



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MERU**

**PETITION NO. 1 OF 2016**

**In the matter of: Article 1(2), (3) and (4); 2(1), (2) and (5); 3(1); 10, 19, 20, 21, 22(1) and (2) (b) and (c); 23(1); 24(1); 47(1) and (2); 48; 52, 73, 125, 165(3) (b) and (d) (ii); 258.....**

**BONIFACE KOOME ..... 1<sup>ST</sup> PETITIONER**

**Versus**

**HON. PETER MUNYA.....1<sup>ST</sup> RESPONDENT**

**MARTIN BIKURI.....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MERU .....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

[1] This Constitutional Petition is against the Governor of the County Government of Meru, the Meru County Executive Committee Member for Lands, Economic & Physical Planning and ICT, and the County Government of Meru as the 2<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively. The 3<sup>rd</sup> Respondent has been sued as the successor of the defunct Municipal Council of Meru. From the heading of, the Petition is expressed to be brought under a number of Articles of the Constitution of Kenya, 2010 and sections of the County Government Act, 2012 and Public Finance Management Act, 2012. The petition seeks the court to *inter alia* determine the following questions:-

***(a) Whether the alienation of Public Property known as Angaine Estate/149 (hereafter the Angaine Estate) in order to put up a 15 storey Meru Rising Tower building (hereafter referred to as the Meru Rising Tower) in a residential area violates Article 1(1), (2) and (3)(a); 2(1) and (2); 3(1); 10; 73; 201(a) of the Constitution as read with sections 6, 30,34, 102, 108, 110 and 115 of the County Government Act, 2012;***

***(b) Whether bypassing the Meru County Assembly Sectoral Committee on Land, Economic and Physical Planning in approving and securing funds to put up the Meru Risisng Tower violates sections 140, 141, 143 of the Public Finance Management Act NO 18 of 2012 as read with the First Schedule of the County Assembly of Meru Standing Orders (7);***

***(c) Whether the authority to demolish the Angaine Estate to put up the Meru Rising Tower which was not provided for in the First Meru County Integrated Development Plan 2013-2017 violates section 112 of the County Government Act, 2012;***

***(d) Whether failure and neglect to seek the necessary County Assembly approval, involve public participation in the process of alienation of the Angaine Estate and construction of the Meru Rising Tower amounts to gross violation of the Constitution, the County Government Act, 2012 and the Public Finance Management Act, 2012.***

[2] And if the answer to the foregoing questions is in the affirmative, the Petitioners are seeking the court to declare violations by the Respondents of the specific provisions of Constitution, the County Government Act, 2012 and Public Finance Management Act No 18 of 2012 which have been cited in the Petition. And, also find and declare those actions by the Respondents to be null and void. There are other declarations which have also been sought in the Petition, namely; (1) violation of public trust by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in allowing selected tenants in the Angaine Estate to demolish and take away public property; (2) that the official of the Respondents acted illegally and unconstitutional in demolishing and disconnecting electricity, water and evicting tenants from the Angaine Estate; and (3) that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents lack integrity, competency and suitability to continue holding their respective public offices under the Constitution. The petition was supported by the affidavit of BONIFACE KOOME.

[3] On 11<sup>th</sup> February 2016, parties agreed that the main petition be canvassed by way of written submissions. Parties then filed their respective submissions which I shall consider in my decision. But one fundamental issue has arisen from the submissions of the parties; the question of jurisdiction of this court to hear and determine this dispute. Some of the points on jurisdiction were also taken out by the Respondents in their Notice of Preliminary Objection filed on 11<sup>th</sup> February, 2016. Toward this end, I am acutely aware the sweetest canticle on jurisdiction that was composed by Nyarangi JA in the famous “**Lilian S**” Case that;

***“Jurisdiction is everything...”***

Thus, jurisdiction is *sine qua non* any adjudication of a dispute by a court of law, and so it is a matter fundamental preliminary significance which I have resolved to determine *in limine* and at the onset.

### **Of jurisdiction**

[4] The Petitioners submitted that, contrary to the objection by the Respondent, this court has the jurisdiction to hear and determine this petition for it relates to violation of constitutional rights. They took the view that the jurisdiction of Environment and Land Court is limited to only disputes contemplated under Article 162(2) (b) of the Constitution and section 13 of the Act, except, however, that there are other disputes which relate to the environment and land but do not fall within the said constitutional and statutory confines; to them, such disputes shall be determined by the High Court. They insisted that the primary duty of the court is to serve justice to all the parties by enquiring into the allegations of violations of the Constitution and the law herein without undue regard to technicalities. They, therefore, beseeched the court to find in public interest that the omissions complained of to be mere oversight and irregularities which amount to no more than mere technicalities for which the petition should not be struck out.

[5] The Respondents on the other hand submitted that this court lacks jurisdiction to adjudicate on this dispute which relates to environment and use and occupation of and title to, land, i.e. the Angaine Estate; a jurisdiction that is reserved for the Environment and Land Court under Article 162(2) (b) of the Constitution and section 13 of the Environment and Land Act. Accordingly, the reliefs sought in this petition should be sought from the Environment and Land Court and no from this court. The Respondent cited ample judicial authorities to support their position on jurisdiction of the Environment and Land Court on matters relating to land and environment. In addition, the Respondents argued that the Petitioners had already filed another suit in MERU ELC NO. 76 OF 2015 and obtained injunctive relief, thus, this petition is subjudice and, therefore, a total abuse of the court process. On that basis, the Respondents sought the petition to be struck out with costs.

### **DETERMINATION ON JURISDICTION**

[6] It bears repeating that jurisdiction is sine qua non adjudication of any dispute by a court of law; I therefore refuse that jurisdiction could ever be a matter of technicality. I must admit that the scope of the jurisdiction of the Environment and Land Court under Article 162(2) (b) and section 13 of the Constitution and Environment and Land Act, respectively should not be in doubt any more. It has been made abundantly clear by the law and the meticulous judicial decisions from the Court of Appeal that the jurisdiction of the Environment and Land Court includes hearing and determining applications for interpretation of the Constitution or redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to environment and use and occupation of and title to, land. The said court also has the jurisdiction to determine whether any or all of the actions by the Respondents, in so far as it relates to the environment and the use and occupation of, and title to, land, was done under the authority of the Constitution or of any law or is inconsistent with, or in contravention of, the Constitution and other written laws as is the case here. I note that the terms used in the Article 162(2) (b) of the Constitution are very wide, to wit;

***...to hear and determine disputes relating to the environment and the use and occupation of, and title to, land***

And, Section 13 of the Act has given just some of the disputes which relate to the environment and the use and occupation of, and title to, land. In my view, that list is not heretically closed or exhaustive especially in light of section 13(2) (e) of the Act which provided that the Environment and Land Court has jurisdiction to hear and determine...*any other dispute relating to environment and land.*I should be understood here; the list will continue to grow as and when courts are confronted by different scenarios in real cases, except, however, the basis of delineation of jurisdiction for Environment and Land Court is that set by the Constitution; the subject of dispute relates to environment and land. That connexion is fundamental and of real time value in dealing with the question of jurisdiction of Environment and Land Court. And, once that proposition is understood, there will be little difficulty to discern that the subject matter of this petition is alienation of public land, i.e. the Angaine Estate and conversion of use thereof from residential property into commercial complex without following the land planning laws or obtaining the necessary approvals, or involving public participation in the process, These violations of rights relate to the environment and use and occupation of and title to, land under Article 162(2) (b) of the Constitution and section 13 of the Act. Matters of carrying through the proposed project of erecting a high rise tower when it was not in the ***First Meru County Integrated Development Plan 2013-2017*** are inextricable within the main subject of the petition which is the alienation and use of the land in question. Therefore, with tremendous respect to the Petitioners, I do not agree that these are the so called other disputes relating to the environment and land which fall outside the jurisdiction of the Environment and Land Court, but within the jurisdiction of the High Court. In fact, counsel for the petitioners did not demonstrate this dispute to be one of or enumerate such other disputes relating to land and environment but not falling within the jurisdiction of the Environment and Land Court. The kind of restriction of the jurisdiction of the Environment and Land Court being proposed by the Petitioners totally runs contrary to the express provisions of the Constitution. It is time that parties started to accord the Environment and Land Court its due deference and constitutional honour. And the High Court will be the first one to enforce the defence of each court of law established under the Constitution by referring such misguided suits to their right forum. But as litigants become aware of the constitutional designs on jurisdiction of courts especially those established under Article 162 of the Constitution, we will become more readily to and strike out suits which have been deliberately filed in the High Court in contravention of the Constitution. Accordingly, I find that the High Court does not have jurisdiction to hear this petition; the appropriate forum to hear and determine this dispute is the Environment and Land Court. I am properly guided by the decision in the case of: (1) **ERNEST KEVIN LUCHIDIO vs. AG & 2 OTHERS [2015] e KLR**; and (2) **DANIEL N. MUGENDI vs. KENYATTA UNIVERSITY & 3 OTHERS [2013] e KLR**. But one other thing has been argued by the Respondents; that there exists another suit in Meru ELC NO 76 OF 2015 in which similar issues as those in this petition are substantially and directly in issue. This is a substantial issue of law and fact which I think I should not determine given my decision above. It is, however, an important consideration in my final order which will follow after the wise counsel by the Court of Appeal in the case of **DANIEL N. MUGENDI vs. KENYATTA UNIVERSITY & 3 OTHERS (supra)**. Thus, in the interest of justice, I will not strike out the petition. Instead, I order that this petition be transmitted to the Environment and Land Court sitting at Meru for hearing and disposal.

The issue of subjudice and all the other issues; preliminary and substantive, will be tried and determined by the judge in the Environment and Land Court before whom the other suit is pending. Cost shall abide the cause. It is so ordered.

**Dated, signed and delivered in open court at Meru this 18<sup>th</sup> day of**

**August 2016**

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**F. GIKONYO**

**JUDGE**