



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CONSTITUTIONAL PETITION NO. 5 OF 2019**

**H. YOUNG & CO (EA) LTD.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF LAMU.....RESPONDENT**

**RULING**

1. The Petitioner, by its petition dated 1<sup>st</sup> April 2019, seeks for the following prayers:-

(i) A declaration that the Lamu County Finance Act 2016 is ambiguous in so far as the listed cessable items in the fourth and fifth schedule are concerned.

(ii) A declaration that the Respondent's demand for cess from the Petitioner for the soil of the Garsen – Witu - Lamu Road project which is not a cessable item under the Lamu County Finance Act 2016 is unlawful, unconstitutional and null and void.

(iii) A declaration that the actions of the Respondent in continuing to levy/charge cess fees for the soil being used in the construction of the Garsen –

Witu – Lamu Road Project without a supporting legal framework expressly violates the provisions of the Constitution of Kenya as reproduced hereinbefore and which specifically provides that no tax or licensing fees may be imposed, waived or varied except as provided by legislation.

(iv) A Prohibitory Injunction directing the Respondent to stop the levying of cess fees for soil for the Garsen – Witu – Lamu Road project in their area of jurisdiction until such a time as they will have enacted a supporting legal framework.

(v) A Mandatory Injunction to restrain the Respondent, the Lamu County Government from enforcing of levying cess fees for soil for the Garsen – Witu – Lamu Road project illegally and unlawfully under the Lamu County Finance Act, 2016.

(vi) Costs of this Petition.

(vii) Any other relief or orders that this Honourable Court shall deem fit to grant.

2. The Respondent opposed the Petition and filed their Answer and Response to the Petition and Grounds of Opposition both dated 14<sup>th</sup> May 2016. They further filed a Notice of Preliminary Objection (P.O) dated 16<sup>th</sup> May 2019. The P.O is the subject of this ruling.

3. The P.O is based on the ground: “That the pleadings were a nullity and that the court has no jurisdiction to entertain the same in view of the provisions of section 15 and 88 of the County Government Act read together with the provisions of the Constitution of Kenya and Public Finance Management Act.”

4. The parties agreed to dispose of the P.O. by way of written submissions, which were highlighted when the matter came up for hearing on the 2<sup>nd</sup> July 2019.

**Respondent's Submissions**

5. Mr. Mburu, learned counsel for the Respondent submitted that whereas the court had unlimited jurisdiction, where other procedures of resolving

disputes were provided, parties were expected to submit to them. He stated that section 15 and 88 of the County Government Act 2016 provided for an alternative remedy to address the Applicant's grievances by petitioning the County Government and the County Assembly. Counsel contended that the Petitioner had failed to comply with the law providing the alternative procedure and therefore the Petition should be struck out. He relied on the **The Speaker of the National Assembly vs Karume (2008) 1KLR 425; Mutanga Tea & Coffee Ltd vs Shikara Limited & Another [2015] eKLR; Ledarn Ole Taura & others vs AG & 2 others [2015] eKLR** and; **Diana Kethi Kilonzo & Another vs IEBC & 10 others.**

6. Mr Onsare, learned counsel for the Petitioner submitted that the P.O. was premised on section 88 of the County Government Act (CGA) which dealt with public participation for purposes of County legislation. He stated that the petition was seeking to interpret statute and not to render the statute illegal. On the procedure under section 15 of the CGA, Mr. Mbura, argued that the Respondent had failed to prescribe the procedure to exercise the right under section 15. He stated that it was the compulsory obligation of the County Assembly under section 15 (2) to prescribe the procedure and that it had failed to do so.

7. Counsel further submitted that the Respondent was attempting to arrogate itself judicial authority to interpret statute and therefore the P.O. ought to be dismissed. He relied on **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] eKLR; Samuel Macharia Kamau & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR; Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 other [2018] eKLR;**

**A.O.O & 6 others v Attorney General & Another [2017] eKLR; Raiply Woods (K) Ltd & another v Baringo County & 3 others [2017] eKLR,** and; **Diani Business Welfare Association 7 others v County Government of Kwale [2015] eKLR.**

#### **Analysis and determination**

8. From the P.O as framed and respective submissions, the only issue for determination is whether the P.O has merit or put differently, whether this court has jurisdiction to determine the Petition.

9. The principles in respect of a preliminary objection are well founded in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696.** at page 700 where. D-F Law JA as he then was had this to say:-

*"...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."*

10. Further, jurisdiction is a fundamental issue and should be disposed of whenever raised. Where a court is convinced that there is want of jurisdiction to entertain any matter before it to finality, that court has no option but to down its tools. This was held by Nyarangi JA in the case of **Owners of the Motor Vessel 'Lillians' versus Caltex Oil (Kenya) Ltd [1989] KLR1,** where he succinctly held thus:-

*"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had 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. ...."*

11. In **Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR,** the Supreme Court pronounced itself 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..."*

12. The High Court derives its jurisdiction from **Article 165** of the **Constitution, 2010** which provides:-

*"(3) Subject to clause (5), the High Court shall have —*

*(a) unlimited original jurisdiction in criminal and civil matters;*

*(b) ....*

*(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) 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;*

*(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

(iv) a question relating to conflict of laws under Article 191;...

13. It is not in dispute that the Constitution, confers on the court unlimited jurisdiction in civil matters. However, the court has to consider before it exercises its jurisdiction, whether the Petitioner was required to exhaust all other avenues of dispute resolution before approaching the court. In **Speaker of National Assembly vs Karume (Supra)** the Court of Appeal held that:-

*"Where there is a clear procedure for redress of any particular grievance 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 procedures."*

14. In **Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others (2015) eKLR** the Court of Appeal further restated this position in stated as 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. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."*

15. Article 159 (2) (c) of the Constitution of Kenya, 2010 provides:-

*(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

*(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

16. It is the Respondents submission that section 15 and 88 of the County Government Act (CGA) provide for alternative mechanisms for review of the Respondent's decisions or actions and, that the said sections form the basis of the ousting the jurisdiction of this court.

17. Section 15 (1) of the CGA states that:-

*"A person has a right to petition a County Assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation."*

Section 88 (1) on the other hand provides that:-

*Citizens have a right to petition the county government on any matter under the responsibility of the County Government.*

18. In order to determine whether the jurisdiction of the court is ousted, the court looks at the pleadings of the Applicant which contains the legal basis of the claim. I am persuaded by the exposition by Mativo J in **Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments [2019] eKLR**, where he rendered himself thus:-

*"On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court held in the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others[43]had this to say:-*

*"Jurisdiction is determined on the basis of the pleadings,[44]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by... {another court}, the High Court would lack jurisdiction..."*

19. In the present case, it is clear from the orders sought in the Petition, that the Petitioner is challenging the constitutionality of the Respondent's County Finance Act 2016 regarding the levying of cess on soil being utilized in their project. The question then is whether the constitutionality of the Lamu County Finance Act 2016, is a matter envisioned under section 15 and 88 of the County Government Act.

20. Section 8 of the County Government Act outlines the role of the County Assembly and provides that:-

*The county assembly shall—*

21.

22.

- (a) vet and approve nominees for appointment to county public offices as may be provided for in this Act or any other law;*
- (b) perform the roles set out under Article 185 of the Constitution;*
- (c) approve the budget and expenditure of the county government in accordance with Article 207 of the Constitution, and the legislation contemplated in Article 220(2) of the Constitution, guided by Articles 201 and 203 of the Constitution;*
- (d) approve the borrowing by the county government in accordance with Article 212 of the Constitution;*
- (e) approve county development planning; and*
- (f) perform any other role as may be set out under the Constitution or legislation.*

21. From the above, it is clear that the County Assemblies are not vested with authority to decide on the constitutionality of county legislation and therefore Section 15 of the CGA does not apply in this matter.

22. **Section 5 (2)** of the County Government Act provides for the functions of the County Government which are:-

- (2) Without prejudice to the generality of subsection (1) a county government shall be responsible for—*
- (a) county legislation in accordance with Article 185 of the Constitution;*
- (b) exercising executive functions in accordance with Article 183 of the Constitution;*
- (c) functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution;*
- (d) any other function that may be transferred to county governments from the national government under Article 187 of the Constitution;*
- (e) any functions agreed upon with other county governments under Article 189(2) of the Constitution; and*
- (f) establishing and staffing its public service as contemplated under Article 235 of the Constitution.*

23. The relevant provision in this suit is **Article 183** of the Constitution states that:-

- 1) A county executive committee shall—*
- (a) implement county legislation;*
- (b) implement, within the county, national legislation to the extent that the legislation so requires;*
- (c) manage and coordinate the functions of the county administration and its departments; and*
- (d) perform any other functions conferred on it by this Constitution or national legislation.*

24. In **Raiply Woods (K) Ltd & another v Baringo County & 3 others [2017] eKLR**, Muriithi J, while addressing a similar issue held that:-

*37. At the outset, the principle of strict compliance with statutory procedure for resolution of disputes is inapplicable in this matter. The petitioners are not required to petition the County Government under sections 15 and 88 of the County Government Act, 2012 to challenge the constitutionality of an Act of its County Assembly.....*

*39. In the present petitions, the challenge is on the constitutionality of the enactment of the law on taxation of the forest produce from state forests consideration being called upon for the interpretation of the allocation of functions between the National Government and the County Government under Article 186 and the Fourth Schedule of Constitution. This is clearly a matter for the constitutional interpretation jurisdiction of the High Court under Article 165 (3) (b) and (d) and 258 of the Constitution.*

25. I am persuaded by the above case. It is apparent that constitutional interpretation is not a function of the County Government but the function of this court under Article 165 (3) (b) and (d) of the Constitution. I therefore find section 88 of the County Government Act not applicable in this matter. The Petitioner was not obligated to petition the Respondent under section 88 of the County Government Act.

26. Further, and from my perusal of the pleadings before me, it is evident that both parties had engaged in a back and forth correspondence on the contentious matter of levying of cess on the soil used by the Petitioner and that the Respondent threatened to use all legal avenues available to it to enforce its claim. It is therefore crafty for the Respondent to now turn around to challenge the jurisdiction of the court after

it was beat to the line by the Petitioner.

27. In the end, I find that the P.O. dated 18<sup>th</sup> June 2019 lacks merit and is dismissed with costs.

28. Orders accordingly.

**Ruling delivered, dated and signed at Garsen this 27<sup>th</sup> day of November, 2019**

**R.LAGAT KORIR**

**JUDGE**

**In the presence of:**

S. Pacho Court Assistant

Ms. Thuku holding brief for Mr. Kilonzo for the Respondent.

Mr. Mungatana holding brief for Mr. Onsare for the Petitioner.