



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 317 OF 2019

LOISE K’ODUOL & KEZIA K’ODUOL (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THERESA GRACE ACHIENG ALONE K’ODUOL).....1ST PETITIONER

MARGARET WANGARI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHN KAMAU NJENGA).....2ND PETITIONER

LAWRENCE OTIENDE LUMBASYO.....3RD PETITIONER

THUTA INVESTMENT COMPANY LIMITED.....4TH PETITIONER

LEONIDA F. A OMONDI.....5TH PETITIONER

JOSEPH FREDRICK GATHII, RICHARD HENRY NJUNJI GATHII, ROBERT NICHOLAS ROGOI GATHII AND OTHERS (KELVIN GATHI).....6TH PETITIONER

ISAIH NGOTHO WATHEKA.....7TH PETITIONER

PETER WAINAINA.....8TH PETITIONER

JOHN KINGORI KARIUKI.....9TH PETITIONER

ELIZABETH MWARI MAINGI.....10TH PETITIONER

MARY WANJIKU CHEGE MAHIA.....11TH PETITIONER

MARY WANJIKU NJIRAINI (SUING AS THE LEGAL REPRESENTATIVE OF ESTATE OF JAMES RAYMOND NJENGA).....12TH PETITIONER

VERSUS

ATHI WATER SERVICES BOARD.....1ST RESPONDENT

MANGAT I. B. PATEL & PARTNERS LTD.....2ND RESPONDENT

ZHONGMEI ENGEERING GROUP.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL4TH RESPONDENT

AND

PRESIDENTIAL DELIVERY UNIT.....1ST INTERESTED PARTY

KFW DEVELOPMENT BANK OF GERMANY.....2ND INTERESTED PARTY

EUROPEAN UNION.....3RD INTERESTED PARTY

LORESHO SOUTH RESIDENTS ASSOCIATION.....4TH INTERESTED PARTY

DEPUTY COMMISSIONER, WESTLANDS.....5TH INTERESTED PARTY

RULING

1. Loise K'Oduol & Kezia K'Oduol (suing as the administrators of the estate of Theresa Grace Achieng, Aloande K'oduol), 1st Petitioner; Margaret Wangari (suing as the administrator of the estate of John Kamau Njenga), 2nd Petitioner; Lawrence Otiende Lumbasyo, 3rd Petitioner; Thuta Investment Company Limited, 4th Petitioner; Leonida F. A. Omondi, 5th Petitioner; Joseph Fredrick Gathii, Richard Henry Njunji Gathii, Robert Nicholas Rogoi Gathi and others (Kevin Gathii), 6th Petitioner; Isaiah Ngotho Watheka, 7th Petitioner; Peter Wainaina, 8th Petitioner; John Kingori Kariuki, 9th Petitioner; Elizabeth Mwari Maingi, 10th Petitioner; Mary Wanjiku Chege Mahia, 11th Petitioner; and Mary Wanjiru Njiraini (suing as legal representative of the estate of James Raymond Njenga), 12th Petitioner have sued Athi Water Services Board (1st Respondent), Mangat I. B. Patel and Partners Ltd (2nd Respondent), Zhongmei Engineering Group Ltd (3rd Respondent) and the Attorney General (4th Respondent). The Presidential Delivery Unit, KfW Development Bank of Germany, European Union, Loresho South Residents Association and the Deputy Commissioner, Westlands are named as the 1st to 5th interested parties respectively.

2. This ruling is in respect of two notices of preliminary objection. The first one was filed by the 4th Respondent and is dated 16th August, 2019. It is framed as follows:-

“Take notice that the Attorney-General shall raise and urge a preliminary objection to the petition herein on the following grounds;

1. The Honourable Court lacks the jurisdiction to hear and determine the petition herein since it is a dispute relating to the environment, the use and occupation of, and title to land by virtue of the provisions of Article 165(5) of the Constitution which provides that ‘the High Court shall not have jurisdiction in respect of matters- (b) falling within the jurisdiction of the courts contemplated in Article 162(2)’

2. Section 13(1) of the Environment and Land Court Act provides that the Environment and Land Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and shall have power to hear and determine disputes relating to environmental planning and protection, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land.

3. Section 13(7) of the Environment and Land Court Act provides that the Environment and Land Court can issue prerogative orders, issue injunctions, award damages, award compensation, issue declarations, which provision if read together with the provisions of Article 162(2) of the Constitution ousts the jurisdiction of this Court to hear and determine this case.

4. The Petitioner’s case is premised on the Petitioner’s alleged title to, rights and interest over land.”

3. The second Notice of Preliminary Objection was filed by the 1st and 2nd respondents. It is dated 29th August, 2019 and it states:-

“The 1st and 2nd Respondents shall raise an Preliminary Objection on a Point of Law to the Petitioner’s Petition and Application dated 5th August, 2019 on the following grounds:

1. That this court does not have jurisdiction over the present matter.

2. The matter in dispute relates to land and environment.

3. The suit is *sub judice*, the issues being raised here are the same as those in Milimani ELC number 306 of 2018 and Nairobi Civil Appeal number 99 of 2019 which are still ongoing before Milimani Environment and Land Court and

Nairobi Court of Appeal by clothing it in the garb of constitutionality.

4. It is not open to the Petitioners to raise the present petition which relates to land and environment and whose appropriate forum for resolution is the Environment and Land Court by clothing it in the garb of constitutionality.

5. This Honourable Court has no jurisdiction to hear and determine the dispute under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act which falls in the sphere of the Environment and Land Court.

6. That this Court is also now bound by the decision of the Court of Appeal sitting in Malindi in *Karisa Chengo & 3 others versus Republic*, Criminal Appeal Nos. 44, 45 and 76 of 2014, (2015) eKLR, that a judge who has been appointed as a judge of the High Court cannot preside over matters reserved for either the Environment and Land Court or the Employment and Labour Relations Court.

7. That the suit herein is scandalous, vexatious and a gross abuse of court process.

REASONS WHEREFORE the Petitioners' Petition and the Application should be struck out with costs."

4. Two grounds for striking out the petitioners petition emerge from the two notices of preliminary objection namely that the court lacks jurisdiction to entertain the petition and that the petition violates the doctrine of *sub judice*.

5. In the submissions dated 5th September, 2019, Mulekyo & Company Advocates indicated that it was acting for the 1st, 2nd and 3rd respondents. On the issue of jurisdiction, counsel submitted that the petitioners allege that the respondents have trespassed upon their parcels of land which borders Kibarage River and caused damage to their properties.

6. Counsel cited Article 260 of the Constitution which defines land and Article 61(2) which classifies land and submitted that jurisdiction over such matters belongs to the Environment and Land Court. He stressed that the jurisdiction of this court in respect of matters touching on land and environmental issues is expressly ousted by Article 165(5) of the Constitution. Pointing to Article 162(2) of the Constitution and Section 13(2) of the Environment and Land Act, 2012, counsel asserted that jurisdiction on land and environment matters is solely vested by the law on the Environmental and Land Court.

7. Counsel submitted that the jurisdiction of this court as provided by Articles 23 and 165(5) of the Constitution excludes it from determining matters touching on land use and environmental management. Further, that the Environment and Land Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) of the Constitution and any other law relating to environment and land.

8. Counsel cited the decisions in **Eldoret ELC Petition No. 2 of 2013 Mohamed Said v County Council of Nandi [2013] eKLR ; Ledidi Ole Tauta & others v Attorney General [2015] eKLR**; and **Nakuru ELC Petition No. 50 of 2013 Ken Kasing'a v Daniel Kiplagat Kirui & 5 others [2015] eKLR** for the proposition that the jurisdiction of the Environment and Land Court is all encompassing when it comes to matters touching on land and environment.

9. Counsel consequently urged this court to down its tools in line with the pronouncement in the case of **Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] KLR 1** that a court without jurisdiction cannot make one further step and has to down its tools the moment it holds that it is without jurisdiction.

10. Turning to the assertion that this petition is *sub judice*, counsel for the 1st, 2nd and 3rd respondents submitted that the issues raised by the petitioners herein are the subject of **Nairobi ELC No. 306 of 2018** and a ruling delivered in that matter is a subject of appeal in the Court of Appeal at Nairobi in **Civil Appeal (Application) No. 99 of 2019**.

11. Counsel cited Section 6 of the Civil Procedure Act, and the decisions in **Kerugoya ELC Case No. 596 of 2014 Thiba Min. Hydro Co. Ltd v Josphat T. Karu Ndwiiga and David Ramogi & 4 others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 others [2017] eKLR** as establishing, expounding and delineating the *sub judice* principle

12. The 4th Respondent did not file any submissions.

13. The petitioners filed a response dated 4th September, 2019 to the notices of preliminary objection. According to the petitioners, the instant matter is not about title to, rights or interest over land but is about the actions or omissions of the respondents in relation to the implementation of the Nairobi City Water Distribution Network Modification Project, Construction of the Western Transmission (Kabete – Uthiru – Karen) Pipeline – Lot 2 Contract No. AWSB/Kfw/W/02/2016.

14. It is the petitioners' case that although Article 162(2) provides for the establishment of a court to hear and determine disputes relating to the environment and the use and occupation of and title to, land, this court is empowered by Article 165(3)(b) of the Constitution to determine the question whether a right or a fundamental freedom in the Bill of Rights has been denied, infringed or threatened.

15. The petitioners' case is that the courts established under Article 161(2) of the Constitution cannot exercise the jurisdiction granted to this court by Article 165(3)(b) of the Constitution. In support of this assertion, reference is made to Section 13(2) of the Environment and Land Court Act, 2011 as outlining the jurisdiction of the Environment and Land Court. Further, that the scope of reliefs availed by Section 13(7) of the said Act is not relevant to this case because it does not influence the issue of jurisdiction in relation to the subject matter in the petition.

16. The petitioners assert that the jurisdiction of the Environment and Land Court does not include human rights violations, which is solely the preserve of the High Court and specifically the Constitutional and Human Rights Division. It is stressed that Article 23 of the Constitution grants the High Court jurisdiction to hear and determine applications for redress of, a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

17. It is the petitioners' position that their petition raises many questions relating to violation of their rights including their rights to freedom and security, dignity, the right not to be treated in inhuman and degrading manner, the right to equal protection of the law, rights to privacy, access to information, protection of private property, and fair administrative action. They conclude that this petition is about violation of their dignity and the same has no relationship with the issue of land ownership and compensation.

18. On the claim that this petition is *sub judice* **Nairobi ELC Case No. 306 of 2018**, the petitioners asserts that the parties in that case are different from the petitioners herein as that case was filed by Loresho South Residents Association, the 4th Interested Party herein. Further, that the respondents in that case are different from the respondents herein. Also, that the subject matter in the land case relates to the erection of beacons and demarcation of boundary lines in a purported exercise to ascertain the riparian reserve whereas the course of action in this petition is alleged violation of human rights.

19. Finally, the Petitioners urge that the reliefs sought in the land case are not similar with the reliefs sought herein which includes prayers for an order of certiorari to quash the decision to implement the project on private property, an order of excavation and removal of pipes, compensation for malicious damage to property as well as exemplary and punitive damages. The court is therefore asked to dismiss the notices of preliminary objection.

20. Once the question of jurisdiction is raised, the court is enjoined to dispose the matter at the earliest opportunity for a court without jurisdiction has no business proceeding with the matter. This statement finds footing in the celebrated case of **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Nyarangi JA stated that:-

"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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

21. In **Republic v Karisa Chengo & 2 others [2017] eKLR**, the Supreme Court stressed the importance of the courts of equal status by stating that:-

"[50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of "equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other". Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another."

22. In **Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others [2017] eKLR**, the Court of Appeal held that for land use to occur **"the land must be utilized for the purpose for which the surface of land, air above it or ground below"** is adapted and that to the law therefore **"land use entails the application or employment of the surface of the land and /or the air above it and/or ground below it according to the purpose for which that land is adopted."** The Court also held that in matters where issues straddled the jurisdiction of this court and a court of equal status, the determining factor as to where the suit should be filed is the dominant issue in the case.

The Court of Appeal did not recommend splitting of issues as the petitioners have done here.

23. That courts of equal status enforce constitutional rights is no longer a matter for debate – see the Court of Appeal decisions in **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR** and **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR**. The claim by the petitioners' counsel that the Environment and Land Court cannot remedy the alleged violation of human rights is therefore unfounded.

24. A perusal of the pleadings in this matter clearly shows that everything revolve around the petitioners' alleged violation of their land rights by the respondents. The jurisdiction to hear and determine such matters belongs to the Environment and Land Court. This court will therefore be violating the Constitution were it to proceed on the pretext that it has jurisdiction in a matter that purely deals with land and environment. I down my tools.

25. Having confirmed my lack of jurisdiction to handle the matter, it would be remiss of me to go ahead and tackle the issue of *sub judice*. That is now a matter to be dealt with by a judge with jurisdiction. In the circumstances of this case and guided by the principles governing the exercise of judicial authority as provided by Article 159(2) of the Constitution, I transfer this case to the Environment and Land Court, Nairobi for possible merger with **Nairobi ELC Case No.306 of 2018**.

26. Litigants have now developed a tendency of knocking on multiple judicial doors with the hope that one of them may yield favourable results. This behavior should be discouraged. For that reason, I award the respondents the costs for their notices of preliminary objection.

Dated, signed and delivered at Nairobi this 31st day of October, 2019.

W. Korir,

Judge of the High Court