



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 50 OF 2013

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 42 & 70 OF THE CONSTITUTION,

AND

IN THE MATTER OF ARTICLE 1 OF THE COMMUNICATION COMMISSION OF KENYA GUIDELINES FOR SITING OF COMMUNICATIONS INFRASTRUCTURE TOWERS (MASTS) AND SAFE USE OF MOBILE TELEPHONES AND OTHER WIRELESS TERMINALS 2007,

AND

IN THE MATTER OF SECTION 58 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT CAP 387 OF THE LAWS OF KENYA,

AND

IN THE MATTER OF SECTION 25 OF THE KENYA INFORMATION AND COMMUNICATIONS ACT CHAPTER 411A OF THE LAWS OF KENYA,

AND

IN THE MATTER OF SECTION 36 OF THE PHYSICAL PLANNING ACT CHAPTER 286 LAWS OF KENYA

BETWEEN

KEN KASING'A.....PETITIONERS

VERSUS

DANIEL KIPLAGAT KIRUI.....1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY.....2ND RESPONDENT

EATON TOWERS KENYA LTD.....3RD RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA.....4TH RESPONDENT

NAKURU COUNTY GOVERNMENT.....5TH RESPONDENT

PEMAN CONSULTANTS LIMITED.....6TH RESPONDENT

RULING

1. Ken Kasinga, (the Petitioner) is the owner and resident of the parcel of land known as NAKURU MUNICIPALITY BLOCK 11/196 which is situate in Milimani Estate within Nakuru County. He filed the Petition Amended on 14th February 2014, against the Respondents alleging that they have violated his right to a safe, clean and healthy environment.

2. It was his case that the Third Respondent, a limited liability company which specializes in construction of telecommunication masts which are then leased to network operators at a fee, leased to the First Respondent's parcel of land, for purposes of installing and operating a mobile telephone base transmission mast. To this end, the Third Respondent sought and was granted approval to carry out the development by the Fifth Respondent (*Nakuru County Government*), an Environmental Impact Assessment License by the Second Respondent (*National Environmental Management Authority*) and a Telecommunications Licence by the Fourth Respondent (*Communications Commission of Kenya*).

3. The Applicant contended the above approvals and licenses were not properly issued as the said Respondents did not conduct due diligence on procedural issues surrounding the legality of the construction of the mobile telephone base transmission mast and the licenses were issued in contravention of the regulations governing their issuance.

4. In particular the Petitioner alleged that the environmental impact assessment for the project which was carried out by the Sixth Respondent, acting at the behest of the First Respondent, and which formed the basis of granting the licenses was full of falsehoods in as far as it contended that persons who stood to be affected by the project and in particular the Petitioner, had been interviewed and consulted by the Sixth Respondent during its studies. The Petitioner also alleged that in the course of its activities on the First Respondent's land, the Third Respondent produced intrusive noise which caused him a lot of discomfort thus infringing on his right to a safe, clean and healthy environment.

5. In opposition to the Petition, the Second Respondent has raised a Preliminary Objection to the suit by a Notice thereof dated 14th January 2014 and filed on 15th January 2014, on the grounds that-

(a) the jurisdiction of this Honourable Court has not been properly invoked,

(b) the Petition herein is defective and bad in law.

6. The Preliminary Objection came up for hearing on 4th April 2014. Counsel for the Second Respondent relied on his written submissions filed on the same day. According to Counsel, this court lacks jurisdiction to hear and determine this case as the issues raised concern the use of land and the effects of such use on the environment. The matter therefore should properly be before the Environment and Land Court established under Article 162(2)(b) of the Constitution.

7. He further contended that prayer (e) of the Petition should have been sought before the National Environment Tribunal established under Section 125 of the Environmental Management and Coordination Act of 1999 which is the only forum with original jurisdiction to hear appeals from the decision of the Second Respondent under Section 129 of the Act. The decision of this tribunal may only then be challenged before the Environment and Land Court under Section 13(1) of the Act. He therefore urged the court to dismiss the Petition.

8. Counsel for the Petitioner only submitted that if the court has no jurisdiction, then the Preliminary Objection should be argued and determined before the Environment and Land Court. Mr. Kahiga for the First and Fifth Respondent was also of the view that the question of jurisdiction should be determined by the Environment and Land Court.

9. As jurisdiction connotes the power of the court to hear and determine an issue or suit before it, once raised, it must be determined forthwith. It is a substantial question that goes to the root of the matter for without it the court has no power to hear or make any determinations before it and all proceedings before it are rendered null and void. This was the holding of Nyarangi, J in the case of ***THE OWNERS OF MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL KENYA LIMITED [1989] KLR where he stated*** as follows:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

10. Further, contrary to the submissions of Counsel for the Petitioner, this is a question that is properly determined by the court handling the matter and before which the issue is raised based on the evidence, whether scanty or limited, before the court. (See page 15 of ***THE OWNERS OF MOTOR VESSEL "LILLIAN S" VS CALTEX OIL KENYA LIMITED, (supra)***)

11. The High Court is established under Article 165 (1) of the Constitution. Being a creation of the Constitution therefore, it can only exercise its powers as conferred or limited by the Constitution or by any other written law, whether expressly or impliedly, as long as the limitation by the written law is not inconsistent with the Constitution to the extent that it purports to take away powers donated to it by the establishing law.

12. It is not in dispute that under Article 165(1)(c) of the Constitution the High Court has jurisdiction to **determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.** However, Article 165(5)(b) thereof limits this court's jurisdiction in respect of matters **falling within the jurisdiction of the courts contemplated in Article 162(2).** Thus article 165(2)(b) provides for the establishment of Courts with the status of the High Court to hear and determine matters relating to the environment and the use of, and title to land by Parliament. The functions and jurisdiction of this court, as per sub-article (3) are to be determined by Parliament.

13. In exercise of these powers, Parliament enacted the Environment and Land Act 2011, (No. 19 of 2011) and by Section 4 thereof established the Environment and Land Court. Its jurisdiction under Section 4(1) includes powers to hear and determine disputes relating to environment and land, including disputes:

(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

3. ***Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.***

14. The issue for determination in this Petition is primarily whether the Respondents have infringed the Petitioner's right to a clean and healthy environment under Article 42 of the Constitution. The nature of the dispute between the parties is in relation to the use of the First Respondent's land by the Third Respondent for purposes of installing and operating a mobile telephone base transmission mast. In his Petition, the Petitioner has challenged decision of the Fifth Respondent to grant approval for the said development on the land as well as the licenses issued by the Second and Fourth Respondents to the Third Respondent. He alleges that the said Respondents failed to have regard to the procedures laid out by the law governing the issuing of the said licenses and as a result they have consented to the noise pollution by the Third Respondent.

15. It is clear in light of the provisions of the Constitution and the Environment and Land Act 2011 (No. 19 of 2011) that the issues raised herein are within the exclusive jurisdiction of the Environment and Land Court which was established before the cause of action herein arose. I agree with Counsel for the Petitioner and the First and Fifth Respondent that it is within the jurisdiction of that court to determine the other limb of the Preliminary Objection as to whether the License issued by the Second Respondent ought to have been challenged before the National Environment Tribunal. Having found that it is without jurisdiction, this court must down its tools and take no further step.

16. For the above reasons I find merit in the Preliminary Objection dated 14th January 2014. However, in the interest of justice, I decline to strike out the Petition amended on 14th February 2014 and instead direct that the same be transferred to the Environment and Land Court for determination. The Second Respondent is awarded costs of the Preliminary Objection.

It is so ordered.

Dated, signed and delivered at Nakuru this 18th day of June, 2014

M. J. ANYARA EMUKULE

JUDGE