



Nyange [Suing on Behalf of Iko Kitu Women Group] v Voi Point Limited & another; County Government of Taita Taveta (Interested Party) (Environment & Land Petition 1 of 2023) [2023] KEELC 20149 (KLR) (Environment and Land) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND PETITION 1 OF 2023**

SM KIBUNJA, J

SEPTEMBER 27, 2023

[FORMERLY ELC CONST. PETITION NO. E004 OF 2023]

AND

**IN THE MATTER OF THREATENED INFRINGEMENT AND
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 2, 19, 22 & 23 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10(1), (2) & (3), 27(4),
(5) & (6), 24, 50, 60, 66, 129(2) & 165 OF THE CONSTITUTION OF**

KENYA

BETWEEN

**MARGARET WAKESHO MARGARET NYANGE [SUING ON BEHALF OF IKO
KITU WOMEN GROUP] PETITIONER**

AND

VOI POINT LIMITED 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF TAITA TAVETA INTERESTED PARTY



RULING

Notices of Preliminary Objection by the 1st and 2nd Respondents dated the 21st February 2023 and 10th March 2023 respectively

1. The Petitioners commenced this proceeding through the petition dated the 6th February 2023 seeking for inter alia, three declaratory orders that the change of user of L.R. No. 28683, suit property, by 1st Respondent amount to breach of conditions of title, that the said land is public property, and the subdivision, sale and or transfer of the said land or part thereof is irregular, null and void. Filed contemporaneously with the petition is the notice of motion of even date seeking for inter alia, orders restraining the 1st and 2nd Respondents from transferring, alienating, advertising, selling, charging in any other way dealing with the suit property or any parcels subdivided therefrom pending the hearing and determination of the petition.
2. The 1st Respondent filed the notice of preliminary objection dated the 21st February 2023 raising four (4) grounds that the petition is incompetent, incurably defective and the court is without jurisdiction by dint of section 61(3) of the [Physical and Land Use Planning Act](#) of 2019; that petitioners are without capacity to file the petition in the absence of a resolution from the group; the petition and application were filed through a firm of advocates without authority from the group in the absence of the requisite resolution; and the supporting affidavit by Margaret Nyange is fatally defective, the entire proceedings null and void and ought to be struck out forthwith. The 1st Respondent also filed grounds of opposition dated 21st February 2023 and replying affidavit by Julius Odhiambo Okumu, a director, sworn on the 31st March 2023 in response to the notice of motion dated the 6th February 2023.
3. The 2nd Respondent also filed the notice of preliminary objection dated the 10th March 2023 raising one ground that the court lacks jurisdiction to hear and determine the petition as the Petitioners have not exhausted the established statutory dispute resolution mechanism as required under section 61(3) and (4) of the [Physical and Land Use Planning Act](#) No. 13 of 2019, and therefore the petition should be struck out with costs.
4. When the matter came up for mention on the 18th April 2023 the court, after hearing submissions from the learned counsel for the parties, directed that the 1st and 2nd Respondents' preliminary objections be heard and determined first through written submissions to be filed and exchanged within the timelines given. The learned counsel for the 1st Respondent filed their submissions dated the 9th May 2023 which the court has considered. Mr. Penda for the 2nd Respondent had on the 5th July 2023 undertaken to ensure a copy of their filed submissions was placed on the record but I have not seen any. However, I have checked for it from the e-filing portal and confirmed the submissions dated the 24th April 2023 was filed and the court has considered it also. I have also established from the e-filing portal and the record that no submissions have been filed by or for the Petitioners on the two preliminary objections. There is a notice of change of advocates dated the 8th August 2023 by Ms. Okonji Wanjira & Associates coming on record for the Petitioners filed through e-filing system. The Interested Party



was given 14 days from 5th July 2023 to file their submissions but as of today, the 15th August 2023, none has been filed.

5. The following are the issues for the determination by the court;
 - a. Whether the court is with the original jurisdiction to hear and determine the petition and application in view of the provisions of section 61(3) & (4) of the *Physical and Land Use Planning Act* No. 13 of 2019, or conversely put, whether the Petitioners have exhausted the statutory dispute resolution mechanism before coming to the court.
 - b. Whether the Petitioners and their counsel have valid authority to act for and bind Iko Kitu Women Group.
 - c. Who pays the costs.
6. The court has carefully considered the grounds on the two preliminary objections, the submissions by the learned counsel for the Respondents, superior courts decisions cited therein and come to the following conclusions;
 - a. To understand what a preliminary objection is, it is important to restate that it should be based on pure points of law as was held by Law JA in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 when he rendered himself thus:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

That position was upheld in the case of *Oraro v Mbaja* [2005] eKLR by Ojwang, J (as he then was) when he expressed himself as follows on preliminary objections:

“... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of



judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

- b. The learned counsel for the Respondents have submitted that their preliminary objections raises pure points of law of court’s jurisdiction and validity of the petition. That while the court agrees with the counsel for the Respondents that the issue of the court’s jurisdiction is one of a pure point of law and if upheld may determine the petition, the question of whether the petition is valid or not for reasons inter alia that there are no signed resolutions or authority from Iko Kitu Women Group for the two Petitioners and the advocates, through who the petition and application were filed, to act on behalf or for the said group would need evidence to be taken or referred to, for a determination to be made. That as such, the question whether or not there is a valid petition before the court is not a pure point of law to be raised through a preliminary objection. It would require such an issue to be raised through an application with a supporting affidavit to enable the other parties to present their evidence before a determination. It follows therefore, that the Respondents’ preliminary objections have only one ground of pure point of law which is on the court’s jurisdiction in the petition and the application, which question the court will now proceed to address.
- c. *Black’s Law Dictionary, Seventh Edition at page 855* defines the term “jurisdiction” as: “A court’s power to decide a case or issue a decree.” The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi JA expressed himself as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

That position is further buttressed by the decision in the case of *Samuel Kamau Macharia v. Kenya Commercial Bank and 2 Others*, Civ. Appl. No. 2 of 2011 where the Supreme Court of Kenya held that:

“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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings It cannot expand its jurisdiction through judicial craft or innovation.”

It is the Respondents’ submission that the Petition, though framed as a Constitutional cause touching on violation and/or infringement of the Bill of Rights, has no nexus or co-relation in any way to any constitutional issue for determination by this Court. That the alleged Constitutional infringements and/or infractions appear to arise from the failure by the Petitioners to abide by the procedure provided in law to avoid such infringements. The counsel further submitted that every case has a constitutional underpinning, but that it is not every dispute which should be filed as a constitutional reference, unless it raises constitutional issues. That a constitutional issue is one that forces the court to consider constitutional rights and values, one that will deal with the interpretation of the *Constitution*. The learned counsel for the 1st Respondent referred to the decision in the case of *Hakiziman Abdoul Abdulkarim v Arrow Motors EA Ltd & Another* (2017) eKLR where the court applied with approval the decision illuminated in the South African case of *Fredricks & Others v MEC for Education & Training, Eastern Cape & Others* 9200) 23 (LJ.81) where it was held that: “the Constitution provides no definition of constitutional matter. What is a constitutional matter must be gleaned from reading of the Constitution itself..... constitutional matters must include disputes as to whether any law or conduct is inconsistent with constitution” and held that:

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

- d. The learned counsel for the Respondents further pointed out that a careful glean of the petition reveals that the Petitioners are merely challenging the decision of the Interested Party to approve the 1st Respondent’s application seeking for change of use of the property in question from agricultural to mixed use. The Petitioners’ main gravamen is that the title to the suit property had imposed a condition on its use,



to wit agricultural use hence their contention that after the change of use from agricultural to mixed-use, the same automatically became public land and hence unavailable for sale to third parties.

- e. Implicitly, what the Petitioners are challenging is the decision by the Interested Party to permit the change of use from agricultural to mixed use, and that the Petitioners gravamen falls far from a constitutional issue but rather, a matter that ought to have been pursued at the County Physical and Land Use Planning Liaison Committee pursuant to Section 61 (3) of the *Physical and Land Use Planning Act*, No. 13 of 2019. However, the Petitioners have clothed that very issue as a constitutional petition to gain entry into this Court, which should not be countenanced.
- f. Taking into account the Petitioners' pleadings, and more specifically the prayers sought in the petition, it is easily discernible that the petition is not anchored on any constitutional issue. That upon considering the Petitioners prayers in the petition, it is clear that the basis of their grievances is traceable to the permission granted to the 1st Respondent by the Interested Party to change the use of the suit property from agricultural to mixed use, and further the permission to subdivide the land. The court agrees with the Respondents' submissions that those are matters/issues falling within the realm of the *Physical and Land Use Planning Act*, No.13 of 2019 by way of lodging an objection to the County Physical and Land Use Liaison Committee, after which any dissatisfied party may approach this court through an appeal.
- g. What the Petitioners are inviting the Court to do by filing the petition and the application herein is to ask it to exercise jurisdiction that it is yet to be conferred with. The Petitioners have not sought any declaration to the effect that any of their constitutional rights has been infringed and/or violated. The prayers sought have no nexus to violations of constitutional rights to warrant intervention by the Court. The corollary to the foregoing is that the *Physical and Land Use Planning Act*, 2019 has reserved matters pertaining to any complaints and/or objections to the grant of the change of use or subdivision to the County Physical Planning and Land Use Liaison Committee. Section 73(4) of the *Physical and Land Use Planning Act* expressly provides that it is only after a party who is aggrieved by the determination of the County Physical and Land Use Liaison Committee that they may appeal to the Environment and Land Court on a matter of law only. Accordingly, the court comes to the conclusion that the law is patently clear that on matters falling under the provisions of the *Physical and Land Use Planning Act*, it enjoys appellate jurisdiction and on matters of law only.
- h. Clearly, the Petitioners have not approached this Court by way of an appeal. What they have filed instead is a Constitutional Petition whilst there is no evidence of an appeal before the County Physical and Land Use Planning Liaison Committee having been filed, heard and decided first. In so far as the grievance pertaining to the grant of change of use



is concerned, this Court is not clothed with the original jurisdiction to consider it in the first instance in accordance with the provisions of the said Statute. Those disputes ought to be filed, heard and determined in accordance with the provisions of section 72(3) of the *Physical and Land Use Planning Act*. The attempt by the Petitioners to circumvent the law by clothing it 'in the Bill of Rights language' and filing a Constitutional Petition before exhausting the mechanism provided for under the Statute is nothing but an abuse of the process of Court, and is clearly a violation of the doctrine of exhaustion.

- i. The doctrine of exhaustion was succinctly explained by the Court of Appeal in the case of *Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 others* (2015) eKLR where the Court stated thus:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked”.

The Court of Appeal upheld the doctrine as a sound one and expressed the view that Courts ought to be fora of last resort and not the first ports of call any time that a dispute arises. The Respondents referred the court to the decision in the case of *C O D & another v Nairobi City Water & Sewerage Co. Ltd* [2015] eKLR where what constitutes a constitutional issue was discussed before concluding that:

“The parties in this dispute are in agreement that the spectrum of the dispute before me revolves around a contract for supply of water to the Petitioners. In that regard, the Petitioners contend that they are entitled to supply of water since they have paid all their outstanding bills and that the alleged account with arrears does not belong to them in any way. In that context, where is the constitutional issue that the Court is called upon to determine?”

9. I have seen the Petitioners' Petition which is premised under the provisions of Articles 26, 27, 28, 35, 43, 46, 47, 48 and 50 of the *Constitution*. As much as the Petitioners have alleged a violation of those rights it must be remembered that the crux of their case is based on a contract for supply of water which has allegedly been terminated. It has not been alleged in any way that the Respondent has refused to grant access to the Petitioners to clean and safe water. It is indeed admitted that the Petitioners had been connected and had not only access but supply of water before a dispute arose between the parties. The question then would be whether the Parties had performed their respective obligations under the contract to supply water. In my judgment, the court can do so but not through a constitutional petition.



10. The High Court in *International Centre for Policy and Conflict and 5 Others v The Hon. Attorney-General & 4 Others* [2013] eKLR observed as follows;

109 An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the *Constitution* in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.”

- j. The foregoing legal truism was restated by the Court in the case of *Issa Ahmed & 15 others v Mohamed Al-Sawae* [2021] eKLR as follows:

“It is common ground that the issue at hand in this matter was about physical planning and execution of an existing development plan. The issues were purely matters of planning and development that are covered under the Physical Planning and Land Use Act. For the aforesaid reasons, I am persuaded that the Plaintiff ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical Planning and Land Use Act before engaging the Environment and Land court.”

And in the case of *Kibos Distillers Ltd & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR, the Court of Appeal observed in part:

“As aptly stated by the Supreme Court in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others* (*Supra*), jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleading to confer or oust the jurisdiction conferred on a Tribunal or another institution by the *Constitution* or statute”.

The court went further to state:

“..... further, I observe that the jurisdiction of the ELC is appellate under Section 130 *EMCA*. The ELC also has appellate jurisdiction under Section 15, 19 and 38 of the *Physical Planning Act*. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent



organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.....”

Further, in the case of *Speaker of National Assembly v James Njenga Karume* [1992] KLR 21 the court held that;

“Where there is a clear procedure for redress of any particular ground prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”

- k. The net effect of the foregoing findings/conclusions is that the Respondents’ preliminary objections on the ground that the court is without the original jurisdiction to hear and determine the issues raised in the petition dated the 6th February 2023 and the application of even date that is predicated on the said petition has merit and is hereby upheld.
 - l. That the Respondents having succeeded in their preliminary objections are entitled to costs to be borne by the Petitioners.
7. That flowing from the above determinations, the court finds and orders as follows;
- a. That the 1st and 2nd Respondents preliminary objections dated the 21st February 2023 and 10th March 2023 respectively, on the ground of the court lacking original jurisdiction on the issues in the petition has merit and are hereby upheld.
 - b. That the Petitioners petition and notice of motion dated the 6th February 2023 were prematurely filed before the court and are consequently struck out with costs to the Respondents.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 27th DAY OF SEPTEMBER 2023.

S. M. KIBUNJA, J.

In the presence of;

Petitioners: Absent

Respondents: Mr. Penda for 2nd Respondent

Interested Party: Absent

Court Assistant– Mary Ngoira

S. M. Kibunja, J.

