



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 500 of 2012**

**KIRIGITI THATHI-INI MUGUMO WATER CO. LTD.....PLAINTIFF**

**VERSUS**

**KIAMBU WATER AND SEWERAGE COMPANY LTD.....DEFENDANT**

**RULING**

On 11<sup>th</sup> October 2012 the Plaintiff/Applicant filed a Notice of Motion dated 10<sup>th</sup> October 2012 seeking the following orders:

- a) **The court be pleased to certify this application as urgent and to hear it ex parte in the first instance.**
- b) **A temporary injunction be and is hereby issued to restrain the Defendant whether by itself its servants and or agents from terminating and or breaching the water services agreement dated 12<sup>th</sup> October 2009 entered into between the parties or taking over the supply of water in the areas served by Plaintiff and or taking over the Plaintiff's water distribution network or in any other way interfering with the plaintiff's operations pending the hearing of this application.**
- c) **A temporary injunction be and is hereby issued to restrain the Defendant whether by itself its servants an or agents from terminating and or breaching the water services agreement dated 12<sup>th</sup> October 2009 entered into between the parties or taking over the supply of water in the areas served by the plaintiff and or taking over the Plaintiff's water distribution network or in any other way interfering with the plaintiff's operations pending the hearing and determination of this suit.**
- d) **The costs of this application be awarded to the Plaintiff/Applicant.**

Upon service of the said application, the Defendant on 8<sup>th</sup> November 2012 filed a Notice of Preliminary Objection dated 7<sup>th</sup> November 2012 in which it contended:

1. **That this Honourable Court has no jurisdiction to hear, entertain and/or issue orders sought in both the Plaintiff's notice of Motion Application dated 10/10/2012 and the Plaint dated 10/10/2012 by virtue of Section 85 of the Water Act, 2002.**
2. **That the dispute between the Plaintiff and the Defendant revolves around the Sub-contracting agreement signed by the parties herein on 12/10/2009 relating to the provision of water services, hence the water Appeals Board is best suited to entertain the matter.**

In support of the said objection, **Mr Odoyo**, learned counsel for the defendant submitted that the Court

has no jurisdiction to entertain the orders sought in the application and the plaint filed herein. The basis of the objection according to learned counsel is that the matter revolves around the Water Service Agreement dated 12<sup>th</sup> October 2009 which provides that the plaintiff was contracted to provide water services within its environs. A dispute has however arisen regarding the contract between the parties thereto and according to counsel such disputes cannot be entertained by this Court since it concerns the provision of water services and hence the only body empowered to do so is the Water Appeals Board as provided under section 85(1) and (2) of the Water Act. According to counsel a clear reading of section 85(2) shows that the purpose of the Water Act is that all disputes under the Act be resolved by the Water Appeals Board as provided for under clause 19 of the said Agreement. Whereas under Article 165 of the Constitution, the High Court has original jurisdiction, learned counsel submitted that these are special cases which the High Court cannot entertain but which ought to be decided by a different body in this case the Tribunals which are mentioned in Article 165(1)(d) and 169(2) of the Constitution. It is submitted that the Water Appeals Board is properly constituted under the Act and has the jurisdiction to grant injunction. Accordingly, the defendant prayed that the preliminary objection be allowed and the application as well as the suit be dismissed.

On the part of the plaintiff, it was submitted by **Mr Mwangi**, its learned counsel that the power to grant injunction is not conferred on the Appeals Board and that if the Board purported to grant injunctions, the same were done ultra vires hence the preliminary objection ought to be disallowed.

I have considered the foregoing. The objection taken goes to the jurisdiction of this Court and as was stated by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1:**

**“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”.**

Article 165(3)(a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. It is therefore clear that the High Court no longer has original and unlimited jurisdiction in all matters as it used to have in the old Constitution. However, it is my view that the jurisdiction of the High Court can only be limited as provided by or on the authority of the Constitution itself and any purported limitation not founded on the Constitution, is in my considered view, is null and void. In **Kitololo vs. Kenya Revenue Authority Nairobi Hccc No. 1969 of 1996** it was held that any purporting ousting of the jurisdiction of the Court is null and void. That decision was decided under the old Constitution under which the High Court’s jurisdiction was original and unlimited. As already stated hereinabove the jurisdiction of the High Court may now be limited. Nevertheless any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act. However, it is no longer in doubt that even in cases where the jurisdiction of the High Court is not limited, it may be restricted and this position prevailed even under the old Constitution. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000**, the Court of Appeal expressed itself as follows:

**“Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the**

**Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity... The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute”.**

The rationale behind this is that for the purposes of specialization, Parliament is within its powers to legislate on the manner in which certain disputes are to be determined. This is a recognition of the fact that in certain areas specialized bodies are better placed to arbitrate between the parties in those sectors and such decisions ought to be respected. That, however, does not deprive the Court of jurisdiction to entertain such disputes. What it means is that the Court may decline to entertain such disputes until such time as the specialized body or Tribunal has been moved to sort out the dispute. The High Court may therefore stay any proceedings filed before Court pending such determination. However, where it is clear that the filing of the proceedings in the High Court is meant to dodge or go round or mischievously evade the procedure set out by the Legislature the Court has wide powers to strike out the proceedings before it as to entertain such proceedings may amount to abuse of its process. As was stated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009:**

**“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.**

I, however associate myself with my learned brother **Justice Majanja**, in his view expressed in **Dickson Mukweluine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights.

Section 85 of the Water Act provides as follows:

***(1) An appeal shall lie to the Water Appeal Board at the suit of any person having a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister or the Regulatory Board concerning a permit or licence under this Act, and the Board shall hear and determine any such appeal.***

***(2) In addition, the Board shall have such jurisdiction to hear and determine disputes, and shall have such other powers and functions, as may be conferred or imposed on it by or under this or any [other Act](#).***

Whereas the foregoing provision provides for a dispute resolution mechanism with respect to disputes mentioned therein, to read into that provision the exclusion of the jurisdiction of the High Court to entertain such disputes would in my view amount to the abdication by the High Court of its Constitutional mandate. In their objection the defendants have exhibited Gazette Notice No. 133 dated 11<sup>th</sup> January 2008 in which the Chairman of Water Appeals Board stated that all disputes under the Water Act, 2002 be filed in and determined by the Water Appeal Board and that disputes already filed in the High Court and Magistrates' Courts be transferred to the Water Appeals Board within 30 days from the date of the notice. In my view, by publishing this notice the said Chairman was purporting to do two things. Firstly, he was directing the High Court to transfer all matters pending before it to the said Board. With due respect, the Chairman had no jurisdiction to direct the High Court on how to deal with matter pending before it. Such matters can only be dealt with in accordance with the Constitution and Legislation enacted under or by the authority of the Constitution. In **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 Nyamu, J** (as he then was) held:

**“It is arguable if or not section 100(4) of the Public Procurement and Disposal Act, 2005 offends section 77(9) of the Constitution. Further, the legislature and the Executive have failed to appreciate the constitutional doctrine of separation of powers. The Legislature by providing that the Court must hear and determine a judicial review case within 30 days and the enthusiastic implementation of the same by the 2<sup>nd</sup> respondent which is part of the Executive, is a deliberate encroachment to the strictly operational independence of the Judiciary which is an independent arm of the government... In the case of Kenya there is no such thing as Parliamentary supremacy and every legislation is subject to the Constitution. The Courts are the guardians of the Constitution. There cannot therefore be any allegation of the Courts disobedience of Parliament. Where Parliament itself, purports to restrict or curtail the powers allocated to the Court by the Constitution the Court must promptly intervene. Constitutional power once allocated cannot be shifted either by the Legislature or the Executive under the banner of policy.”**

The Courts guard their jurisdiction jealously and Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court. See **Anisminic vs. Foreign Compensation Commission [1969] I All ER 208** and **Smith vs. East Elloe Rural District Council [1965] AC 736**.

Secondly, the said Chairman was in effect purporting to supervise the Magistrate's Courts. This was, in my view *ultra vires* his powers. Under Article 165(6) of the Constitution it is the High Court that has the supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, other than a superior court.

Whereas the this Court has the inherent jurisdiction to restrict the extent to which it ought to entertain disputes which ought to be dealt with by the Water Appeals Board, without any legislative provision that mandatorily requires that the said disputes be referred to the said Tribunal it is an exercise of discretion on the part of the Court based on the facts and circumstances presented before the Court such as the nature of the orders sought and whether the Water Appeals Board has the powers to resolve the dispute in question. It however, has been held time and again that a preliminary objection cannot be cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. On my part I say that a preliminary objection seeking exercise of judicial discretion cannot be sustained.

Since what this Court is empowered to do in the circumstances of this case would be to stay these proceedings which is an exercise of judicial discretion, I am of the view and hold that the preliminary objection taken herein was not properly taken and I accordingly disallow the objection with costs to the plaintiff.

**Dated at Nairobi this 18<sup>th</sup> day of January 2013**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

Mr Odoyo for the Defendant

Miss Mogeria for the Plaintiff