



Gisesa v National Land Commission & another; County Government of Nyamira & 2 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2023] KEELC 17867 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND PETITION E001 OF 2023**

**JM KAMAU, J
MAY 25, 2023**

BETWEEN

NYAMBEGA GISESA PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

AND

THE COUNTY GOVERNMENT OF NYAMIRA INTERESTED PARTY

THE MINISTRY OF LANDS AND PHYSICAL PLANNING INTERESTED PARTY

THE COUNTY GOVERNMENT OF KISII INTERESTED PARTY

RULING

1. In this matter where the 2nd respondent has raised a preliminary objection on the grounds that: -

1. The Petition herein is not pleaded with precision as required of constitutional Petitions in that: -

- a. The Petition has not set out with adequate precision the Petitioner’s complaint, the provisions of the Constitution infringed and the manner in which they are alleged to be infringed as held in the case of *Annarita Karimi Njeru v Republic* (1979) e KLR.
- b. The Petition and the Application do not prove for adequate particulars of claim relating to the alleged violations of the Constitution of Kenya and the County Governments Act, 2012 as set out in the case of *Mumo Matemu v Trusted Society of*



Human Rights Alliance v 5 Others (2013) e KLR relating to the principle as set out in the Annarita Case (Supra).

- c. The Petition and the Application do not state in a clear, concise and precise manner the correlation between the alleged infringements and the actions of the Respondents (if any) as set out in the case of *Manase Guyo & 260 Others v Kenya first Services* (2016) e KLR.
 - d. The Petition is premised on alleged breach of statute without demonstrating how such alleged breach infringes on the bill of rights and/or constitutional breach and thus wrongly brought as a Constitutional Petition as set out in the case of *Godfrey Paul Okutoyi v Habil Okaka & Another* (2018) e KLR.
2. This court lacks jurisdiction to hear this matter pursuant to article 89 (2) (3) of the Constitution of Kenya, which states that: -
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- (2) The Independent Electoral and Boundaries Commission shall review the names and the boundaries of constituencies at intervals of not less than eight years and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of parliament.
 - (3) The Commission shall review the number, names and boundaries of wards periodically and therefore this Honourable Court lacks bereft of jurisdiction as prayed for in prayers 67 (c), (d), (e), (f), (g), (i), (j) and (k) of the Petition.
3. This Court lacks jurisdiction in terms of hearing and determining the prayers sought both in the Notice of Motion dated 6th April, 2023 at paragraphs 2 (a), (b), (c) and (3) and the Petition at paragraphs 67 (a), (b) and (h) in a far as the same run contrary to the provisions of section 13 of the Environment and Land Court Act No. 19 of 2011 and article 162 (2) (b) of the Constitution of Kenya 2010.
4. That the orders sought can only be issued in an Application for Judicial Review hence the orders sought are untenable in law in the instant suit.
2. I have observed that the I.E.B.C. had raised similar objections but which she has now withdrawn and in a surprise twist, decided to support the Petition.
3. Jurisdiction is everything and since this Court's jurisdiction to entertain this Petition has been raised, I must address it first. This court derives its authority from article 162 (2) (b) of the Constitution of Kenya, 2010:
- “Parliament shall establish courts with status of the High Court to hear and determine disputes relating to the Environment and the use and occupation and Tittle to land.”
4. The Environment and Land Court Act, No. 19 of 2011 is preambled:-
- “An act of parliament to give effect to Article 162 (2) of the Constitution to establish a Superior Court to her 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.”



5. Section 13 (2) (a) (c) and (e) of the Act provides that: -

“In exercise of its jurisdiction under article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes.

- (a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources
- (b) Relating to land administration and management
- (c) Any other dispute relating to environment and land.”

6. Among the issues raised in this Petition is who should collect revenue in Keroka Town. Such revenue include rates and rents by the 2 County Governments that have a common boundary on the said town. The other issue is where the boundary is. The 2nd Interested Party admits that the issue of the boundary between the Petitioner’s ward Rigomba in Nyamira and that of Ichuni in Kisii County is in issue. Should this court determine prayer numbers (c) (g) and (k) of the Petition which fall under article 162 (2) (b) of the Constitution it will have discharged its mandate. This is in fact the dominant issue. It falls under occupation of land. This court therefore has jurisdiction under article 162 (2) (b). Once the same is sorted out, all other issues will take their shape, including the collection of revenues. Unless there are other underlying issues not brought out before this court.

7. On precision, I agree with Mr. Anyoka for I.E.B.C. that the Petitioner has complied with the threshold of precision by relying on the appropriate Articles when moving the court under the Bill of Rights. There are well particularized incidents of harassment, injuries and loss of property. The same are well particularized. The court is therefore fully and well seized of the matter.

8. On the issue of article 89, this court has not been invited to alter or review the boundaries of any constituencies but to have the relevant bodies point out those boundaries.

9. Article 89 (3) of the Constitution of Kenya, 2010 provides that the Commission, I.E.B.C. shall review the number, names and boundaries of wards periodically. It is true that Article 189 (1) of the Constitution provides that: -

- (3) in any dispute between Governments, the Governments shall make every reasonable effort to settle the dispute including by means of procedures provided under national legislation,”

10. This does not concern the matter before this court. It only recommends and encourages Governments to use every reasonable effort to settle the dispute by whatever means allowed by law. The article uses the term including. It does not even give the list of the means used to settle the dispute. It is left open to the parties to choose the means they wish to provide. The use of courts is one of them. Secondly, this is not a matter between 2 Governments. It is a matter between a private Kenyan citizen by the name Nyambega Gisesa who is not a Government on one side and the National Government as well as its Chief Legal Advisor, the Hon. Attorney General, a Government Ministry, the Department that sets the boundaries and 2 County Governments on the other hand. It can therefore not be a matter falling under the *Inter-Governmental relations Act* No. 2 of 2012 at all. The fact that the Petitioner is a member of County Assembly notwithstanding.

11. Under article 96, the role of the Senate does not include determining a dispute between a private citizen and a Government. It therefore is not applicable in this Petition. article 119 is also not relevant. In as far as article 159 (2) of the Constitution is concerned, the 2nd Respondent has shot himself on the foot



by invoking this Article. When she says that this dispute begun in 2016, she has not done anything to address it until the issue of where the boundary lies was taken up by the Petitioner this year. You cannot expect other people to seek alternative forms of dispute resolution when you yourself are not doing anything about it and when your opponent moves the court, you start crying foul that he should have sought reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. You can also not invoke Sub-Article 2 (b) since by not resolving this matter once and for all you are not helping not to delay justice. In fact, you are doing the direct opposite. The matter is already in court. The court has asked the Independent Electoral and Boundary Commission of Kenya to help the parties identify the boundary. You want to impede this. The Land Registrars and County Surveyors from both neighboring counties including the Regional Land Registrar are in court with all their maps. You don't want them to help the court to resolve the matter. When the court asks these qualified personnel to assist the court, you claim that the court is taking a short cut to the matter. Isn't the court by so doing trying not to delay justice and do justice to all without undue regard to procedural technicalities? Top Government Personnel from the I.E.B.C. and N.L.C. are in court to show the parties the boundaries of the 2 neighboring wards at short notice. The 2nd Interested Party does not want them to do so.

12. Finally, section 3 of the Environment and Land Court Act, No. 19 of 2011 provides that the Principal Objective of the Act is to provide fast, expeditious, proportionate and accessible resolutions of disputes governed by the Act and that the parties and their duly authorized representatives, I believe mainly Advocates, shall assist the court to further this overriding objective. Counsel should therefore help parties to achieve this as soon as is practicable. I agree with Mr. Mbosota entirely that a number of prayers in the Petition do not fall under the jurisdiction of this court. But the dominant issue is the boundary over which this court has jurisdiction.

13. In the premises the Preliminary Objection dated 24/05/2023 is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 25TH DAY OF MAY, 2023

MUGO KAMAU

JUDGE

In the Presence of: -

Mr. Maeche, Ms. Bundi & Mr. Mokaya for the Petitioner

Mr. Ramah for the 2nd Respondent and holding brief for the 1st Respondent and also for the 3rd Interested party

Mr. Mbosota for the 2nd Interested party

Mr. Anyoka for the C.E.O. of the I.E.B.C.

Mr. Orina for the 1st Interested party

