REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. 6 OF 2018

NYERI TIMBER MANUFACTURERS ASSOCIATION.….....1ST PETITIONER

NYANDARUA TIMBER AND TREE PLANTERS.....2ND PETITIONER

KIAMBU TIMBER MANUFACTURERS.…….....….....…3RD PETITIONER

KIRINYAGA TIMBER MANUFACTURERS ASSOCIATION...4TH PETITIONER

VERSUS

KENYA FOREST SERVICE.…….....……1ST RESPONDENT

CHIEF CONSERVATOR OF FORESTS…….....….…2ND RESPONDENT

MINISTRY OF ENVIRONMENT & FORESTRY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

By a letter dated 27th February, 2018, the 1st respondent wrote to saw millers, transmission of poles operators and fuel wood licensees notifying them of the government's decision suspending extraction of forest resources or utilisation activities in public and community forests throughout the country. The letter was couched in the following terms:

> ***The government has with immediate effect imposed a moratorium on timber harvesting in all public and community forests for a period of 90 days to allow reassessment and rationalisation of the entire forest sector in the country.***
>
> ***During this period, you are directed to suspend all logging activities and keep off state and community forest areas.***
>
> ***Note that failure to comply with this directive will result in severe action being taken against you including cancellation of your licence.***

The letter was authored by the Chief Conservator of Forest who, no doubt, wrote it in his capacity as an agent of the 1st respondent.

The 1st respondent is itself established under section 7 of the Forest Conservation and Management Act, No. 34 of 2016 as a body corporate to, among other things, conserve, protect and manage all public forests in accordance with the provisions of this Act and where so requested, assist in preparation of management plans for community forests or private forests in consultation with the relevant owners. See section 8 (a) and (b) of the Act.

Although it is not so expressly stated, the letter by the Chief Conservator of Forests must have been informed by these provisions. However, the petitioners were aggrieved by the embargo on logging activities and so on 11th May, 2018, they lodged in this honourable court a petition seeking for orders of certiorari to quash the 1st respondent's decision and for a declaration that decision is unconstitutional. They also sought for an order compelling the first two respondents to allow the petitioners access the forests either to cut down timber or remove timber that had been purchased prior to the embargo.

Alongside the petition, they filed a motion in which they sought for conservatory orders to suspend the 1st respondent's decision and to allow them continue with extraction of forest resources pending the hearing and determination of their petition.

In response to the petition, counsel for the 1st and 2nd respondents filed a preliminary objection objecting to the petition mainly on the ground that this court is deficient of jurisdiction to entertain this suit. According to the these respondents' learned counsel, any dispute arising out of forest conservation, utilisation or its management must first be submitted to the lowest possible structure under the devolved system of Government before it is escalated to the courts. He cited section 70 (1) of the Forest Conservation and Management Act in this regard.

In any event, so the learned counsel submitted, if there is any need for the dispute to be placed before court, the appropriate court to handle it is the Environment and Land Court which is seized of the jurisdiction to hear and determine all issues relating the environment and the use, occupation and title to land. On this submission he invoked Article 162 (2)(b) of the Constitution.

The petitioners' counsel's response to the objection was this; that the major issue in the petition is about the processed timber and has nothing to do with the environment. According to him, it is the commercial transactions between his clients and the respondents or some of them that is the bone of contention.

To begin with, it is worth noting that the petitioners themselves invoked Forest Conservation and Management Act in their quest for orders they have sought; no doubt, they did this because they are aware that their relationship with the respondents is governed by this particular law. A look at some of these provisions should provide the answer to the question that has been raised by the respondents.

> ***70. Disputes***
>
> ***(1) Any dispute that may arise in respect of forest conservation, management, utilization or conservation shall in the first instance be referred to the lowest possible structure under the devolved system of government as set out in the County Governments Act, 2012 (No. 17 of 2012).***
>
> ***(2) any matter that may remain un-resolved in the manner prescribed above, shall be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie in the Environment and Land Court as established under the Environment and Land Court Act, 2011***

Although the petitioners may want to run away from it, it is apparent that the dispute between them and the respondents revolves around forest conservation, management and utilisation. The timber which they are concerned with is a 'forest produce' as defined in section 2 of the Forest Conservation and Management Act. It is true, as submitted by their learned counsel, that they could have been engaged in some commercial transactions with the respondents but those transactions are tied to utilisation of forests and the extraction of forest produce; without the forests and their products there would be no link between them. Part VII of the Act and in particular section 56 (2) thereof which the petitioners themselves invoked in their petition sheds more light on how the forest conservation, management and utilisation is pivotal to the interaction between the petitioners and the respondents; it states as follows:

> ***PART VII — LICENSING AND TRADE IN FOREST PRODUCTS***
>
> ***56. Authorization and private sector involvement***
>
> ***(1) ...***
>
> ***(2) The Service may issue authorisations for forestry activities in form of—***
>
> > ***(a) a permit;***
> >
> > ***(b) a timber licence;***
> >
> > ***(c) a special use licence;***
> >
> > ***(d) a contract;***
> >
> > ***(e) a joint management agreement; or***
> >
> > ***(f) a concession agreement.***
>
> ***(3)No authorization shall be issued in respect of a forest for which there is a pre-existing authorization, except on terms mutually agreed upon by all the parties involved.***

There is no doubt that the permits licences or other forms of authorisation by the 1st respondent were issued on the basis of these provisions. The point is, as far forests, particularly those that are public are concerned, the petitioners' activities with regard to those forests, irrespective of whether they are of commercial nature or not, are regulated by the Forest Conservation and Management Act.

This being the case, whenever a dispute arises, as it has now arisen between a licensee and the forest manager, in this case the 1st respondent, the aggrieved party is certainly bound by the provisions of this Act that prescribe how such a dispute should be resolved. I agree with the 1st and 2nd respondent's learned counsel that section 70 (a) and (b) of the Act is such a provision that prescribes the procedure to be followed. This section which I quoted earlier in this ruling is clear that the first port of call is the lowest possible structure that may have been set up in the devolved system of governance.

If the dispute is not resolved at that lowest level, then recourse has to be made to the National Environment Tribunal for determination. It is only in a case where any of the disputants is dissatisfied with the decision of the Tribunal, that an appeal can be lodged, not in this court, but in the Environment and Land Court.

The upshot is that the petitioners' petition is defective in at least two respects; first, as far as I understand the Act, the original jurisdiction to determine the sought of dispute that the petitioner have lodged in this lies with the lowest structure set up in devolved system of governance. It is only when the dispute cannot, for one reason or another, be determined at that level, that a party can then proceed to Environment Tribunal and ultimately to the Land Court. This may be more of a question of procedure than jurisdiction but it is settled that whenever an Act expressly prescribes a certain procedure, that procedure must be followed. See **Methodist Church Kenya Trustees & Another versus Rev. Jeremiah Muku & Another (2012) eKLR**, (Court of Appeal).

To invoke the provisions of the Constitution to allege breach of constitutional rights in addition to or as an alternative to laid down procedure of seeking a particular remedy is considered frivolous, vexatious or an abuse of this Court's process. **Lord Diplock** made reference to this sort of proceedings in his pronouncement in **Harrikson versus Attorney General of Trinidad & Tobago (1980) AC 265** where he said:-

> ***The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapter 1 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 the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.***

Second and equally, if not more fundamental, is the fact that the dispute involves the environment, use, occupation of and title to land the jurisdiction of which falls under the Environment and Land Court as per Article 162(2)(b) of the Constitution. This provision of the Constitution strips this Court of jurisdiction for which special courts, albeit of equal status, have been created; it states as follows:

> ***162. (1)…***
>
> ***(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-***
>
> ***(a)…***
>
> ***(b) the environment and the use and occupation of, and title to, land.***
>
> ***(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)***
>
> ***(4) …***

The Environment and Land Court envisaged in Article 162(2)(b) was eventually established by the Environment and Land Act, 2011 and section 13. (1) thereof is clear that the Court has both original and appellate jurisdiction all the affairs concerning the environment, the use occupation and title to land.

There can be no doubt that disputes arising from the application of the Forest Conservation and Management Act fall within the jurisdiction of this Court, the more reason why the Act itself is clear that if one has to prefer an appeal against the Environment Tribunal's decision, the appellate court is the Land Court rather than the High Court. And it is on this note that I uphold the preliminary objection dated 29th May, 2018 and strike out the petitioners' petition with costs. It is so ordered.

Signed, dated and delivered in open court this 28th day of September, 2018

Ngaah Jairus

JUDGE