



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 244 OF 2018

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFE GISEBE.....2ND PETITIONER

MATHEW MWILITSA OKWANDA.....3RD PETITIONER

VERSUS

GENERAL ELECTRIC COMPANY (GE).....1ST RESPONDENT

AMU POWER.....2ND RESPONDENT

FRANCIS NJOGU.....3RD RESPONDENT

MICHAEL KEROULLE.....4TH RESPONDENT

ALEX DEMETRIEFF.....5TH DEFENDANT

MICHAEL HOLSTON.....6TH DEFENDANT

RULING

1. The petitioners herein, who describe themselves as law abiding citizens of Kenya, public spirited individuals and human rights defenders, filed this petition against the respondents herein on 5th July 2018 seeking the following orders:

i. A declaration that the respondents violated the Constitution of Kenya.

ii. A declaration that the respondents violated Section 129(4) and the EMCA by trading in shares for the Lamu Power Plant while Appeal No. NET/196/2016 was pending before the National Environment Tribunal.

iii. A declaration that by violating Section 129(4) of the EMCA, the 1st, 2nd, 3rd, 4th, 5th and 6th respondents are in contempt of court.

iv. An order compelling the 1st and 2nd respondents to each pay a fine not exceeding kshs 200,000,00 (two hundred thousand shillings) to the Republic of Kenya for violating Section 129(4) of the EMCA.

v. An order committing the 3rd, 4th, 5th and 6th respondents to jail for such period of time as this Honourable court will deem fit and/or proper to punish the contemnors.

vi. A declaration that the 1st respondent's so-called ultra-critical coal technology does not make coal clean.

vii. A declaration that there is nothing called clean coal.

viii. A declaration that the respondent misled the Kenyan public by claiming that they will deploy clean coal technologies at their

intended Lamu coal fired power plant.

ix. An order compelling the respondents to publish full page adverts in two national newspapers recanting their false claims about clean coal.

x. A declaration that the proposed Lamu coal fired power plant should not be established since it constitutes an existential threat to the cultures, lifestyle, livelihoods, and lives of the people of Lamu and the surrounding areas.

xi. A permanent injunction prohibiting the respondents or any person for that matter from establishing the intended Lamu coal fired power plant.

xii. An order that the costs of this suit, including the costs of expert witnesses, be provided for by the respondents.

xiii. Any other relief the court may deem just to grant.

2. Simultaneously with the petition, the petitioner also filed a Notice of Motion application, of even date, seeking the following interim orders.

1. That this honourable court be pleased to certify this application as extremely urgent and hear it ex-parte at the first instance.

2. That pending the inter-partes hearing and determination of this application and the instant petition, the honourable court be pleased to issue a temporary order of injunction prohibiting the respondents, whether by themselves, or any of their employees of agents or any person claiming to act under their authority, or howsoever, from continuing to claim that the proposed Lamu Coal fired power plant will be based on clean coal technologies.

3. That pending the inter-partes hearing and determination of this application and the instant petition, the honourable court be pleased to issue a temporary order of injunction prohibiting the respondents, whether by themselves, or any of their employees of agents or any person claiming to act under their authority, or howsoever, from carrying out any activity including the trade in shares, or the doing anything towards the construction of the proposed Lamu coal power point.

4. That this honourable court be pleased to certify that the petition herein raises a substantial question of law and forthwith refer the petition to his Lordship the Chief Justice for appointment of a bench of three or five judge pursuant to Article 165(4) of the Constitution of Kenya, 2010.

5. That consequent to the grant of the prayers above the Honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

6. That during the hearing of the petition, the petitioners be allowed to call and rely on experts and other witnesses.

7. That the cost of this application be provided for.

3. The petitioners' case is that following the filing of the National Environment Tribunal's Appeal No. NET/196/2016, Save **Lamu and 5 others vs National Environment Management Authority & Another**, and pursuant to Section 129(4) of the Environment Management and Co- Ordination Act (Cap 387) (hereinafter "the EMCA"), all activities regarding the 2nd respondent's Lamu Coal Fired Power Plant (hereinafter, **the project**) were frozen by an act of the law pending the hearing and determination of the appeal.

4. He states that on 14th November 2016, the National Environment Tribunal issued a formal stop order addressed to the 2nd respondent but that despite the existence both of the stop order and of Section 129(4) of the Environment Management and Co- Ordination Act, it was reported in the local press that the 1st respondent had acquired a USD \$500 million (50 billion KES) stake in the Lamu coal plant.

5. According to the petitioner, the transaction in shares involving the 1st and 2nd respondents is in contemptuous violation of both Section 129(4) of the Environment Management and Co- Ordination Act and the stop order as it effectively changed or altered the status quo of the project contrary to Section 129(4) of the Environment Management and Co- Ordination Act and that consequently, the processes and dignity of Kenya's institutions have been brought to ridicule.

The 1st, 4th, 5th and 6th respondent's response to the petition

6. In response to the petition, the 1st, 4th, 5th and 6th respondents filed a notice of preliminary objection seeking the striking out of the petition on the grounds that;

1. This Honourable court lacks the jurisdiction to hear and determine this matter in view of the mandatory provisions of Articles 162(2) (b) of the Constitution as read together with Section 13 of the Environment and Land Court Act Cap 19 of 2011.

2. That the application and petition violates the provisions of Article 159(2)(d) of the Constitution in view of the fact that the Environment Management and Coordination Act Cap 8 of 1999 provide more efficacious mechanism for addressing the issues raised by the petitioners in the petition and application.

3. That the petitioners' claim is bad in law as it statute barred.

4. That the application and petition violate Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms (Practice) Rules, 2013 as considered together with the principles espoused in the case of Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154 and Mumo Matemu vs Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] e KLR as they lack precision and specificity.

5. That there is no cause of action disclosed against the 4th, 5th and 6th respondents nor are the 4th, 5th and 6th respondents necessary parties required for the determination of this petition.

6. That the suit against the 4th, 5th and 6th respondents is bad in law and is fatally defective as they are agents of a disclosed principal.

7. That the application and petition are incompetent and bad in law as they do not raise any constitutional issues to warrant the invoking of this Honourable court's jurisdiction as a Constitutional Court.

7. Parties thereafter agreed to canvass the preliminary objection by way of written submissions.

1st, 4th, 5th and 6th respondent's submissions.

8. M/S Iseme Kamau & Maema Advocates submitted that this court lacks jurisdiction to hear and determine this matter in view of the mandatory provisions of Articles 162(2) of the Constitution and Section 13 of the Environment and Land Court Act. In this regard counsel submitted that the gist of the petitioners' case against the respondents is the environmental considerations that have allegedly been disregarded in the Lamu Coal Power Project and the claim that the respondents were in contempt of stop order issued in NET/196/2016 save Lamu & 5 Others vs National Environment Management Authority and Another.

9. Counsel submitted that the petition does not raise any constitutional issue as it is only a basic complaint touching on contempt of court and adherence to the Environmental Management and Coordination Act (EMCA).

10. It was argued that by providing that all disputes revolving around land and environment shall be heard by the Environment and Land Court (ELC), the law does not make any exemption for contempt of court matters which arise in the course of determining the environmental claims. Counsel maintained that National Environment Tribunal, having been established under Section 125 of the Environmental Management and Coordination Act, falls within the contemplation of Article 169(1) (d) of the Constitution and that it follows it has power under Section 6 of the Contempt of Court Act to punish for contempt.

11. Counsel further submitted that even though Article 165 3(b) and (d) of the Constitution empowers this court to hear and determine the question as to whether fundamental freedoms in the Bill of Rights has been denied, violated, infringed or threatened and any question on the interpretation of the Constitution, this court's jurisdiction is ousted by Article 165(5) (b) of the Constitution.

12. It was submitted that in view of the express ousting of this court's jurisdiction in respect to all disputes touching on land and environment, this court has no power to continue entertaining these proceedings and that it ought to down its tools. For this argument, counsel relied on the decision on the case of Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR where the court stated:

"The jurisdiction of the High Court as established under Article 165 of the Constitution is limited in two fronts. First, it shall not exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two courts contemplated in Article 162(2). It is therefore clear that the High Court no longer had original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under Section 12 of the ELRC Act and Section 13 of the ELC Act. Conversely, the courts contemplated in Article 162(2) of the Constitution cannot deal with matters reserved for the High Court."

13. Counsel argued that Environmental Management and Coordination Act has elaborate mechanism for addressing all grievances connected with the environment including the petitioners grievances and that it was therefore an abuse of the court's process for the petitioners to skip and/or ignore the statutory mechanism provided for addressing such grievances and rush to the Constitutional Court for redress. For this argument, counsel cited the case of Bernard Murage v Fineserve Africa Limited & 3 Others [2015]eKLR where it was held:

" There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provide d a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or State Organs to deal with the dispute as provided in the relevant statute.....I am bound to follow that principle in law since it flows from the other important principle 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." [Emphasis added].

14. Counsel further submitted that the instant petition is statute barred and is a surreptitious attempt by, the petitioners, to go behind the provisions of Section 129(1) of Environmental Management and Coordination Act which stipulates that anyone challenging issuance of a licence must do so within 60 days.

15. Counsel further noted that the 4th, 5th and 6th respondents have been cited in the petition yet no orders have been sought against them.

The 2nd and 3rd respondents' submissions.

16. Mr. Masika, learned counsel for the 2nd and 3rd respondents, while relying on the principles stated in the case of **Mukisa Biscuits Manufacturing Company vs West End Distributors Ltd [1969] EA 696** case submitted that since the facts pleaded in the petition in respect to the proceedings pending before the National Environment Tribunal are not controverted, the preliminary objection was properly founded. Counsel submitted that the instant petition is res sub judice in view of the fact that the matter is still pending before the National Environment Tribunal. For this argument, counsel relied in the decision in the Malindi case of **Okiya Omtatah vs Kenya Power and Lighting Company** & Another in which a Malindi Civil appeal No. 55 of 2018 similar question arose and the court held that the matter could not be entertained for being sub judice.

17. On jurisdiction, counsel reiterated that the matter falls under the jurisdiction of the Environment and Land Court and that the National Environment Tribunal is the first port of call for any party alleging that his health is at stake due to certain compromise of the environment. Counsel added that the National Environment Tribunal exercises jurisdiction under Section 29 of the Environmental Management and Coordination Act which is where the current dispute is still pending. He further asserted that under Section 130 of Environmental Management and Coordination Act even where a decision has been made and a party is dissatisfied with the outcome, that party may appeal to the Environment and Land Court in which case, even the jurisdiction of Environment and Land Court can only be invoked on appeal.

18. On the alleged contempt of court, counsel submitted that Section 127 (2) (e) of Environmental Management and Coordination Act stipulates that National Environment Tribunal has powers to punish for contempt of its orders.

Petitioners' submissions

19. In opposition to the preliminary objection, the 1st petitioner submitted that the instant petition is a bona fide public interest litigation and that the petitioners therefore have the locus standi to institute the petition before this court as the National Environment Tribunal which has no jurisdiction in matters brought under Articles 22 and 258 of the Constitution.

20. As regards the claim that the instant petition falls within the purview of the Environment and Land Court, the 1st petitioner submitted that this is a hybrid petition that has nothing to do with Environment and Land Court as the petition is about violation of human rights under the Bill of Rights which is an integral part of this court's jurisdiction.

21. On *sub judice*, the petitioner argued that the doctrine is not applicable in this case because there is nothing in the petition that is sub judice since the basic structure of the Constitution imposes an obligation on every person to protect and uphold the Constitution.

22. The 1st petitioner further argued that none of the remedies provided for under Environmental Management and Coordination Act can address the issues raised in the petition. He cited the decision in the case of **Mohamed Ali Baadi & Others –vs- The Attorney General & 11 Others [2018] eKLR** which was also a hybrid petition where a similar objection was raised and the court found that the matter fundamentally falls under the jurisdiction of the High Court.

23. The petitioner maintained that the instant petition does not challenge the decision of National Environmental Management Authority but the action of the respondents in acting the way they did. He added that the petition raises triable issues and that the invalidation of the Contempt of Court Act happened after the filing of this suit and cannot therefore be a basis for striking out of this petition.

Determination

24. I have considered the preliminary objection raised by the respondents herein, the petitioners' response and the parties' submissions together with the authorities that they cited. I note that the main issue for determination is whether this court has the jurisdiction to hear and determine this petition.

25. In the celebrated case of Mukisa Biscuits **Mukisa Biscuits Manufacturing Company vs West End Distributors Ltd [1969] EA 696** (supra), the court stated as follows on what constitutes a preliminary objection:

"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."

26. This was followed up by the judgment of Sir Charles Newbold in the same case:

"The first matter relates to the 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had 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 the issue. The improper practice should stop"

27. Considering that the issue of jurisdiction of this court is the subject of challenge in the instant preliminary objection, I find that the objection is properly before this court as it is founded on a pure point of law. In the case of **Karisa Chengo & 2 Others –vs- Republic (Criminal Appeal Nos. 44, 45 and 76 of 2014[2015] eKLR** the court observed as follows on the subject of jurisdiction:

"Assumption of jurisdiction by courts of Kenya is a subject regulated by the Constitution, by Statute Law, and by

principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): “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. [30] The Lillian “S” case establishes that jurisdiction flows from the law, and the recipient – court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

28. In this case, jurisdiction has been raised on two fronts firstly; that the matter before the court is still pending before the National Environment Tribunal and that this court therefore lacks jurisdiction to entertain on the account of the doctrine of res subjudice and secondly; that the court lacks jurisdiction in view of the mandatory provisions of Articles 162(2) of the Constitution as read with Section 13 of the Environment and Land Court Act (ELC Act) Cap 19 of 2011.

Res Subjudice

29. It was not in dispute that the instant petition is mainly predicated in a stop order issued by the National Environment Tribunal in case No. NET/196/2016, Save **Lamu & 5 Others vs NEMA & Another** pursuant to Section 129(4) of the Environmental Management and Coordination Act which section stipulates that:

“Upon any appeal to the Tribunal under this section, the status quo of any matter or activity which is the subject of the appeal shall be maintained until the appeal is determined.”

30. The petitioners’ claim is that despite the existence of both the said stop order and Section 129(4) of Environmental Management and Coordination Act, the 1st respondent has gone ahead to acquire a kshs 50 Billion stake in the Lamu Coal Plant thereby effectively altering the status quo of the said coal project.

31. The respondent’s position on the other hand was that this court has no jurisdiction to punish the 2nd and 3rd respondents for the alleged disobedience of the stop order issued by the National Environment Tribunal by virtue of Section 129(4) as such jurisdiction is under Section 125 of Environmental Management and Coordination Act vested in the National Environment Tribunal. It was the respondents’ case that the National Environment Tribunal has powers, under Section 127(2) (e) of Environmental Management and Coordination Act, to punish any person who does not comply with its decision or order. The said Section 127(2) (e) stipulates as follows:

Section 127(2) (e) of Environmental Management and Coordination Act:

Any person who-

(e) fails or neglects to comply with a decision order, direction or notice confirmed by the Tribunal, commits an offence under this Act.

32. My finding is that in view of the fact that Environmental Management and Coordination Act provides for a mechanism for redress in matters of contempt, there exists a sufficient and adequate avenue for the resolution of the issue of contempt of the National Environment Tribunal orders without resorting to the jurisdiction of this court. Indeed, this is the position that was adopted in the **Gabriel Mutava & 2 Others vs Managing Director Kenya Ports Authority & Another [2016] eKLR** wherein it was held:

“ Time and gain it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. Indeed, in the case of Harrikissoon v Attorney General [1980] AC 265, the Privy Council held that:-

“.....The motion that whenever there is a failure by an organ of the government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individual by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action.....”

33. I further note that the Contempt of Court Act, (No. 46 of 2016) on which the petitioners’ prayer for order on contempt of court is founded, was by the decision made by Chacha Mwita J. on 9th November 2018 in the case of **Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR** declared unconstitutional in which case, the prayer for orders based on the said Act cannot stand.

Article 162(2) of the Constitution

34. Turning to the claim that this court lacks jurisdiction on account of the provisions of Article 162(2) of the Constitution and Section 13 of the Environment Land Court Act, I note that the said provisions stipulate as follows.

See Article 162(2) of the Constitution

(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.

Section 13 Environment and Land Court Act

(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. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

35. In this case, it is not in dispute that even though violation of constitutional rights has been alleged by the petitioner, the main subject of the case is the environment. Indeed, a perusal of the prayers sought by the petitioner point to the fact that the petition is predicated on an environmental challenge revolving around the proposed construction of the Lamu Coal Fired Power Plant. In fact, going by the fact that the genesis of this petition is the orders issued by the National Environment Tribunal in NET/196/2016- **Save Lamu & 5 Others vs National Environmental Management Authority** (NEMA) and Amy Power Company Ltd, I find that the irresistible conclusion is that this is a case on environmental challenge for which the right forum would be in the Environment and Land Court if not the National Environment Tribunal where the main dispute is still domiciled.

36. For the above reasons, I find that the preliminary objection on jurisdiction is merited as the jurisdiction of this court is ousted by the

provisions of Article 165(5) (b) of the Constitution. This court therefore downs its tools at this point and directs that the petitioners are at liberty to pursue his case, if any, before the Environment and Land Court, should they deem it necessary. I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 30th day of April 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Omuom for Masika for 2nd and 3rd respondent

No appearance for petitioner

Court Assistant – Ali