



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.117 OF 2019**

**IN THE MATTER OF ARTICLES 2(6), 10,19, 20(1), (2), (3) & (4), 21(1), 22(1),(2), (3)(A), (B), (C) & E (25) (A), (27) (2) & (5), 28, 29(F), 31, 35(2)**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLE 10,22,23,23(3), 40(1), 27 AND (3), 42 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**KO HOLDINGS LIMITED.....PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT**

**RED HILL KENTMERE RESIDENTS ASSOCIATION.....INTERESTED PARTY**

**JUDGMENT**

**Petitioner's Case**

**1.** The petitioner through a petition brought pursuant to Articles 10, 19,20(1), (2), (3) and (4); 21(1), 22(1) (2) (3) (a) (b) (c) & (e); 23(3), 25(a), 27(2) and (5); 40(1) and 47 dated 25<sup>th</sup> March 2019 seeks the following reliefs:-

- a) A Declaration that the petitioner's right to equality before the law was breached by the Respondent.
- b) A Declaration that the Petitioner's freedom from discrimination was breached by the Respondent.
- c) A Declaration that the Petitioner's right to property was breached by the Respondent.
- d) A Declaration that the Petitioner's right to fair administrative action was breached by the Respondent.
- e) A Declaration that the purported cancellation of the Petitioner's approval as contained in the Respondent's letter dated 23<sup>rd</sup> October 2018 is unconstitutional, illegal and unlawful.
- f) An order prohibiting the Respondent from acting and/or interfering with the Petitioner's fundamental rights of right to equality before the law, freedom from discrimination, right to property and right to fair administrative action with respect to the Project and the Property by cancelling the Construction Permit or otherwise howsoever.
- g) An order for compensation by way of damages on account of breach of the fundamental rights to equality before the law freedom from discrimination, right to property and right to fair administrative action with respect to the Suit Property.
- h) Such other orders that this Honourable Court shall deem just.

**2.** The petition is supported by the petitioner's supporting affidavit of even date and annexures thereto.

3. The petitioner's petition was triggered by the Respondent's decision contained in the letter dated 23<sup>rd</sup> October 2016 by which letter the respondent unilaterally purported to cancel the petitioner's construction permit allegedly on account of objections raised by residents on account of environmental pollution and development density.

#### **Respondent's Case**

4. The Respondent filed a Replying affidavit sworn by Mwaniki J. Wanjiru on 12<sup>th</sup> April 2019 to the petition. That on 9<sup>th</sup> October 2018, the Chief Officer Lands, Housing, Physical Planning and Urban Development issued the petitioner with a construction permit which letter through a letter of 23<sup>rd</sup> October 2018, he cancelled on account of complaints raised by residents of the area, in which the development application was made. It is urged the petitioner failed and/or neglected to pursue the appropriate dispute resolution mechanism as established under Physical Planning Act (Cap 286) Laws of Kenya. It is contended that the petitioner should have appealed against the cancellation of the construction permit under Rule 28 of the Physical Planning (Building and Development) (Control Rules 1998) before respective Liason Committee failure whereof the petitioner has invoked the jurisdiction of this court prematurely. It is further contended that the appeal from decision of National Liason Committee as per section 15 of the Act lies with the Environmental and Land Court established under Article 162(2) (b) of the Constitution of Kenya 2010. It is further contended the construction permit was issued by Chief Officer and not the Director Physical Planning within the County Government of Kiambu, and that the petitioner's development application and approvals. There was no consent of Director Physical Planning sought and obtained prior to issuance of the construction permit.

5. It is Respondent's case that the petitioner's development application, **(CPTC/037/2018/180)**, was considered and the committee declined to approve the development application on the grounds set in the annexure **(JM-1)** a print out of the system developed status:-

- a) The developer was to attach copies of their lease conditions.
- b) The developer was to attach copies of rates clearance.
- c) Each unit was to sit on 0.2 hectares.

#### **Interested Party's Case**

6. The Interested party filed a Replying affidavit to the petitioner's petition sworn by David Ikonya Kariuki on 10<sup>th</sup> June 2019 together with grounds of opposition of even date setting out the following grounds of opposition:-

- a) THAT the Petition is frivolous, vexatious and an abuse of the Court process.
- b) THAT the instant dispute relates to property and alleged violations of the right to property and as such, the instant suit offends the provisions of Article 162 (2) (b) and Article 165 (5) (b) of the Constitution as read with Sections 4 and 13 of the Environment and Land Court Act.

#### **Analysis and Determination**

7. I have very carefully considered the petition, the Replying affidavit by the Respondent; the Replying affidavit and grounds of opposition by the interested party; counsel rival submissions and from the aforesaid the following issues arises for consideration:-

- a) **Whether the court has jurisdiction to hear and determine the petition?**
- b) **If the answer to (a) above is in the negative, do alternative dispute resolution mechanism limit the rights as espoused in Article 22 and 23 of the Constitution of Kenya 2010?**
- c) **Whether the decision of Chief Officer Lands, Housing, Physical Planning & Urban Development were right and whether cancellation of the construction permit issued to petitioner was proper?**
- d) **Whether the petitioner's constitutional rights have been violated in any way?**
- e) **Whether the petitioner deserves the prayers in the petition?**

#### **A) Whether the court has jurisdiction to hear and determine the petition?**

8. The Respondent and Interested party contention is that this court lacks jurisdiction to hear and determine this petition. The courts have always held that jurisdiction is everything and at the instance where challenge is made on court's jurisdiction, then, that court has an obligation to make a finding on whether or not it has the capacity to hear the suit as filed before it. Where court finds that it has no jurisdiction to hear the matter it has to down its tools. In support the aforesaid proposition great reliance has been made on a ruling by Nyarangi J. in **Lillian "S" (1989) KLRI** where the Judge stated that:-

**"Jurisdiction is everything. Without it, a court has not power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

9. In **Suzanne Achieng Butler & 4 others vs Redhill Heights Investments Limited & another [2016] eKLR**, the Hon. Justice Professor

Ngugi held that:

**"The Constitutional implication of this is that since the Court is vested with authority to exercise on behalf of the people Kenya, the Court can only exercise the limited authority it has been vested with. A court cannot by invention or innovation or judge craft aggrandize its jurisdictional reach as this would amount to overreaching the mandate bequeathed by the people."**

10. The Hon. Judge in making the above finding placed reliance on the **Supreme Court of Kenya Application No. 2 of 2011 involving Samuel Kamau Macharia vs KCB and others [2012] eKLR** where it was held that:-

**"A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court 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..... the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation."**

11. The interested party submits, that the instant disputes relates to property and alleged violations of right to property and as such, the instant petition offends the provisions of **Article 162 (2) (b) and 165(5) of the constitution as read with section 4 and 13 of the Environmental Land Act**. The Respondent on the other hand opines that jurisdiction lies with the Liaison Committee established under the Physical Planning Act, whereas, on the other end, the petitioner believes that the jurisdiction of court cannot be ousted.

12. The Physical Planning Act relied upon by the Respondent provides the functions and powers of the Liaison Committee as follows:-

**"Section 10(2) The functions of other liaison committees shall be-**

- a) To inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act;**
- b) To enquire into and determine conflicting claims made in respect of applications for development permission;**
- c) To hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act."**

Further the **Physical Planning (Building and Development) (Control) Rules 1998** on its part states:-

**"Rule 28 (Appeals)**

**Any person aggrieved by the decision of the local authority under the foregoing rules may appeal to the respective liaison committee."**

13. From the foregoing provisions of the Act and Regulations made thereunder it is clear that Physical Planning Act not only envisages a dispute such as the one before this court but also provides an avenue for which such a dispute ought to be resolved. It is clear that the Act does create a dispute resolution mechanism where the first part of call is the Liaison Committee, set out under section 10(2) of the Physical Planning Act (Cap 286) of the Laws of Kenya. The question of alternative forms of dispute resolution is well embodied in our constitution under **Article 159 (2) (c)** where it is clearly provides as follows:-

**"Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)."**

14. The point that begs for answer is, where the court has jurisdiction to entertain a matter and a statute provides a parallel dispute resolution mechanism, other than court, where then should the dispute be heard and determined? In this matter the Respondent and Petitioner do not agree. In the case of **Johnstone Ewoi Lotiir & another vs Jeremiah Ekamais Lomorukai & 4 others [2017] eKLR** Hon. Justice Odunga had the follows to say:-

**"...It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in *Pasmore vs. Oswaldtwistle Urban District Council [1988] AC 887* that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy are deprived of any other means of enforcement However, as was stated in *Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728*, ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality...."**

15. The constitutionality of the Liaison committees has been tried and tested in the Court of Appeal in recognizing the Liaison Committee as an alternative form of dispute resolution mechanism in which the court had this to say in **Murang'a Tea & Coffee Company Ltd vs Shikara Limited & another [2015] eKLR (Mombasa Civil Appeal No. 54 of 2014:-**

**"...We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which**

sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison d'être of the mechanisms provided under the two Acts."

16. This court takes judicial notice that the local authorities upon promulgation of the constitution 2010 became counties. It therefore follows that any reference to the term local authority ought to be considered to mean the County Government. This position is clearly stated in the sixth schedule to the Constitution of Kenya 2010 at paragraph 7(1) when it is clearly stated that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

17. I therefore find, that it follows the jurisdiction of the court, has by operation of statute, in this case the Physical Planning Act, been restricted. However I find such limitation is only in exercise of the courts' original jurisdiction in matters of Physical Planning. I find the petitioner's failure to have the matter referred to liaison Committee amounts to casting aspersions to a public body which is yet to undertake its duty and as such undermining its independence. In view of the provisions under section 10(2) of the Physical Planning Act and authorities relied upon in this matter, I am in agreement with the Respondents' submissions, that where an obligation is created by statute and a specific remedy is clearly given by the statute, the persons seeking the remedy are deprived of any other means of enforcement. Further it has not been demonstrated the ouster clauses in this matter are institutional or inconsistent with the objectives of the Act and that they are unreasonable and unjustified. I therefore make a finding based on the provisions of the Act herein above-mentioned, that this court lacks jurisdiction to proceed with the instant matter on account of an ouster clause provided or in statute that prescribes alternative means of resolving the dispute. The alternative Dispute Resolution is provided for under Article 159(2) (c) of the Constitution of Kenya 2010, hence I find it to be constitutional.

18. The interested party in submitting, that this court lacks jurisdiction to hear and determine this matter places its reliance on provisions of Article 162 (2) (b) and Article 165 (5) of the Constitution of Kenya. The petitioner has a response to the interested party's submissions and urges that, jurisdiction on any court is conferred either by the constitution or through a statute. It is petitioner's submissions that questions relating to violation of the fundamental rights and freedoms are within the jurisdiction of this Honourable Court

19. The petitioner in the instant petition reiterates that the Respondent acted unconstitutionally by purporting to cancel the construction permit issued to the petitioner when it did not have powers to cancel the same in the first place.

20. It is interested party's contention that **Article 162 of the Constitution** provides what court has jurisdiction to handle matter similar to the one before court. It is provided by **Article 162 of the Constitution** thus:-

"1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to 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."

21. Article 165(5) of the constitution provides:-

" 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)."

22. Further In the case of **Christopher Ngusu Mulwa & 28 others vs. County Government of Kitui & 2 others [2017] eKLR**, the Learned Judge affirmed the jurisdiction of the Environment and Land Court to hear disputes relating to land and environment and made the following observation thus:-

"The Respondents' counsel has submitted that under Article 165(3) of the Constitution, the jurisdiction to determine questions on a right or fundamental freedom in the Bill of rights or to hear any question respecting the interpretation of the Constitution is vested in the High Court and that the Environment and Land Court does not have jurisdiction to hear and determine questions relating to rights and freedoms, except those rights and freedoms under Articles 42, 69 and 70 of the Constitution.

The above argument by the Respondents' counsel is not novel in nature. Indeed, the said argument has been heard by the High Court and this court before.

In the case of *Ifdid Ole Tauta & others vs Attorney General (2015) eKLR*, a three judge bench held as follows: "having regard to constitutional provision under Article 165(3) (b) and Section 13(3) of the Environment and Land Court Act, in constitutional matters touching on the violation and/or infringement of the fundamental Bill of rights and freedoms as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and a party could bring such matters either before the High Court and or before the Environment and Land court."

23. The petitioner contend that the decisions cited by the interested party on the issue of jurisdiction related to where the courts stated that disputes touching on environment and use are preserve of the Environment and use are preserve of the Environment and Land court and that even High Court as well as Elc court established pursuant to Article 162(1) (b) of the constitution and section 13 of the Environment and Land Court Act have concurrent jurisdiction. In constitutional matters touching on violation and/or infringement of Bill of Rights and freedoms as far as the same relate to the Environment and Land matter. However he ignored the holding in **Christopher Ngusu Mutua & 28 others vs County Government of Kitui & 2 others (2017) eKLR** where the learned Judge stated:-

**"The position that I have taken above that the two courts cannot have concurrent or coordinate jurisdiction in disputes relating to the environment and land – whether filed as constitutional petitions or ordinary suits - is informed by the Constitution and the Supreme Court's decision in the case of *Republic vs Karisa Chengo & others, Supreme Court. Petition No. 5 of 2015* in which the court held as follows: "From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court."**

**Consequently, and considering that a dispute relating to land and or the environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters. The two courts cannot have concurrent jurisdiction in such matters because they are two distinct courts."**

24. From the aforesaid, it is my view that a court without jurisdiction has to down its tools, for any action taken without jurisdiction is null and void. In the instant petition, the basis of the petitioner's case is on the question of development on land, land use management, exercise of power by the County Government of Kiambu in terms of approval of land use and cancellation of the approval amongst other prayers. The interested party is aggrieved by the ignoring of Article 165(5) (b) and section 13(3) of the Environment and Land Court Act, where it is provided the Elc court has power to deal with constitutional matters touching on the violation and/or infringement of the Fundamental Bill of Rights and Freedom as far as the same relate to Environment and Land. In view of the submissions by both parties in this matter, I find the instant suit arises out of the construction permit which led to the raising of objections related to environmental concerns such as pollution and density issues. The issues as pleaded in the petition and replying affidavits are issues for determination by the Environment and Land Court. To that extent I am convinced that this court lacks jurisdiction to hear and determine this matter.

25. Having come to the conclusion that this court lacks jurisdiction following raising of objection by the Respondent and Interested party; I have no alternative but to down my tools. I cannot proceed to deal with any other issue though raised in this matter for want of jurisdiction. The petitioner's petition is premature as he has not exhausted the alternative remedy provided by Physical Planning Act, an Act, of Parliament which remedy is effective and applicable to the dispute before this court. The dispute should be resolved in accordance with the relevant statute as the petitioner is deprived of any other means of enforcement due to ouster clause in the relevant statute.

26. Accordingly the petition is dismissed with costs to the Respondent and Interested party.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of December, 2019.**

.....

**J .A. MAKAU**

**JUDGE**