



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 43 OF 2015

**(IN THE MATTER OF AN APPLICATION UNDER ARTICLES
1,2,3,4,10,20,21,22,23,27,29,40,41,42,43,47,50,56,69,73,75,174,175,176,232,235,258 & 165 OF THE
CONSTITUTION OF KENYA, 2010)**

AND

**IN THE MATTER OF AN ABUSE OF CONSTITUTIONAL RIGHTS AND FUNDAMENTAL
FREEDOMS OF THE APPLICANTS BY COCA COLA KISII BOTTLERS LTD. CONTRARY
TO THE CONSTITUTION**

AND

**IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL INTERPRETATION OF
WHETHER EMPLOYMENT ON YEARLY RENEWAL CONTRACTS BY COCA COLA KISII
BOTTLERS LTD. AGAINST MEMBERS OF THE COMMUNITY ARE CONSTITUTIONAL**

AND

**IN THE MATTER OF CONFIRMATION OF ALL THE WORKERS ON ILLEGAL AND
UNCONSTITUTIONAL RENEWED CONTRACTS SINCE 2010 TO DATE**

AND

**IN THE MATTER OF AN ABUSE OF THE MINORITY AND MARGINALISED
GROUPS/COMMUNITY BY COCA COLA KISII BOTTLERS LTD. CONTRARY TO THE
CONSTITUTIONAL OF KENYA 2010**

AND

**IN THE MATTER OF LACK OF PROVISION OF HEALTH FACILITY, PRIMARY SCHOOL,
SECONDARY SCHOOL, TAPPED WATER, ELECTRICITY, ROAD NETWORK AND SAFE
WASTE DISPOSAL TO SAFEGUARD THE COMMUNITY**

AND

**IN THE MATTER OF THE ILLEGAL AND UNCONSTITUTIONAL MEANS THROUGH THE
HUMAN RESOURCE AND ADMINISTRATION MANAGER JOHN BASWATI TO REMOVE
ALL WORKERS FROM THE COMMUNITY FROM THE PAYROLL OF COCA COLA KISII
BOTTLERS AND REPLACING THEM WITH HIS CRONIES, RELATIVES TO
MANAGEMENT AND BOARD OF DIRECTORS CONTRARY TO LAW**

AND

IN THE MATTER OF NOISE POLLUTION AND WASTE DISCHARGE FROM THE KISII BOTTLERS FACTORY INTO THE ONLY WATER SPRING USED BY THE COMMUNITY WITHOUT ANY SAFEGUARD AT ALL

AND

IN THE MATTER OF LACK OF PUBLIC PARTICIPATION AND ACCRUING BENEFITS BY THE COMMUNITY FROM THE COCA COLA KISII BOTTLERS LIMITED CONTRARY TO ARTICLE 69 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF DISRESPECT, DISCRIMINATIVE AND ABUSIVE TREATMENT BY THE MANAGERS AGAINST THE WORKERS FROM THE COMMUNITY IN FAVOUR OF THOSE FROM OUTSIDE AND RELATIVES OF MANAGERS AND DIRECTORS CONTRARY TO LAW

AND

IN THE MATTER OF EXPOSURE TO HARSH TREATMENT, SERVITUDE, HARASSMENT, INTIMIDATION OF CASUAL WORKERS FROM THE COMMUNITY WORKING IN THE FACTORY BY KISII BOTTLERS MANAGERS CONTRARY TO THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LACK OF PROTECTION OF THE RIGHTS OF THE COMMUNITY TO GOOD HEALTH, SAFE DRINKING WATER, PROVISION OF GOOD ROADS, PROVISION OF HEALTH CENTRES, NURSERY SCHOOL, BOREHOLE, ELECTRICITY AND PROTECTION OF ALL CASUAL WORKERS FROM THE COMMUNITY AROUND THE KISII BOTTLERS FACTORY FROM EXPLOITATION AND OVER WORKING IN AND UNDER POOR CONDITIONS CONTRARY TO AND CONSTITUTIONAL PROVISIONS

AND

IN THE MATTER OF LACK OF PROTECTION FROM THE ECM'S LAND, ECM LABOUR AND ECM ENVIRONMENT OF THE COUNTRY GOVERNMENT OF KISII'S CONTROL OF COCA COLA KISII BOTTLERS LTD'S OPERATION AND ABUSE OF MEMBERS OF THE COMMUNITY, THE ENVIRONMENT AND LABOUR OF THE COMMUNITY CONTRARY TO ARTICLE 56, 41, 42 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LACK OF PROVISION OF HEALTH FACILITY, PRIMARY SCHOOL, SECONDARY SCHOOL, TAPPED WATER, ELECTRICITY, ROAD NETWORK AND SAFE WASTE DISPOSAL TO SAFEGUARD THE COMMUNITY

AND

IN THE MATTER OF UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES AS ACCEPTABLE PRACTICE IN RESOURCE BENEFIT SHARING

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN & PEOPLES' RIGHT, 1987

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF KISII BOTTLERS LIMITED'S OWN SAMPLE LETTER OF CONTRACT OF EMPLOYMENT, 2015

AND

IN THE MATTER OF KISII COMMUNITY SUSTAINABLE LOCAL BENEFITS AND KISII BOTTLERS LIMITED'S CORPORATE SOCIAL RESPONSIBILITY

BETWEEN

EDWARD NORMAN NYAMWEYA & 9 OTHERS.....PETITIONERS

Suing on behalf of themselves and that of the community surrounding Coca Cola Kisii bottlers Ltd and contracted workers hereunder:-

JANE MAGETO & 123 OTHERS PETITIONERS

-VERSUS-

COCA COLA KISII BOTTLERS LTD & 9 OTHERS RESPONDENTS

RULING

1. This petition filed and dated the 24th September 2015, is essentially brought by the first to the tenth petitioners on their own behalf and that of the eleventh to the one hundred and twenty fourth petitioners, all described as the community surrounding Coca cola Kisii Bottlers Ltd and contracted workers.

Coca cola Kisii Bottlers Ltd together with its officials are named as the first to sixth respondents while the Kisii County Government executive members for environment, land and labour are named as the seventh to the ninth respondents. The Kisii County Government is itself named as the tenth respondent.

2. The petition is brought under a multiplicity of provisions of the Kenya Constitution 2010 and basically relates to land, labour and environmental rights.

In a nutshell the complaint against the first to the sixth respondent is that they have breached the employment contract entered between them and some of the petitioners and that they have inflicted abuses on the members of the community living within and outside the first respondent's factory.

The complaint against the seventh to the tenth respondents is that they have failed in their constitutional duty to protect the said community from abuses inflicted on its members by the first to the sixth respondents in relation to the members' land, labour and environment rights.

It is for all the foregoing reasons that the petitioners seek against the respondents, declaratory and judicial review orders as well as damages for unlawful termination of employment. They also seek an order that an expert does conduct an independent environmental impact assessment of the first respondent factory in relation to the surrounding community.

3. The petition was filed contemporaneously with the Notice of Motion dated 24th September 2015,

seeking temporary prohibitory and conservatory orders against the first to the sixth respondents on the basis of the grounds contained in the Motion and supported by the averments contained in the supporting affidavit deposited by the first petitioner, **Edward Norman Nyamweya**, dated 24th September 2015.

Petitioner No. 123, **Samson Kennedy Maranga**, filed a motion dated 6th October 2015, to have his name struck out and expunged from the petition. The motion was allowed by consent on the same 6th October 2015 and on the 15th October 2015, the first to the sixth respondents filed a notice of preliminary objection to the petition dated 14th October 2015 based on twelve (12) grounds which in essence are a challenge of this court's jurisdiction to deal with the issues raised herein by the petitioners in so far as they relate to matters of land and environment as well as employment.

4. The basic contentions by the first to the sixth respondents are that the petition does not seek interpretation of any constitutional rights or issues nor does it seek declarations on any fundamental constitutional questions of law. That, the petitioners have approached this court through an entirely erroneous process as the matter stated by the petitioners is based on personal employment contracts which ought to be litigated upon at the Employment and Labour Relations Court. That, the petitioners have invoked the wrong procedure in asking for orders of judicial review yet they have not filed a judicial review application for which leave to file the same is mandatory. That, in any event, the process of judicial review is reserved for administrative decisions of public bodies and not employer/employee matters which are premised on private inter-parties contracts. That, matters relating to environmental claims are reserved for the National Environment Management Authority (NEMA) tribunal and/or the Environment and Land Court.

5. The seventh, eighth and ninth respondents oppose the petitioners' application on the basis that it does not relate to them and that it is incurably defective. They did not however, address the preliminary objection to the application raised by the first to the sixth respondents.

The objection was itself a matter to be argued separately from the main petition by way of written submissions.

In that regard, the first to the sixth (1st to 6th) respondents filed their submissions on the 3rd December 2015 through the firm of **Mukite Musangi & Co. Advocates**. The seventh to ninth (7th to 9th) respondents did not file any submissions with respect to the objection. The petitioners through the firm of **S.M. Sagwe & Co. Advocates**, filed their written submissions on the 9th December 2015.

This court has carefully considered the rival submissions and as indicated hereinabove, the primary issue arising for determination at this stage is the jurisdiction of this court to deal with the basic issues raised in the petition.

6. As was stated in the case of **Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (K) Ltd (1989)KLR 1**, jurisdiction is everything and without it a court has no power to make one more step.

So, if this court has no power to deal with the issues raised in the petition, then it would be compelled not to move any further and strike out the petition for being defective and incompetent.

It is without doubt that by virtue of Article 165(3) of the Constitution of Kenya 2010, this court has unlimited original jurisdiction in criminal and civil matters and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Further, the court has jurisdiction to hear any question respecting the interpretation of the Constitution with regard to "inter-alia" the question whether any law is inconsistent with or in contravention of the constitution or the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with, or in contravention of the constitution.

7. However, under Article 165(5) of the Constitution, this court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court or falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution i.e. **The Employment and Labour Relations Court (formerly Industrial Court)** and **The Environment and Land Court**.

The jurisdiction of this court as a Constitutional Court is well carved out in the constitution but not everything which is clothed with constitutional undertones is necessarily a constitutional matter for determination by such court when such matters fall within the jurisdiction of the courts with the status of the High Court.

Being courts with the status of the High Court, those courts would necessarily have the jurisdiction to deal with any constitutional question arising from labour or employment related matters or even environmental related matters.

8. Invariably, anything bearing a public interest connotation would fall within the realm of constitutional petitions and attract the remedies provided under Article 23 of the Constitution including a conservatory order and an order of judicial review “inter-alia” so long as court proceedings are properly and correctly brought under Article 22 which provides for the enforcement of the Bill of Rights in chapter four (4) of the Constitution.

The present petition and the application which comes with it pre supposes that the petitioners’ rights under Articles 41, 42 and 43 have been violated by the respondents and in particular the first to the sixth respondents but what really comes out from the pleadings is a labour dispute revolving around private individuals i.e the 1st to 6th respondents and some of the petitioners.

The bulk of the petitioners are said to be people living within the vicinity of a factory belonging to the first respondent whose complaint relates to matters of the environment, a domain whose responsibility lies with the National Environment Management Authority which has not been enjoined as a party to this petition and instead the Kisii County Government and its officers have been roped in.

9. Public interest is the general welfare of the public that warrants recognition and protection. It is something in which the public as a whole has a stake, especially an interest that justifies governmental regulation (**see Blacks Law Dictionary 8th Ed**).

The pleadings herein clearly indicate that a dispute between an employer and its employees has been magnified and blown out of proportions by the affected employees soliciting support from people living around the employer’s factory and inciting them to claim violation and/or breach of their labour, environment and socio-economic rights by the employer rather than by the state and/or its officers.

The petition is disguised as a public interest claim yet it is in reality meant to serve the private interests of the disgruntled employees of the first respondent. It is to that extent an abuse of the court process which cannot be condoned by this court.

10. The Employment and Labour Relations Court and the Environment and Land Court, are all superior courts with the status of the high court. They have been constitutionally mandated to deal with matters of labour and environment falling under Articles 41 and 42 of the Constitution. Those are the courts to which the petitioners should run to if they indeed have a genuine legal cause against the respondents. Those are the courts to make declarations as to whether their alleged constitutional rights have been infringed, breached or violated by any of the respondents.

Even if the petition raises a constitutional matter the same is not worthy of attention by this court as it is clearly not brought in the interest of justice to the general populace within the area the first respondent’s premises are situated as may be deduced from the manner in which it is framed. It does not accord with the requirement set out in the case of **Anarita Karimi Njeru Vs. Attorney General (1979) KLR 154**, in that a petitioner shall set out with reasonable degree of precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed.

11. In the case of **Minister of Home Affairs Vs. Bickie & Others (1985) LRC 755**, it was stated that:-

“It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so court will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provisions or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights”.

The circumstances described in this decision aptly apply to this petition (see also, **Uhuru Kenyatta Vs. The Nairobi Star Ltd HC Petition No. 187 of 2012 (Nbi)**).

There are other legal avenues through which the petitioners can litigate without necessarily coming by way of a constitutional petition.

12. For all the foregoing reasons, this court must and hereby upholds the present preliminary objection by holding that it lacks the necessary jurisdiction to deal with the matters raised in the petition in as much as they relate to private issues and matters of labour and the environment.

Consequently, the petition and the notice of motion brought with it, both dated 24th September 2015 are hereby dismissed with costs to the first to sixth respondents only.

Ordered accordingly.

J.R. KARANJA

JUDGE

Read and signed this 31st day of **March 2016**.

In the presence of Mr. Tombe for 1st to 6th respondents, M/S Nyaega holding brief for Onsembe for 7th to 9th respondents and Mr. Orieyo holding brief for Mr. Sagwe for petitioners.