



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 504 OF 2019

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 42, 43, 46, 47, 48, 69(d), 69, 70, 118, 185, 186, FOURTH SCHEDULE PART 2 (2g), 3, 10, 21, 22 & 23, 27, 43, 232, 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 3(f), 5, 8(b), 15, 87, 88, 89 OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF SECTIONS 4, 5, 6, 8, 10, 14, 12, 15, 16, 18, 19, 82, 84, 85 OF THE CONSUMER PROTECTION ACT

AND

IN THE MATTER OF PART III, SCHEDULE 2 OF THE NAIROBI CITY COUNTY FINANCE BILLS 2018, 2019

AND

IN THE MATTER OF SECTION 5, 6, 10, 11, 12, 18, 17, 20, 26, 30 OF THE NAIROBI CITY COUNTY SOLID WASTE ACT, 2015

-BETWEEN-

WASTE & ENVIRONMENT MANAGEMENT

ASSOCIATION OF KENYA.....PETITIONER

AND

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND RESPONDENT

RULING

THE PETITION

1. The Petitioner through a Petition dated 16th December 2019 seek the following orders:-

a) An order directed at the 1st Respondent barring them from charging the Petitioner' members Kshs.20,000/= per truck for a

licence of an authority to collect and dispose waste.

b) A declaration that the licence to transport waste, levy charges for a licence to transport waste by the 2nd Respondent is unconstitutional, null and void thus should stop forth with.

c) A declaration that PART III, items listed under CBO Solid waste collection and transport especially on permit for private service providers on the charges per ton, truck/annum is unconstitutional and discriminatory in nature.

d) A declaration that there was no public participation on effecting amendments to the Nairobi City County solid waste Management Act, thus unconstitutional and the amendments made there under are unconstitutional.

e) An order do issue barring the 1st Respondent from discriminating the Petitioners while administering tax levies.

f) The costs of this Petition be borne by the Respondents in any event.

NOTICE OF MOTION

2. Simultaneously with the filling of the Petition the Petitioner filed an application dated 16th December 2019 seeking the following orders:-

a) Prayer No. 1 is spent.

b) That the 1st Respondents herein be restrained by means of an Interim Conservatory Order from charging the Petitioners Kshs.20,000/= for an authority to collect and dispose waste licence per lorry pending hearing and determination of the application and Petition herein.

c) That the 2nd Respondent be restrained by means of an interim conservatory order from charging licence fees for transport of waste as the same is a devolved function pending the hearing and determination of the application and Petition herein.

d) That the 1st Respondent be restrained by means of an interim conservatory order from implementing PART III, items listed under CBO Solid waste collection and transport especially on permit for private service providers on the charges per ton, truck / annum pending the hearing and determination of this application and Petition herein.

e) That an order do issue compelling the 1st Respondents to desist from discriminating the Petitioner's members on issues of payment of licence fees for authority to collect and dispose waste pending hearing and determination of this Application and Petition.

f) That costs hereof be provided for.

g) That there be such other or further orders as the Court may deem fit and just to grant in the circumstances.

RESPONSE BY 1ST RESPONDENT

3. The 1st Respondent filed grounds of opposition and Preliminary point of Law dated 10th February 2020 raising ten (10) grounds as follows:-

a) That the 1st Respondent contends on preliminary point of law that this Petition is incurably defective and that it discloses no or known cause or causes of action as:-

i. The Honorable Court lacks the jurisdiction by dint of Article 165(5) of the Constitution of Kenya and Section 13 2(a) of the Environment and Land Act.

ii. The Petition and the Application is overtaken by events.

iii. The 1st Respondent has been improperly sued in respect of the whole claims made in the suit. The Suit is therefore not maintainable against the 1st Respondent to that extent.

b) The 1st Respondent contends that Part 2 of the Fourth Schedule of Constitution of Kenya 2010 grants it the mandate for refuse removal, refuse dumps and solid waste disposal hence cannot be faulted by the Petitioner for charging for them for dumping on the 1st Respondent's dumping sites.

c) Besides the 1st Respondent contend that its function and mandates and those of the 2nd Respondent are distinguishable in so far as the 2nd Respondent functions in relation to waste management are provided under EMCA and the waste Management Regulations of 2006 and the 1st Respondent function are clearly spelt out under part of the Constitution hence the issue of

double taxation does not arise under the circumstances and the nature of the case.

d) In view of the foregoing, the fact that the 2nd Respondent levy charges on the Petitioner for annual license fee for waste transporters does not take away the 1st Respondent's right to grant permits to the waste collections and disposal as provided by the 1st Respondent legislations.

e) The Petitioner is forum shopping away from the Environment and Land Court which has the jurisdiction to hear and determined this Petition as the issues involved are purely environmental in nature.

f) The Application and Petition are accentuated by malice, spite and has brought in bad faith.

g) The Petition and Application dated 16th December, 2019 are therefore an abuse of the Court process and should be dismissed with costs to the 1st Respondent.

RESPONSE BY 2ND RESPONDENT

4. The 2nd Respondent filed Replying Affidavit dated 3rd January 2019 urging among other grounds that under **Part 2 of the Fourth Schedule of the Constitution of Kenya 2010** is explicit that the County Government shall be responsible for refuse removal, refuse dumps and solid waste disposal, which role does not conflict with the clearly designated role of the Authority, granted by both the EMCA and the Waste Management Regulations of 2006, to ensure that Waste Transportation is only done by licenced operators and whose waste transport vehicles meet the design requirements as stipulated by the Authority. That by charging an annual license fees from waste transporters, it does not usurp, the role of the County Government to grant permits for waste collection and disposal.

5. The 2nd Respondent adds, that the mandate to licence the transportation of waste and to levy charges for a license to transport waste as discharged by the Authority is supported by both the EMCA and the Constitution, the latter which grants each person a right to a clean and healthy environment under **Article 42**.

6. The 2nd Respondent urges, that this Petition is better placed before the Environment and Land Court, which it is urged has jurisdiction to adjudicate on applications for the redress of a denial, violations or infringement of or threat to right, or fundamental freedoms related to clean and healthy environment. It is further contended, that Environment and Land Court, is clothed with the power to hear and determine disputes relating to environmental planning and protection.

NOTICE OF PRELIMINARY OBJECTION BY THE 2ND RESPONDENT

7. The 2nd Respondent further to its Replying Affidavit filed Notice of Preliminary Objection dated 30th December 2019 and 7th July 2020, raising the grounds that:-

i. This Court lacks jurisdiction to hear and determine the present petition based on Article 165 (5) of the Constitution and Section 13(2)(a), and (3) of the Environment and Land Court Act.

ii. That the Petition is sub-judice by virtue of NRB HC Pet 116 of 2016 between the very Petitioner and Respondents.

8. The 1st Respondent filed submissions dated 14th February 2020 and the 2nd Respondent filed submissions dated 19th October 2020 in support of their respective Preliminary Objections to the Petition; whereas the Petitioner filed submissions in reply to both the 1st Respondent's grounds of opposition and 2nd Respondents Preliminary Objection.

ANALYSIS AND DETERMINATION

9. I have very carefully considered the Petitioner's pleadings as well as the Respondents pleadings and rival submissions and from the same only one issue arise for determination:-

a) Whether this Court has jurisdiction to hear and determine the application and the Petition herein.

10. The Respondents through their respective responses and submissions urged that this Honorable Court lacks the requisite jurisdiction to hear and determine the application and Petition herein. Their arguments are based on provisions of **Article 165(5) of the Constitution and Section 13(2)(a) of the Environment and Land Act**. It is contended by the Respondents that this is an environmental dispute and as such it falls squarely within the jurisdiction of Environment and Land Court.

11. The Petitioner in response contended, that jurisdiction is a creature of statute and Constitution. The Petitioner referred to **Article 165(3) (d) of the Constitution** in urging that the High Court has jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of :-

“(i) The question whether any law is inconsistent with or in contravention of this Constitution.

(i) 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, this Constitution;

(ii) Any matter relating to constitutional powers of State organs in respect of country governments and any matter relating to the constitutional relationship between the levels of government; and

(iii) A question relating to conflict of laws under Article 191; and

(iv) Any other jurisdiction, original or appellate, conferred on it by legislation.”

12. In addition to the above, the Petitioner asserts, that this Court was created to specifically deal with all matters concerning the Constitution and hence the Petitioner desires this Court to give a declaration on whether the conducts of the Respondents are inconsistent or contravene, the constitution which gives the Petitioners various rights; and make further declarations on conflicts arising between two levels of Government.

13. The Petitioner in support of the above proposition sought reliance in the Supreme Court decision *In the Matter of the Interim Independent Electoral Commission, Constitutional Application Number 2 of 2011* where it was stated:-

“Where the Constitution exhaustively provides for the jurisdiction of a Court of Law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through Judicial craft or innovations, nor can Parliament confer jurisdiction upon a Court of Law beyond the scope defined by the Constitution. Where the Constitution confers power 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.”

14. The Petitioner, therefore, contended, that this Court is enshrined with original jurisdiction from the Constitution to deal with Constitutional Petitions, and the Respondents cannot abrogate to create jurisdiction for the Environment and Land Court, which is a creature of an Act of parliament. I find that **Section 13 (2)(a) of the Environment and Land Court** which the Respondents rely on ought to be read in its full context together with the **Article 165 of the Constitution**.

15. In order to determine whether this Court has jurisdiction to hear and determine the Petition herein, the Court is required to look at the prayers sought in the Petition and the applicable law. The 2nd Respondent’s arguments are, that the substratum of the Petition is premised on environmental planning issues and **Section 13 of the Environment and Land Court Act** provides for jurisdiction of Environment and Land Court to include environmental planning.

16. Upon perusal of the Petition herein it is clear that the prayers sought are as follows:-

a) An order directed at the 1st Respondent barring them from charging the Petitioner’ members Kshs.20,000/= per truck for a licence of an authority to collect and dispose waste.

b) A declaration that the licence to transport waste, levy charges for a licence to transport waste by the 2nd Respondent is unconstitutional, null and void thus should stop forthwith.

c) A declaration that PART III, items listed under CBO Solid waste collection and transport especially on permit for private service providers on the charges per ton, truck/annum is unconstitutional and discriminatory in nature.

d) A declaration that there was no public participation on effecting amendments to the Nairobi City County solid waste Management Act, thus unconstitutional and the amendments made there under are unconstitutional.

17. It is clear that looking at the prayers in the Petition, the substratum of the Petition is premised on environmental planning for which jurisdiction under **Section 13 of the Environment and Land Act**, clearly provides for jurisdiction of the Environment and Land Court.

18. Further **Article 162(2)** ousts the jurisdiction of the High Court and provides jurisdiction in respect of Environment and Land matters to the **Environment and Land Court**.

Article 162(1) provides:-

“162.(1) The Superior Courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2). (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to- (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land.”

19. Further **Article 165(6) (b)** provides for ouster of the jurisdiction of the High Court in certain matters and to be precise, matters reserved for the jurisdiction of the Environment and Land Court and the Employment and Labour Relations Court-

“Article 165(5)(a) & (b) states;

(5) The High Court shall not have jurisdiction in respect of matters – (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162(2).”

20. The Environment and Land Act, under **Section 13** empowers Environment and Land Court to hear matters, that are also in the nature of Constitutional Petitions and in which there is allegation of denial, violation or infringement or threat to, a right or fundamental freedom in the Bill of Rights.

21. The jurisdiction of the Environmental and Land Court is clearly provided for under **Section 13 of the Environment and Land Act** which provides:-

“13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) 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, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources:

b) Relating to compulsory acquisition of land;

c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.”

22. Having considered the relevant provisions of the law; authorities cited as well as submissions, I find no legal basis why a litigant should be allowed to move a Court on a matter, that is expressly reserved for another Court. I find further it is wrong for a party to attempt to confer jurisdiction to a Court through Craft for none can be conferred. The Court of Appeal on this issue stated as follows in **Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR** that:-

“The ratio decidendi for the learned judge holding that the ELC had jurisdiction is that Prayer Nos. 1, 7, 8, 9 and 10 in the Petition are outside the mandate of the NET and other agencies under EMCA. That had all the issues and prayers in the Petition been matters that the Tribunal had jurisdiction to hear and determine, the Court would have upheld the preliminary objections and dropped its tools without proceeding any further. The judge further held that as some of the complaints and prayers in the Petition related to infringement of the constitutional right to a clean and healthy environment, the Tribunal had no jurisdiction to determine the constitutional issue and the sixty-day limitation period in Section 129(1) of EMCA is inapplicable to claims involving violation of constitutional rights before the ELC.”

It’s in my duty to determine whether the ratio decidendi of the learned judge is a correct exposition of law. The Supreme Court in Samuel Kamau Macharia and another – vs. Kenya Commercial Bank and 2 others, Application No. 2 of 2011, pronounced itself on jurisdiction thus:

“[68] 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. ...Where the Constitution operate within the constitutional limits.”

It cannot expand its jurisdiction through judicial craft or innovation...” (Emphasis provided). In the case of Benard Murage vs. Fine Serve Africa Limited & 3 others [2015] eKLR the Supreme Court again stated 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.”

23. In view of the finding, that I have come to, I am satisfied that this Petition should have been instituted in the Environment and Land Court notwithstanding applications for redress of a denial, violation or infringement of or threat to, a right of fundamental freedom in the Bill of Rights, as the Environment and Land Court under **Section 13 of the Environment and Land Act**, has jurisdiction to hear and determine issues related to Bill of Rights, associated with Environment and Land disputes in a Petition presented before it. Having found that the right forum for hearing and determination of this Petition is better placed with Environment and Land Court, I decline to determine any other issue raised in the parties Preliminary Objection; thus the issues of Res-judicata and Sub-judice.

24. **The upshot is that the Petition is accordingly transferred to Environment and Land Court Milimani for hearing and determination.**

25. **Costs be in cause.**

Dated, Signed and Delivered at Nairobi on this 24th day of June, 2021.

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J. A. MAKAU

JUDGE