



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

PETITION NO. E005 OF 2020

IN THE MATTER OF

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER

ARTICLE 27, 28, 40, 47 & 48 OF THE CONSTITUTION OF KENYA 2010

ONESMUS MAINA GATHARAPETITIONER

VS.

1. ATHI WATER WORKS DEVELOPMENT AGENCY

2. CHINA HENAN INTERNATIONAL CO-OPERATION GROUP CO. LTD

3. THE COUNTY GOVERNMENT OF KIAMBURESPONDENTS

RULING

1. Legal practitioners and parties should always acquaint themselves with the court's jurisdiction before filing pleadings in any court.
2. **ONESMUS MAINA GATHARA (Onesmus)** approached this Court with a petition dated 15th December, 2020. He seeks prayers for declaration that his constitutional rights have been violated by **ATHI WATER WORKS DEVELOPMENT AGENCY** (hereinafter **Athi Water**) and **CHINA HENAN INTERNATIONAL CO-OPERATION GROUP CO. LTD** (hereinafter **China Henan**), and **THE COUNTY GOVERNMENT OF KIAMBU**. That is, 1st, 2nd and 3rd respondents.
3. On 21st October, 2021, parties confirmed having filed their respective submissions to that petition and today's date was fixed as the date for the delivery of the judgment by this Court. When I however deliberated on this matter, in preparation of the judgment, it become very clear that this Court lacks jurisdiction to determine this matter. The parties did not however raise the issue of jurisdiction in their written submissions.
4. To appreciate why I am of the view that this Court lacks jurisdiction to determine this matter, I will, in summary form set out the background of this matter and the prayers Onesmus seeks from this Court.
5. Onesmus is the registered owner of property title number **NDUMBER/RIABAI/4774**. Onesmus in his affidavit deponed that Athi water in the year 2019 commissioned construction of Kiambu and Ruaka Water Sewage project. In November, 2020, Onesmus alleged that China Henan invaded his property with tractor, Lorry and pick-up truck and caused destruction of his development, thickets, fences, seedling crops, grass and landscape. That China Henan undertook deep excavation on Onesmus' property and thereby created trenches. Onesmus alleged he had no prior knowledge of such "invasion" of his property. Onesmus deponed that the respondents' acts on his land was a violation of his rights to own property and his right to clean and healthy environment guaranteed under Article 40 and 42 of the Constitution.
6. Onesmus prayers in his petition are that there be declaration the respondent's entry on his land was unconstitutional and violated Article 27, 28, 40 and 47 of the Constitution; for a declaration the respondents' acts did not comply with the provisions under Land Act 2012; a declaration the respondents' acts interfered with private asset; an order for prohibition to restrain the respondents from entering or trespassing Onesmus' land; and an order that the respondents do restore his property by removing the trenches..
7. **Article 165(5)(b)** of the Constitution provides that the High Court does not have jurisdiction in respect of matters "falling within the jurisdiction of the courts contemplated in **Article 162(2)**". One of the courts contemplated under **Article 162(2)** is the **Environment and**

Land Court (ELC). Section 13 of the **Environment and Land Court Act** provides that ELC has exclusive jurisdiction over matters relating to environmental planning and use of land, amongst others. The prayers that Onesmus seeks fall squarely within the provisions of section 13 of Environment and Land Court Act. A case in point is **REPUBLIC VS. CHIEF LAND REGISTRAR & ANOTHER (2019) eKLR** as follows:-

“10. A court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. Article 165(1) of the Constitution vests vast powers in the High Court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction ‘to hear any question respecting the interpretation of the Constitution. The limitation of this courts vast powers conferred under Article 165 is to be found in Sub-Article (5) which states in mandatory terms that the high court shall not have jurisdiction in respect of matters:- (a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b). It is a constitution edict that this court has no jurisdiction to determine matters falling under Article 162(2)(a)&(b). But what are these matters? The answer to this question is found in the provisions of Section 13 of the Environment and Court Act, an Act of Parliament enacted to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

11. The use of the word shall in the Article 162(2)(b) is worth noting. As stated later in this ruling the use of the word shall is mandatory as opposed to directory.”

8. The importance of a court having jurisdiction to determine a matter was stated in the case **OWNERS OF MOTOR VESSEL “LILLIAN S” VS. CALTEX OIL (KENYA) LTD (1989) KLR 1.**

DISPOSITION

9. This Court having found it lacks jurisdiction to determine this matter orders as follows:-

- (a) This case is hereby transferred to Thika Environment and Land Court.
- (b) At the reading of this Ruling, a mention date will be fixed before Thika ELC.

RULING SIGNED DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF FEBRUARY, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Mourice

For Petitioner : - N/A

For 1st Repondent : - N/A

For 2nd Respondent : - N/A

For 3rd Respondent: - N/A

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE