal No. 110 of 2009 *East African Development Bank Versus Blueline Enterprises Limited* (2012) and EA 5S.

8. Based on the foregoing, the parliament of Kenya while domesticating the charter establishing the EADB did so with the full knowledge of the General Rules of international law. The rights of the petitioner were not absolute and fell amongst the rights that can be limited by law under Article 24 of *the Constitution* of Kenya 2010 and his cause of action was not justiciable. The 2nd Respondent too urged this court to find that it lacked jurisdiction to issue any orders which would affect the objective and functionality of EADB.
9. The 6th respondents in their submissions did reiterate that the court lacks jurisdiction to determine this petition as the institution of East African Development Bank was established by treaty amending and re-enacting the charter of the East African Development Bank. The said treaty was also ratified by the other East African countries. The said Bank was accorded privileges, immunities and exceptions accorded to foreign governments in accordance to Part II of the *privileges and Immunities Act*, Cap 179 laws of Kenya, and therefore the bank was thus immune from every form of legal process except in cases arising out of the exercise of its borrowing powers, in which case it could be sued only in a court of competent jurisdiction within the member states.

Petitioners Submissions

10. The petitioner did aver that the Respondents had not filed any Replying affidavit to deny the pleadings as filed and thereof the facts as set out in the petition were uncontested. The petitioners position was that EADB Act should be nullified due to the manner in which it was passed ratified or domesticated by the legislature and further that the provisions cited in the petition specifically Articles 2(1), & (2) and Article 44(1) and (2) be declared unconstitutional and unenforceable for being inconsistent with *the constitution* of Kenya and undermines its spirit.
11. The preliminary objection also fell short of meeting the threshold of being a pure point of law likely to dispose of the petition as any determination on the question of immunity relied upon by the respondents, would require examination of the facts presented in the petition and an adjudication made on the basis of the facts pleaded thereto. Reliance as placed on *William Kiprono Towett and 1597 others versus Farmland Aviation Ltd and 2 others* (2016)eKLR.
12. On the issue of jurisdiction, Article 165(3)(d) of *the Constitution* of Kenya 2010 explicitly granted this court exclusive jurisdiction to hear and determine question concerning the interpretation of *the constitution* including the determination of whether anything said to be done under the authority of *the constitution* was consistent with it. The legislature had the constitutional mandate to pass legislation in a specified manner and the same could be challenged to see if it meet/passed the constitutional threshold. If the process failed to pass the constitutional test, then the high court could intervene, and had jurisdiction to hear any petition challenging such process. Reliance was placed on *speaker of National Assembly versus Attorney General and 3 others* (2013) eKLR and *Kiria wa Ngugi & 19 others versus the Attorney General*.
13. The respondent urged the court to find that the preliminary objection was misplaced, lacked merit and should be dismissed with costs.

Analysis & Determination

14. I have considered the Preliminary objection as filed, the replying affidavit of the petitioner in response and the submissions filed by the parties. The only issue which arises for determination is whether this court has jurisdiction to hear and determine this petition as presented and/or if the court lacks



jurisdiction to do so by dint of provisions' of Articles 45, 46 and 47 of the charter of East African Development Bank as domesticated by *East African Development Bank*, Cap 493A.

15. The petitioner did file this petition and sought various prayers in this petition namely;
- a. A declaration that the Petitioner's rights as aforementioned have been breached infringes and threatened by the Respondents actions referred to in the petition.
 - b. A declaration that in management of public funds, the 3rd respondent by dint of the *east African Development Bank Act* has violated the principles enshrined in Article 10 of *the constitution*.
 - c. A declaration that the said *East African Development Bank Act*, Cap 493A, ratified by the National Assembly of Kenya and/or Senate in 2014, was passed un-procedurally without regard for the rule of law or Supremacy of *the constitution* and in a manner that offends *the Constitution* of Kenya 2010.
 - d. A declaration that Sections 2(1) and (2) of the *East African Development Bank Act* Cap 493 and Articles 44(1) and (2) respectively for the East African Development Bank Charter appearing in the schedule to the Act are inconsistent with *the Constitution* of Kenya undermine the spirit of *the Constitution* and therefore the said Act is unconstitutional as far as the said provisions are concerned.
 - e. That a writ of certiorari be hereby issued by this court to quash the decision of the National Assembly to ratify the *East African Development Bank Act* Cap 493.
 - f. A declaration that any private entity that received public funds and other state resources is obliged to account for the utilization of the same to the public and auditor general is mandate to investigate the same and report to parliament for appropriate action.
 - g. A declaration that pursuant to the provision of sections 47 and 48 of the *Public Finance Management Act* 2012, parliament is obligated to formulate a legislative framework to guide donations, grants or payments by national government or its entities or third parties.
 - h. Any further relief, writs, directions s the honourable court may consider appropriate.
16. From the prayers sought in the petitioner it is clear that the petitioner is challenging the legislative process undertaken to pass *East African Development Bank Act*, Cap 493A and is also seeking a declaration that Section 2(1) and (2) of the East African Development Bank Cap 493A and Articles 44(1) and (2) of the East African Development Bank Charter appearing in the schedule are unconstitutional.

I) Whether the High Court has jurisdiction to hear and determine this petition.

17. The subject of jurisdiction is by now well settled by *the Constitution*, the law and legal principles. Jurisdiction is defined in Halsbury's Laws of England 4th Ed Vol 9 as

“...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”. Black's Law Dictionary, 9th Edition, defines jurisdiction as the court's power to entertain, hear and determine a dispute before it.



18. In Words and Phrases Legally Defined Vol 3, John Beecroft Saunders defines jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

19. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

20. Further jurisdiction of a Court can neither be implied nor conferred by agreement of parties, by judicial craft or legal sophistry, it must be expressly provided for in *the Constitution* or in statute. This is holding of Supreme Court in the case of, *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where it 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.” (Emphasis added)

21. Jurisdictional limit of the High Court is anchored in Article 165(3) of *the Constitution* which states that, the High court has;

- a. Unlimited original jurisdiction in criminal and civil matters;
- b. Jurisdiction to determine the question whether a right or fundamental freedom in the bill of Rights has been denied, violated, infringed or threatened;
- c.
- d. Jurisdiction to hear any question respecting the interpretation of this constitution including the determination of
 - (i) The question of whether any law is inconsistent with or in contravention of this constitution;
 - (ii) The question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, *the constitution*;



- (iii) any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the level of governments; and
 - (iv) a question relating to conflict of laws under Article 191; and
22. From the pleadings as filed, the petitioner alleges that there has been a violation of *the constitution* due to failure of the 1st and 2nd respondents to comply with constitutional provisions, in the manner in which they passed, ratified or domesticated the *East African Development Bank Act*. The petitioner also challenges the constitutionality of various provisions of the said Act and Charter. Article 2(1), of *the constitution* states that, *the constitution* is the supreme law of the Republic and binds all persons and all state organs at both levels of government. Further Article 20 of *the Constitution* of Kenya, 2010 also reinforces this provision and states that the Bill of Rights applies to all law and bound all State organs and all persons. Where these rights are breached, under Article 22(1), any person can institute court proceedings to remedy the same.
 23. It therefore follows that when it came to the enforcement of the Bill of Rights, any person or entity, private or public is liable to be sued where allegations of violation of rights are made against them. In other words, it was not the nature of the entity that determines its culpability under the Bill of Rights but the nature of the complaint made against it.
 24. The complaints raised by the petitioner falls squarely within the provisions of Article 20(1), 22(1), and 165(3), (b) and (d)(i) &(ii) of *the constitution* of Kenya and the jurisdiction of this court is clearly provided for under the said Articles of *the constitution* of Kenya 2010. The process under taken to domesticate the EADB Act, and any of the legal provision's made therein, including the immunity clause, and and/or any provision within any law in Kenya can be challenged if its constitutional underpinning is questioned. The validity, merits or lack of merit thereof, can only be determined after full hearing of the petition.
 25. The upshot is that the preliminary objection as filed is wholly unmerited and the same is dismissed with costs to the petitioner.
 26. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 30TH DAY OF OCTOBER, 2023.

In the presence of;

-for Petitioner
-for 1st Respondent
-for 2nd Respondent
- for 3rd Respondent
- for 4th Respondent
-for 5th Respondent



.....for 6th Respondent

..... Court Assistant

