



**Kiirua Buuri Water Project (Suing Through Its Secretary – John Kimathi M’tuerandu ) v Deputy County Commissioner Buuri East & 4 others (Petition E008 of 2023) [2023] KEHC 25785 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25785 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
PETITION E008 OF 2023  
EM MURIITHI, J  
NOVEMBER 28, 2023**

**BETWEEN**

**KIIRUA BUURI WATER PROJECT (SUING THROUGH ITS SECRETARY – JOHN KIMATHI M’TUERANDU ) ..... PETITIONER**

**AND**

**DEPUTY COUNTY COMMISSIONER BUURI EAST ..... 1<sup>ST</sup> RESPONDENT**

**MEMBER OF COUNTY ASSEMBLY KIRICHIA WARD ..... 2<sup>ND</sup> RESPONDENT**

**MEMBER OF COUNTY ASSEMBLY KIIRUA NAARI WARD .... 3<sup>RD</sup> RESPONDENT**

**MEMBER OF COUNTY ASSEMBLY RUIRI-RWARERA WARD .... 4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner/Applicant herein filed a Notice of Motion application dated 27<sup>th</sup> April, 2023 expressed to be brought pursuant to Rules 21 and 22 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules.

**The Application**

2. The said application seeks for the following orders:
  1. Spent.
  2. Spent.



3. That the honourable court be pleased to issue an order of interim injunction restraining the 1<sup>st</sup> to 4<sup>th</sup> Respondents whether acting jointly or severally by themselves, their servants, agents or representatives or otherwise from interfering with the petitioner's running of their water projects to wit Kithima Nkando Borehole (Nkando Borehole), Ntugi Secondary Borehole (Ntugi Borehole), Ruiru Rwarera Borehole (Njotene Borehole) and Kiirua Buuri Irrigation Water Project pending interpartes hearing and determination of this application.
  4. That costs of this Petition do abide the outcome of the Petition.
3. The application is premised on the grounds on the face of the Application and is supported by the affidavit sworn by John Kimathi M'Tuerandu on 27<sup>th</sup> April, 2023. That the Petitioner, Kiirua Buuri Water Project (hereinafter "Kiirua Buuri Water Project") is a community based organization whose purpose is to implement irrigation systems and operate, maintain and manage systems for the betterment of its members.
  4. That the Kiirua Buuri Water Project comprise of 3750 members and it own and manages other projects among them Kithima Nkando Borehole (Nkando Borehole), Ntugi Secondary Borehole (Ntugi Borehole), Ruiru Rwarera Borehole (Njotene Borehole) and Kiirua Buuri Irrigation Water Project. That these projects are funded by members of the Petitioner with assistance from the National Irrigation Authority. That the aforementioned projects were finally completed and handed over to the Petitioner by the National Irrigation Authority.
  5. It is the Petitioner's contention is that the 1<sup>st</sup> to 4<sup>th</sup> Respondents, in abuse of their authority, have incited non-members of the Applicant to use the Applicant's water project, boreholes, and assets without the Applicant's consent. The Petitioner aver that the 1<sup>st</sup> to 4<sup>th</sup> respondents have been interfering with the management of the Petitioner's projects in violation of Articles 40, 47, and 50 of *the Constitution* of Kenya and the *Fair Administrative Action Act* (2015). That the aforesaid actions of the Respondents are ultra vires the authority and powers of the Respondents and unless the orders sought are granted, the Petitioner's rights under *the constitution* and the *Fair Administrative Action Act* (2015) will be violated.

### **The Response**

6. The Application was opposed by the 1<sup>st</sup> and 5<sup>th</sup> Respondents, who jointly filed preliminary objection dated 16<sup>th</sup> May, 2023. On the even date, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents jointly filed their grounds of opposition. Consequently, the 1<sup>st</sup> and 5<sup>th</sup> Respondent also jointly filed grounds of opposition dated 9<sup>th</sup> June, 2023.
7. On the preliminary objection, it was argued on behalf of the 1<sup>st</sup> and 5<sup>th</sup> Respondents that the Petition and Application offend the doctrine of exhaustion of administrative remedies by failing to seek the administrative remedies provided by law before seeking judicial intervention. That the *Water Act* No. 43 of 2016 provides that the Water Tribunal is the one clothed with the jurisdiction to hear and determine any dispute concerning water resources and that the Environmental Management and Coordination Act No. 8 of 1999 grants the National Environment Tribunal the jurisdiction to determine any matter related to environmental resources such as the use and management of water resources. It was thus averred that the failure to comply with two statutes made the suit bad in law, incurable defective, and an abuse of the court process.
8. For the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondent, it was argued that the Application and Petition are not sustainable on the grounds that the Petitioner has no locus stand to institute the proceedings on behalf of Kiiru Buuri Water Project, an unincorporated association. Further, that the Application and Petition do



not meet the prerequisites and requirements of a constitutional petition as it does not disclose any justifiable cause or constitutional violation to form the basis of a constitutional claim.

### **The Submissions**

9. In response to the grounds of opposition by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents, it was submitted, on the issue of whether the petitioner had locus standi to institute proceedings that the Applicant's constitution (Article 10.1 Part IX), that the Association is to sue through the Secretary of the Water Users Association and that the Applicant has provided proof that he was elected as the secretary of the association.
10. On whether the non-joinder of the National Irrigation Authority renders the petition premature and speculative, counsel for the Petitioner submitted that the court can order joinder of the National Irrigation Authority as a party to these proceedings for necessary determination of this suit hence the failure to enjoin the said Authority does not render the entire defective or premature.
11. Finally, on whether the petition has met the requirements of a constitutional petition, it was submitted that the petition has outlined the facts constituting the petition, the nature of the injury caused, details of related proceedings and reliefs sought and therefore has complied with Rule 10 of the Mutunga Rules 2013.
12. In response to the 1<sup>st</sup> and 5<sup>th</sup> Respondent's preliminary objection dated 16<sup>th</sup> May, 2023, counsel for the Petitioner submitted that under the [Water Act](#), the Water Tribunal is empowered to hear appeals from the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board. The Tribunal does not have jurisdiction to hear and determine the present matter as the decision complained about in this case was not made by the Cabinet Secretary, the Authority and Regulatory Board or any person under their authority. Further, that the decision complained of herein does not touch on the refusal of license, restriction of license or a revocation of the Petitioner's license which complaints lie within the jurisdiction of the National Environment Tribunal as per Section 129 of the [Environmental Management and Co-ordination Act](#).
13. It was further submitted that under Section 7 of the [Fair Administrative Action Act](#), a person can apply for judicial review of an administrative action to either a court or a tribunal. That Section 9 of the Act provides that a person aggrieved by an administrative action may without unreasonable delay apply for judicial review of any administrative action to the High Court or a subordinate court upon which jurisdiction is conferred pursuant to Article 22(3) of [the Constitution](#).
14. On the issue of the doctrine of exhaustion, it was submitted on behalf of the Petitioner that the instant suit is not barred by the said doctrine as the suit seeks enforcement of fundamental rights which can only be barred by the High Court. It was hence the Petitioner's submission that this court is the proper forum to determine the issues of contravention of the constitutional rights of the Petitioner.
15. On behalf of the 1<sup>st</sup> and 5<sup>th</sup> Respondents, it was submitted that the dispute herein is premised on the use and management of a borehole which is a water resource and as such the operational law that should govern disputes related to its use is the [Water Act](#) 2016 and the Environmental Management and Coordination Act No. 8 of 1999. Further, that first port of call in disputes related to the use and management of water resources is the Water Tribunal (the "Tribunal") after which any person aggrieved with the decision of the said Tribunal may within 21 days from the date of the decision appeal to the Environment and Land Court (ELC). That the ELC is appellate in nature and the Applicant cannot bypass the Tribunal and seek intervention from the ELC. To this end, they relied on the case of *Apex Apartments Limited v. Elizabeth Maruma Mrema & 3 Others* [2017] eKLR.



16. Additionally, it was submitted that any matter arising out of the management of environmental resources including water as espoused under the Environmental Management and Coordination Act should be first adjudicated by the National Environment Tribunal. To buttress this position, 1<sup>st</sup> and 5<sup>th</sup> Respondents relied on the case of Joseph Ojwang’ Oundo v. National Environment Management Authority & 8 Others [2015] eKLR.
17. Counsel for the 1<sup>st</sup> and 5<sup>th</sup> Respondents further submitted that the Applicant offends the doctrine of exhaustion of statutory remedies by invoking the jurisdiction of this Court at the first instance. That the dispute herein, which involves the use and management of multiple water resources, is most suitably resolved out of court through local community initiatives as the same would efficiently dispose of the dispute whilst safeguarding the greater good and harmony of the community rather than subjecting the matter to a contentious legal process.
18. Finally, counsel for the 1<sup>st</sup> and 5<sup>th</sup> Respondent submitted that the Applicant has not adduced evidence to demonstrate that his right has been threatened or is likely to be threatened by the Respondents herein. Further, that the Applicant has not proved that they have any exclusive right to use and manage the boreholes forming the subject matter of this suit. It was thus his submission that the Applicant has not met the requisite standard for the grant of interlocutory injunction as set out in the case of Giella v. Cassman Brown Co. Ltd. [1973] E.A. 358. He thus implored this Honourable Court to uphold the subject preliminary objection and proceed to dismiss the suit and award costs thereof to the 1<sup>st</sup> and 5<sup>th</sup> Respondent.
19. For the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents, it was submitted that the Petitioner herein is a water user association that is recognized under Section 20 of the *Irrigation Act*. That its mandate in accordance with that position is management and maintenance of the irrigation scheme herein. That being a water users association, the Petitioner performs its mandate as delegated by the National Irrigation Authority and is as such bound by the Section 25 and 26 of the *Irrigation Act* on dispute resolution. To this end, it was submitted that the Petitioner ought to have been heard by the dispute resolution committee at the first instance and that the jurisdiction of this Court ought not to have been invoked until such mechanisms were exhausted.
20. Finally, counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents submitted that the National Irrigation Authority is a necessary party to these proceedings and that the failure to join the said authority in this suit made the Petitioner’s petition defective.

### **Issues for Determination**

21. I have considered Notice of Motion application dated 27<sup>th</sup> April, 2023, the preliminary objection by the 1<sup>st</sup> and 5<sup>th</sup> Respondent, the grounds of opposition raised, as well as the respective submission by counsel for the parties. The main issues that arise for determination are:
  1. Whether this Court has jurisdiction to hear and determine this matter, and if so,
  2. Whether the Petitioner had the requisite locus standi to institute the suit on behalf of Kiirua Buuri Water Project, and if so,
  3. Whether the requirements for granting the interim injunctive orders sought were met.



## Analysis

### On Whether This Court Has Jurisdiction To Determine The Matter

22. The Respondents questions the jurisdiction of this Court to hear and determine the suit in the first instant. According to the 1<sup>st</sup> and 5<sup>th</sup> Respondents, this suit offends various provisions of the Water Act particularly Section 121 of the Act which provides that the Water Tribunal has the jurisdiction to hear and determine at the first instance any dispute concerning water resources. From its preamble, the Water is an Act of Parliament to provide for the regulation, management and development of water resources, water and sewerage services; and for other connected purposes. It establishes a Water Tribunal under Section 119 of the Act whose description is granted under Section 121 of the Act which provides as follows:

“(1) Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.

(2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.”

23. From my understanding of the above provision, I agree with the submission by the Petitioner that the jurisdiction of the Water Tribunal to hear disputes is only limited to appeals the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board. This is not the case in this matter and hence this ground fails.

24. The second ground raised on the issue of jurisdiction of this Court is that the instant Petition and Application further offends the provisions of Section 126 of the Environmental Management and Coordination Act which grants the National Environment Tribunal jurisdiction to determine any matter related to environmental resources such as the use and management of water resources. From its preamble, the said Act was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Section 125 of the Act establishes the National Environment Tribunal whose jurisdiction is provided under Section 126(2) of the Act as follows:

“The Tribunal shall, upon an appeal made to it in writing by any or a referral made to it by the Authority on any matter relating to this Act, inquire into the matter and make an award, give directions, make orders or make decisions thereon, and every award, direction, order or decision made shall be notified by the Tribunal to the parties concerned, the Authority [the National Environment Management Authority] or any relevant committee thereof, as the case may be.”

25. In the instant case, Kiirua Buuri Irrigation Development Project was implemented by National Irrigation Authority (NIA). It is not in dispute that Kiirua Buuri Irrigation Water Project serves farmers who practice irrigation. The dispute herein involves a water users association which therefore,



as submitted by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents, falls under the ambit of the *Irrigation Act*, 2019 and not the Environmental Management and Coordination Act.

26. The dispute resolution mechanisms are provided under Part VII of the *Irrigation Act* which provides as follows: -

Part VII — Dispute Resolution

“25. (1) Disputes related to irrigation and drainage scheme development, management, water allocations and delivery, financing, operation and maintenance and other matters shall be resolved within the irrigation water users association or at irrigation scheme level wherever possible.

(2) Each association which is legally registered shall have a Dispute Resolution Committee that consists of at least three members selected by its governing body.

(3) Decisions regarding any dispute contemplated under this section shall be made by the relevant Dispute Resolution Committee within thirty days of the hearing of the dispute in question.

26. Where the water users association or at the irrigation scheme level is unable to resolve a dispute, the same shall be referred to the Dispute Resolution Committee at the first instance to consider and determine the matter before the same is referred to Court.”

27. The above provisions are cast in mandatory terms and it thus follows that the Petitioner/Applicant ought to have staged their complaint before the Dispute Resolution Committee at the first instance before approaching this Court.

28. The principle of strict compliance with the dispute resolution mechanism under *the Constitution* or statute is long accepted in the oft-cited case of the Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling) that -

“ [T]here is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

29. In the case of Geoffrey Muthinja & another Vs Samuel Muguna Henry & 1756 others [2015] eKLR the Court of Appeal restated the principle: -

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

30. In that case, the two Appellants, Geoffrey Muthinja and Robert Banda Ngombe, were “men of cloth”. Up to the controversial Annual General Meeting of the East Africa Pentecostal Church (“the Church”) held on 19<sup>th</sup> August 2010, they were the National Secretary-General and Treasurer, respectively, of the



Church. They, together with Samuel Muguna Henry, John Jembe Mumba and Rev. John Maroo, the persons said to have been elected to office on that date, were sued at the High Court in Meru by the Trustees of the Church and some 1,750 other persons. The suit, which was commenced by way of Constitutional Petition, alleged that the said elections spawned misunderstandings which generated a plethora of law suits filed by various interested parties in various courts in Meru and its environs.

31. After considering the rival submissions by the parties, the High Court held that all but two of the cases (the excepted ones being one filed at the High Court and the other a criminal case) were null and void; infringed the petitioners' freedom of worship and struck them out. The court ordered the affected plaintiffs or any members of the church aggrieved by the contested elections be at liberty within 30 days to refer their dispute to the appropriate body of the church for determination, failing which such party be at liberty to file suit for redress.
32. The appellants were dissatisfied with that decision and preferred an appeal to the Court of Appeal. The Court of Appeal held that the exhaustion doctrine applies even where what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. The said appeal was thus dismissed, but with no order as to costs.
33. In the instant case, the Petitioner/Applicant did not exhaust the available dispute resolution mechanisms provided by law, and this Court lacks the jurisdiction to determine the case. Consequently, the Court need not delve into the other issues raised by the parties or merits of the case.

### **Conclusion**

34. Accordingly, for the reasons set out above, the court makes the following orders:
  1. The Application dated 27<sup>th</sup> April, 2023 and the Petition of even date is struck out for want of jurisdiction.
  2. There shall be no orders as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Gachohi for the Petitioner.

Mr. Wachira Nguyo for 1 & 5 Respondents.

Mr. Mwirigi Brian for 2, 3, & 4 Respondents.

