



**Jalango (The Project Manager, Kimira-Oluoch Small Holder Farm Improvement Project (KOSFIP) v Ministry of East African Community (EAC) & Regional Development & another; County Government of Homa Bay & 2 others (Interested Party) (Environment & Land Case 003 of 2020) [2022] KEELC 54 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 54 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**

**ENVIRONMENT & LAND CASE 003 OF 2020**

**GMA ONGONDO, J**

**APRIL 28, 2022**

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI, PROHIBITION & MANDAMUS**

**AND**

**IN THE MATTER OF TRANSFER OF THE IMPLEMENTATION OF KIMIRA-OLUOCH SMALL HOLDER FARM IMPROVEMENT PROJECT (KOSFIP) TO LAKE BASIN DEVELOPMENT AUTHORITY**

**AND**

**IN THE MATTER OF RELEASE OF FIRST HALF YEAR BUDGET ALLOCATION TO KIMIRA-OLUOCH SMALL HOLDER FARM IMPROVEMENT PROJECT (KOSFIP)**

**BETWEEN**

**JUMA ROBINSON JALANGO ..... APPLICANT  
THE PROJECT MANAGER, KIMIRA-OLUOCH SMALL HOLDER FARM IMPROVEMENT PROJECT (KOSFIP)**

**AND**

**MINISTRY OF EAST AFRICAN COMMUNITY (EAC) & REGIONAL DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT  
LAKE BASIN DEVELOPMENT AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF HOMA BAY ..... INTERESTED PARTY**



**KIMIRA IRRIGATION WATER USERS ASSOCIATION . INTERESTED PARTY  
OLUCH IRRIGATION WATER USERS ASSOCIATION ... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> respondent's preliminary objection dated November 17, 2021 and lodged in this court on 18<sup>th</sup> November 2021 founded upon the following twin grounds;
  - a. The court lacks jurisdiction to handle this matter being that the matter entails transfer of management from one government agency to another government agency within the same ministry. It neither meets the parameters set out in section 13 of *Environment and Land Court Act*. Nor is it dispute involving environment and land.
  - b. The applicant has no capacity to bring the judicial review application and consequential proceedings thereunder as his contract with the ministry ended June 30, 2021 and the applicant has not demonstrated that the Judicial Review is brought in the interest of Public.
2. The applicant, Juma Robinson Jalango, (the Project Manager (Kimira-Oluch Small Holder Farm Project (KOSFIP) is represented by learned counsel, Mr Ayieko instructed by the firm of Lumumba and Ayieko Advocates.
3. The 1<sup>st</sup> respondent, Ministry of East African Community (EAC) and Regional Development is represented by learned counsel, Sarah Jumma instructed by the office of the Honourable Attorney General.
4. The 2<sup>nd</sup> respondent, Lake Basin Development Authority and the 1<sup>st</sup> interested party namely County Government of Homa Bay are represented by Mr. Geoffrey Yogo instructed by the firm of Otieno, Yogo, Ojuro and Company Advocates.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> interested parties, Kimira Water Users Association and Oluch Irrigation Water Users Association respectively are represented by learned counsel, Nancy Nyarige.
6. It is noteworthy that on September 29, 2021, the applicant obtained leave of this court to originate the present Judicial Review Application further to his chamber summons application dated September 26, 2021.
7. It must also be noted that on November 29, 2021, the court encouraged the parties herein to embrace Alternative Dispute Resolution with a view to resolving this dispute in the spirit of Articles 60 (1) (g) and 159 (2) (c) of the *Constitution of Kenya, 2010*. Be that as it may, no positive report has been received thereof to-date.
8. Accordingly, in the Judicial Review Application by way of a Notice of Motion dated October 26, 2021 duly lodged in court on 1<sup>st</sup> November 2021 (the Application herein ), the applicant is seeking the following orders;
  - a. THAT this Honourable Court do issue Judicial Review orders in the nature of CERTIORARI seeking to remove into this Honourable Court and quashing the decision of the 1<sup>st</sup> Respondent, contained in the Letter from the Principal Secretary of the 1<sup>st</sup> Respondent to the Managing Director of the 2<sup>nd</sup> Respondent dated 24<sup>th</sup> August 2021 transferring the management and implementation of Kimira-oluocho Smallholder Farm Improvement Project (KOSFIP) to the 2<sup>nd</sup> Respondent.



- b. THAT this Honourable Court do issue Judicial Review orders in the nature of CERTIORARI seeking to remove into this Honourable Court and quashing the report of the Transfer and Handing Over of the Kimira-oluoch Small Farm Improvement Project (KOSFIP) to the 2<sup>nd</sup> Respondent.
  - c. THAT this Honourable court do issue Judicial Review orders in the nature of MANDAMUS seeking to compel the Principal Secretary of the 1<sup>st</sup> Respondent Dr. Belio Kipsang to release the first half year allocation of the project in the amount of Kshs 45,400,000.00 comprising both recurrent expenditure in the amount of Kshs. 18,750,000.00 and development expenses in the amount of Kshs. 26,650,000.00
  - d. THAT the costs of these proceedings be borne by the Respondents.
  - e. THAT the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.
9. The application is anchored on grounds (a) to (k) set out on the face of the same. It is further based on the applicant's supporting affidavit of 23 paragraphs sworn on even date together with a copy of letter of appointment/employment and a copy of the appraisal report marked as "JRJ-2" and "JRJ-2" respectively. The applicant laments, inter alia;
    - a. The 1<sup>st</sup> Respondent through the State Department for Regional and Northern Corridor Development has made a decision to transfer the management and implementation of the Kimira-oluoch Smallholder Farm Improvement Project (KOSFIP) to the 2<sup>nd</sup> Respondent, which transfer was to take effect on the 1<sup>st</sup> September 2021.
    - b. The decision to transfer the management and implementation of the project to the 2<sup>nd</sup> Respondent was arrived at un-procedurally and is lacking in legal basis.
  10. By a replying affidavit of 21 paragraphs sworn on 18<sup>th</sup> November 2021 by Michael Okuk, the acting legal manager of the 2<sup>nd</sup> respondent and filed in court on November 24, 2021, the application is opposed. A copy of a letter from the 1<sup>st</sup> Respondent to the Managing Director of the 2<sup>nd</sup> respondent on the transfer on the project in question and a copy of letter dated 9<sup>th</sup> June 2021 extending the contract of employment of the applicant for one year which was to end by June 30, 2021 and marked as "MO-1" and "MO-2" respectively, are annexed to the replying affidavit.
  11. Thus, the 2<sup>nd</sup> respondent is seeking dismissal of the application for having been brought in the wrong court. That there is concealment of material facts which would have helped the court to make an informed decision in this application.
  12. The application therefore, provoked the preliminary objection as set out in paragraph 1 hereinabove.
  13. It is established law that a preliminary objection is a threshold question and best taken at inception. Wherefore, it calls for definitive, determinative and prompt pronouncement; see *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR.
  14. So, on February 21, 2022, the court ordered and directed that the preliminary objection be heard by way of written submissions.
  15. In the submissions dated March 28, 2022 and filed herein on 19<sup>th</sup> April 2022, learned counsel for the applicant gave brief facts of the case and identified triple issues for determination including whether the preliminary objection meets the threshold of a preliminary objection. Counsel relied on *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] EA 696, *Samwel Kamau*



*Macharia and another v Kenya Commercial Bank Limited and others* [2012] eKLR, *Owners of Motor vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1, Section 13 of the *Environment and Land Court Act*, 2015 [2011] and *Attorney General and another v Andrew Maina Githinji & another* [2016] eKLR to fortify the submissions.

16. Counsel submitted, inter alia, that the preliminary objection lacks an essential ingredient that all the facts pleaded by the other side are correct and subsequently it fails the requisite legal test. That the issue of the applicant's employment calls for further interrogation by this Honourable court and cannot be determined at this stage of the matter.
17. The respondents and the interested parties failed to file submissions in regard to the preliminary objection. Nonetheless, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as well as the 1<sup>st</sup> interested party are in support of the preliminary objection. Plainly, in the proceedings of 29<sup>th</sup> November 2021, Mr Yogo learned counsel for the 2<sup>nd</sup> respondent and the 1<sup>st</sup> interested party and holding brief for Jumma for the 1<sup>st</sup> respondent, informed the court, inter alia;

“.....The 1<sup>st</sup> interested party intends not to file any documents and do intend to support the case for 1<sup>st</sup> and 2<sup>nd</sup> respondents.”
18. I have thoroughly considered and read the entire application, the 2<sup>nd</sup> respondent's reply thereto, the 1<sup>st</sup> respondent's preliminary objection, the applicant's submissions and the record in its entirety herein. The onerous duty of this court is to determine the twin issues namely jurisdiction and capacity as raised in the preliminary objection as per paragraph 1 hereinabove.
19. *Halsbury's Laws of England 4<sup>th</sup> Edition Volume 9* at page 350 defines the term 'Jurisdiction' thus;

“.....the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision.....”
20. The preliminary objection is raised in line with the decision in case Mukisa case (supra) where the court remarked;

“.....a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission.....” (Emphasis added).
21. Jurisdiction denotes whether the adjudicatory body has the power to entertain the proceedings in question; See the Supreme Court of Kenya decision in *Benson Ambuti Adegwa and 2 others v Kibos Distillers Limited and 5 others* [2020] eKLR.
22. It must be remembered that in the case Samwel Kamau Macharia (supra), the Supreme Court of the Republic of Kenya held that-

“A court's jurisdiction flows from either Constitution or legislation or both. Thus, a court of law can exercise jurisdiction as conferred by the *Constitution* or other written law.....”
23. Indeed, the jurisdiction of this court is anchored on Article 162 (2) (b) of Constitution of the Kenya, 2010. In exercising the said jurisdiction, the court has the power to hear and determine disputes in accordance with statutory provisions relating to environment and land including section 13 of the *Environment and Land Court Act*, 2015 (2011).



24. As discerned in paragraphs 1(b) 8, 9, 10 and 11 herein above, the present application concerns management, implementation, and allocation of KOSFIP. Both recurrent expenditure and development expenses comprised in the allocation are complained of in the application. Clearly, this dispute does not fall within the purview of Article 162 (2) (b) (supra) or any enabling statute or both. On that account, I find that this court is devoid of jurisdiction over the present application.
25. In the case of *Republic v Karisa Chengo & others* [2017] eKLR, it was observed thus;
- “...Lack of jurisdiction thus renders a court’s decision void as opposed to it being merely voidable. When an act is void, it is a nullity ab initio. It cannot found any legal proceedings.....”
26. In the case of Owners of *Motor Vessel “Lillian S” case (supra)*, the Court of Appeal noted;
- “.....Jurisdiction is everything. Without it a court has no power to take one more step...”
27. Regarding capacity, the 1<sup>st</sup> and 2<sup>nd</sup> respondents asserted that the contract of employment of the applicant with the 1<sup>st</sup> respondent for one year was to end by 30<sup>th</sup> June 2021. However, the applicant stated that he is currently the project manager for KOSFIP and responsible for the day to day management and implementation of the project as shown in the appointment letter (JRJ-1) annexed to his affidavit in support of the application. Therefore, the applicant’s capacity to originate the application is brought into question.
28. The *Concise Oxford English Dictionary 12<sup>th</sup> Edition* at page 208, defines “Capacity” as follows;
- “The ability or power to do something. A person’s legal competence”
29. Similarly, in *Black’s Law Dictionary 10<sup>th</sup> Edition* at page 249, the term “Capacity” means;
- “The power to create or enter into a legal relationship under the same circumstances in which a normal person would have the power to create or enter into such a relation;”
30. Besides, I proceed to endorse the reasoning in *Daniel Kaloki Kioko & another v Willy Muasya Kioko & another* [2009] eKLR that where jurisdiction is wanting, all other issues cannot have any meaning; see also *Karisa Chengo and Owners of Motor Vessel cases (supra)*.
31. In the foregone, this court has no power to take one more step. I find the 1<sup>st</sup> respondent’s Preliminary Objection dated November 17, 2021 and filed in court on November 18, 2021, meritorious. The same is hereby uphold.
32. Accordingly, the applicant’s Judicial Review application commenced by way of Notice of Motion dated October 26, 2021 and lodged in this court on 1<sup>st</sup> November 2021, be and is hereby struck out.
33. In view of the character of the application and being guided by Samwel Kamau Macharia case (supra), each party to bear own costs of the application.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**G.M.A ONG’ONDO**

**JUDGE**



**Present**

Mr. G. Yogo learned counsel for the 2<sup>nd</sup> respondent and 1<sup>st</sup> interested party.

Sarah Jumma learned counsel for the 1<sup>st</sup> respondent.

No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.

No appearance for Ex-parte applicant.

Terence, court assistant.

**\*\*G.M.A ONG'ONDO\***

**JUDGE**