



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CONSTITUTIONAL PETITION NO.5 OF 2019

IN THE MATTER OF ARTICLES 20, 23(3), 27, 28, 39(3), 40(1), 42(as red with Article 70), 43(1) (b), (d), 46(1)(a) and 46(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLE 27, 39, 40(1), 43(1)(b) and (d) and 46 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTIONAL RIGHT OF ACESS TO CLEAN AND SAFE WATER IN ADEQUATE QUANTITIES UNDER ARTICLE 43(1)(d) OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF THE CONSTITUTIONAL RIGHT TO PROTECTIONOF CONSUMER RIGHTS UNDER ARTICLE 46(1)(a) & (c) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

STELLA NYAWIRA NJUGI.....1ST PETITIONER

BROOKPLACE INVESTMENT.....2ND PETITIONER

AND

NYERI WATER & SANITATION

COMPANT LTD (NYEWASCO).....RESPONDENT

RULING

INTRODUCTION

1. A brief overview of the case is that the 1st petitioner’s husband entered into a tenancy agreement with the 2nd petitioner for rental of a residential house, A2 situate on parcel number Nyeri/Municipality Block 1/1255; the 1st petitioner sought provision of supply of water from the respondent company to which the respondent declined as there was an outstanding bill of Kshs.10,469/60 which was owed by a previous

tenant, one Peter Kihara Wanjiru account number 00000118872; the respondent indicated that pursuant to company policy it could not connect water supply to an account with outstanding arrears;

2. The Petitioners being aggrieved by the acts of the respondent in declining and refusing to offer water supply connection to them, filed this instant Petition and sought the following orders;

(i) A declaration that the acts of the respondent to decline and refuse to offer a water supply connection to the petitioners or any other person in the position of land lord are a gross violation of the petitioners' constitutional right to clean and safe water in adequate quantities and to accessible and adequate housing and to reasonable standards of sanitation and the protection afforded under Article 43 of the Constitution;

(ii) A declaration that the act by the respondent to demand that the landlord should settle the outstanding water bill for a previous tenant to enable water connection to their new tenant is a gross violation of a landlords right to protection of their economic interests which protection is offered under Article 46 of the Constitution;

(iii) A declaration that the existing respondent company's policy prohibiting a new consumer from receiving a water supply connection due to outstanding bills of a previous tenant which bills are in no way a result of his/her consumption is null and void and the policy be quashed;

(iv) A declaration that the existing company policy of shifting the burden of payment of outstanding arrears for water bills by previous tenants to the 2nd petitioner and/or their agents is null and void and the said policy be quashed;

(v) A declaration and an order directing the respondent to take all necessary steps to address the gross violation of the petitioners' constitutional rights including but not limited to the respondent forthwith providing a water supply connection to the petitioner with respect to her current premises;

(vi) A declaration that the respondent is liable to compensate the petitioners for the gross violation, infringement and denial of the petitioners' rights and fundamental freedoms;

(vii) An order directing the respondent to refund the sum of Kshs.10,469/60 to the 2nd petitioner paid to the respondent for clearance of the outstanding bill for account number 84254-00000118872;

(viii) General damages for breach of the for breach of the forgoing rights;

(ix) The respondent to pay the costs of the Petition.

(x) Any other relief that this court may deem just to grant.

3. The petitioners' claims are supported by the grounds on the face of the Petition and on the Supporting Affidavits sworn by the petitioners, Stella Nyawira Njugi and a director of the 2nd Petitioner Peter Njoroge; in response the respondent raised a Preliminary Objection on jurisdiction;

4. The petitioners were represented by learned counsel Mr Nderi and Ms Wangechi whereas the respondent was represented by learned counsel Mr Waweru Gikonyo; the parties were directed to canvass the Petition and the Preliminary Objection by filing and exchanging written submissions; hereunder is a summary of the parties rival submissions.

PETITIONERS' SUBMISSIONS

5. The 1st petitioner is the occupant of the residential house marked as A2 on plot Nyeri/Municipality Block 1/1255 and the wife of Hassan Mohammed Abdi the registered tenant of the premises; the 2nd petitioner is the rightful owner of the premises known as Nyeri/Municipality Block 1/1255 Chania and the

landlord of the premises built thereon;

6. It is the petitioners' case that their constitutional rights have been breached, violated and infringed by the respondent declining to offer a connection of water supply to the petitioners; further the respondent is in violation of Article 43 which provides for the right to clean and safe water in adequate quantities and Article 46 of the Constitution which protects consumer rights to goods and services of reasonable quality which the respondent is licensed to provide; the demand for clearing of the outstanding water bills of previous tenants by the 2nd petitioner as the landlord, is a gross violation of the landlords' right to protection of its economic interests;

7. The 1st petitioner contends that she is not in any way connected to the outstanding bill nor is she related to the previous tenant and that the bill does not touch on water that she might have consumed as she was yet to get into a water supply connection contract with the respondent;

8. The respondent's actions contravene the supremacy of the constitution as enshrined under Article 2 of the Constitution by failing to uphold the provisions of the Bill of Rights in particular the protection of the petitioners' economic and social rights among them the right to clean and safe water in adequate quantities and the right to accessible and adequate housing and to reasonable standards of sanitization; and contends that the existence of the respondent's company policy as contained in the letter dated 8/07/2019 is prejudicial, unlawful and is contrary to the constitution as it seeks to violate, deny and infringe the rights and fundamental freedoms set out in the Constitution and it should be quashed;

9. The respondent is the sole water provider within the region where the 1st petitioner resides and its actions have caused great prejudice to her; that the 2nd petitioner was compelled to clear the outstanding bill of Kshs.10,469/60 which it seeks to be refunded; the respondent's delay in offering the 1st petitioner water connection exposed the 2nd petitioner to a risk of financial loss as the 1st petitioner had threatened to vacate the rental premises; which then forced him to clear the outstanding bill.

10. The petitioners submit that the doctrine of privity of contract binds parties to the contract and not third parties; as such the respondent is abusing its monopolistic position by requiring a third party to pay a debt privy to a contract they were not party to; case law relied on **COD & Anor vs Nairobi Water & Sewerage Co. Ltd (2015) eKLR**; the distinguishing factor in the forgoing case and the instant case is that she was never offered a water supply connection, which she was denied from the onset; and that it was not a contractual matter as there was no existing contract between the 1st petitioner and the respondent;

11. The contract for water supply is between the tenant and the respondent and the landlord only issues the tenant with the respective meter number for their house and the plot number to enable the respondent create a new account for that particular tenant; thus the landlord was not a party to the contract and was not obligated to bill or receive water payments from the tenants which are owing to the respondent; case law relied on **Saving & Loan (K) Ltd vs Kanyeje Karangaito Gakombe & Anor (2015) eKLR and Agricultural Finance Corporation vs Lendetia Ltd (1985) eKLR**.

12. The petitioners submit that the respondent was negligent in allowing the water meter to run from 2/07/2018 to 2/07/2019 and the respondent only to be allowed to enforce the contract between it and the previous tenant, Peter Kihara Wanjiru; that it is prejudicial and unjust for the respondent to be allowed to reclaim its loss from a third party who was not privy to the contract; to allow the respondent's conduct to continue an unfair trend will ensue whereby innocent consumers will be burdened with financial bills of irresponsible consumers.

13. The respondent was the sole water supply company in the region and the 1st Petitioner does not have an alternative water supplier to whom she could have sought services from; the respondent in acknowledging that water is a human right vide its letter of 27/03/2017 is obliged to provide an occupant of any premise with water;

14. The petitioners submit that since the respondent has infringed upon the petitioners constitutional

rights a declaration should issue and the respondent ought to compensate the petitioners for the gross violation, infringement and denial of their rights and fundamental freedoms;

15. The petitioners are challenging the policy by the respondent that circumscribes their rights under Section 63 of the Act and Articles 43 of the Constitution; that the tribunal cannot oust the original and supervisory jurisdiction of this court more so the unshared jurisdiction to deal with constitutional rights on the issues raised; the tribunal must be subservient to this court's jurisdiction in order to interpret, preserve and protect fundamental rights and obligations;

16. On the Preliminary Objection the 2nd petitioner submitted that according to Section 121 of the Water Act ('Act') the Tribunal shall hear and determine disputes concerning water resources or water services where there is a business contract; the 2nd petitioner further contends that it was the respondents burden to show that the petitioners had a right of appeal to the tribunal under Section 121(1) of the Act or that there is a business contract out of which there is a dispute amenable to settlement through the tribunal;

17. Even if these facts exist it is the petitioners' contention the Preliminary Objection does not qualify as it is trite law that a Preliminary Objection is on a point of law that will not invite factual arguments; and furthermore in its Replying Affidavit it states that neither of the petitioners have any business contract with the respondent nor is there an appellate dispute as contemplated under Section 121 of the Act;

18. The 2nd petitioner submits that the Preliminary Objection raised by the respondent is an afterthought since it was raised more than one year since the petition herein was filed and served and prays that the Preliminary Objection be disallowed;

19. The petitioners urged this court to make a finding that their prayers were merited and to make a finding in their favour.

RESPONDENT'S SUBMISSIONS

20. In response the respondent raised a Preliminary Objection that this court had no jurisdiction to entertain the amended petition and relied on its list of authorities dated 15/12/2020;

21. The respondent submits that it is a water service provider accredited by the Water Services Regulatory Board; and contends that upon the petitioners being aggrieved by the decision of the respondent ought to have appealed to the Water Tribunal under the provisions of Section 121 of the Water Act, 2016; the petitioners had not exhausted the internal dispute resolution mechanisms established under the Act which includes complaining to the Regulatory Board as provided under Section 72 of the Act and as such this Honorable Court has no jurisdiction as it is not the first point of call;

22. The respondent further contends that the Amended Petition does not raise any violation of any specific rights and is misconceived and incompetent; the demand for payment of outstanding water bills does not violate anyone's rights as it is the duty of every landlord to ensure that all utility bills are paid before a tenant vacates the premises;

23. The 2nd petitioner was aware of the agency relationship between the respondent and landlords on behalf of their tenants and the 2nd petitioner issued the requisite letter on behalf of the 1st petitioner;

24. It was the respondent's case that as part of financial prudence under the Public Finance and Management Act the respondent must ensure that all bills are paid up for it to continue to provide clean water and sanitation as enjoined under the Constitution and the Water Act; and this policy is domesticated at Clause 4 of the respondent's Financial Regulation Policy 2016;

25. The respondent contends that this is a commercial dispute and the instant amended constitutional petition does not raise any violation of any specific rights as required; and further contends that the 2nd petitioner is non-suited as no rights of his has been threatened or infringed; the petitioners do not specify

which right was threatened or denied by the respondent; case law relied on **Justice Amraphel Mboghli Msagha vs Chief Justice of Kenya & 7 Others [2006] eKLR**; that giving pre-conditions for connection does not amount to a denial;

26. The respondent concluded its submissions by stating that the amended petition was misconceived and incompetent and urged the court to strike it out with costs.

ISSUES FOR DETERMINATION

27. After reading the parties rival written submissions this court has framed the following issue for determination;

(i) Whether the Petition is properly before this court; whether this court has jurisdiction to hear and determine this matter;

ANALYSIS

Whether the Petition is properly before this court; whether this court has jurisdiction to hear and determine the Petition;

28. In the instant case the petitioners raise matters on the infringement of their constitutional rights as envisaged under Article 43 of the Constitution 2010 which provides for the highest attainable standards of health, accessible reasonable standards of sanitization, clean and safe water in adequate quantities;

29. The respondent raised a Preliminary Objection and its contention was that upon the petitioners being aggrieved by the decision of the respondent they ought to have appealed to the Water Tribunal under the provisions of Section 121 of the Water Act, 2016 and that the petitioners had not exhausted the internal dispute resolution mechanisms established under the Act which includes lodging complaints to the Regulatory Board as provided under Section 72 of the Act as such this Honorable Court has no jurisdiction as it is not the first point of call;

30. The *locus classicus* on jurisdiction is the renowned case of **Owners of the Motor Vessel ‘Lilian S’ vs Caltex Oil (Kenya) Ltd [1989] KLR** 1 in which Nyarangi J held that;

‘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 pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

31. The courts have held that the question of jurisdiction must be raised at the earliest opportune time and once raised either by a party or by the court *‘suo moto’* it must be decided forthwith on the evidence before it; and *‘it is immaterial whether the evidence is scanty or limited’*; refer to the case of **Owners and Masters of the vessel ‘Joey’ vs Owners and Masters of the Motor Tugs ‘Barbara’ and ‘Steve B’ [2007] eKLR**; therefore *“as soon as it is raised the court should hear and dispose of that issue without further ado;”*

32. Where does a court’s jurisdiction come from; in the case of **SK Macharia vs KCB & 2 others Civil Application No.2 of 2011** and stated as follows;’

‘A courts 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.

.....Where the Constitution confers upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.’

33. Therefore, where a statute has provided for mechanism of dispute resolution the court cannot abrogate that mechanism; a litigant must exhaust the said mechanism before moving to the next level; there is a plethora of case law on the issue of the '**exhaustion doctrine**' which have clearly stated that the courts ought to be the last resort and not the first port of call the moment a storm brews; even though the instant petition is not an election petition the case law relied on is most renowned case of **Speaker of the National Assembly vs James Njenga Karume [1992] eKLR**; where it was stated 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;

34. Looking at the Water Act provides a dispute resolution mechanism at Section 121(1) which section reads as follows;

(1) The 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 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.

35. 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

36. A cursory look at the facts set out in the petition as pleaded by the parties it is sufficient to conclude that the dispute is centered on the provision of water services by the respondent to the petitioners; and it is also evident that the 2nd petitioner has a business contract with the respondent;

37. Although the petitioners raise matter of infringement of their constitutional rights as particularized in Article 43 of the Constitution, it is evident that the dispute is centered on an agency relationship between the respondent and the 2nd petitioner on behalf of its tenants; this contention is supported by the fact that the 2nd petitioner as the landlord issues a requisite letter of introduction on behalf of its tenants to the respondent; secondly, both petitioners are aware of the obligation to clear outstanding water bills and as indicated at Clause 3 of the Tenancy Agreement the 2nd petitioner charges a refundable deposit of Kshs.6,000/- and the agreement stipulates that '**before taking possession, which, will be refunded after clearance of all utility bills and outgoings**';and lastly, by including this clause the 2nd petitioner undertakes upon itself to assist in making sure that all payments due to the respondent are made;

38. By reason of the forgoing this court finds that the issues herein are commercial in nature and not constitutional; the dispute relates to a commercial issue on an outstanding bill for the account 8425-00000118872 and it is this courts considered opinion that the petitioners have chosen the wrong forum to address their grievances; the proper forum in the first instance for ventilating the issues relating to agency, 'privity of contract' and the indolence of either the 2nd petitioner or the respondent is the Water Tribunal; the original jurisdiction enjoyed by the High Court cannot oust the jurisdiction of the Water Tribunal;

39. This court makes reference to the case of **Bernard Murage vs Fine Serve Africa Ltd&3 Others [2015]** where the Supreme Court 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.'

40. For those reasons this court reiterates that the court best suited to canvass these issues would be Water Disputes Tribunal; this court therefore lacks jurisdiction to determine the instant petition which is not properly before this court.

FINDINGS & DETERMINATION

41. For the forgoing reasons this court makes the following findings and determinations;

(i) The Preliminary Objection is hereby upheld; this court finds that it lacks jurisdiction to hear and determine the petition and finds the court best suited to canvass all the petitioners' issues to be the Water Disputes Tribunal;

(ii) The petition is found to be incompetent and is hereby struck out;

(iii) The petitioners shall bear the costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 20THDAY OF
MAY, 2021.**

HON. A. MSHILA

JUDGE