



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 17 OF 2012**

**MWANGAZA HUMANITARIAN ASSISTANCE.....PETITIONER/APPLICANT**

**VERSUS**

**THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1ST RESPONDENT**

**TOWN COUNCIL OF KARURI.....2ND RESPONDENT**

**SAMUEL GACHIE .....INTERESTED PARTY**

**RULING**

1. The Petitioner is a Non-Governmental Organization registered in Kenya under the Non-Governmental Organizations Act. Its Chamber Summon Application is dated 23rd January 2012 and was filed in Court on the same date. The Application is supported by an affidavit sworn by Samuel Gachie, the Interested Party on 23rd January 2012. Subsequently, the Petitioner without leave of the Court filed an Amended Chamber Summons Application dated 20th February 2012 supported by an Amended Supporting Affidavit sworn by the Interested Party, Samuel Gachie and the same is undated.

2. Parties appeared before me on 17th February 2012 when I directed that the Application dated 23rd January 2012 be heard on 16th March 2012. The Application was however not heard on that date as the Parties agreed by consent to file written submissions and I also granted leave to the Petitioner to file a Supplementary Affidavit and set the Application for hearing on 7th May 2012. The court record indicates that the matter did not proceed thereafter for various reasons until 26th October 2012 when by consent, parties agreed to have the Ruling on the Application to be based on written Submissions.

3. As it can be seen from the foregoing and from the Court record at no time did the Petitioner seek leave to amend the Chamber Summons Application dated 23rd January 2012. In the circumstances, I will strike out the Amended Chamber Summons Application dated 20th February 2012 for being an abuse of the court process. That leaves me with the original Chamber Summons Application dated 23rd January 2012 for determination.

4. In that Application, the Petitioner seeks among other things an order of mandamus and an order of specific performance directed at the Respondents to discontinue further dumping of solid waste in the areas within the Karuri County Council and that the 1st Respondent be ordered to deploy officers to supervise and patrol the area of Karuri to ensure the collection of the irregularly dumped waste and to take action to prevent the continued dumping of waste in that area, and also that the Respondents be

ordered to collect the dumped waste in the several sites of Karuri area and to also stop and prevent solid waste pickers and other persons from dumping waste irregularly in the undesignated sites within Karuri area and finally that the 2nd Respondent be ordered to provide the public with information of the whereabouts of the designated landfill sites and areas for treatment of waste management within its jurisdiction. In addition, it sought for an order that this Court do visit the dump site to determine and verify the damage caused by the illegal waste disposal.

5. Before I examine the merits of the Application, I will first deal with the issue of the Petitioner's pleadings as raised by the 1st Respondent who has sought that the same be struck off.

6. The 1st Respondent contends in that regard that the Petitioner has sought mandamus and prohibition orders without leave of the court against the Respondents in both the Petition, Amended Petition, Chamber Summons and Amended Chamber Summons contrary to the provisions of **Sections 8 and 9** of the **Law Reform Act** and **Order 53** of the **Civil Procedure Rules**. The 1st Respondent argues that even though this Court is empowered to issue orders of judicial review under **Article 23** of the **Constitution**, and **Article 23** aforesaid did not repeal the **Law Reform Act** which requires an Application for leave to precede prayers for granting of judicial review orders. In addition, it argues that such orders cannot be issued at the interlocutory stage as the suit shall be rendered determined at that stage. The Petitioner did not respond to this issue as raised by the 1st Respondent.

7. In prayer 4 of the Application before me, the Petitioner seeks orders akin to those in judicial review in the following terms;

***“That the prerogative order of mandamus and specific performance orders be issued to the Respondents to discontinue allowing the further dumping of solid waste in the areas within Karuri County Council.”(sic)***

8. Under **Order 53 Rule 1** of the **Civil Procedure Rules**, the law provides that applications for mandamus, prohibition and certiorari shall be made only with leave which leave shall be obtained *ex parte* from a judge and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and must be accompanied by an affidavit verifying the facts relied on.

9. I am conscious of the fact that this Court in exercising its jurisdiction under **Article 23(1)** of the **Constitution** should also be mindful of the procedures and the law invoked. This was actually the reasoning in the case of Abraham Kaisha Kanzika & Anor vs. Governor of Central Bank of Kenya (2006) e KLR where the Court stated;

***“In my view failure by a Constitutional Court to recognize general Principles of Law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some case ignore the enforcement of their rights under the general principles of Law in order to convert their subsequent grievance into a 'constitutional issue' after the expiry of the prescribed limitations periods...”***

10. I am of the same reasoning and I am also in agreement with the 1st Respondent that the Petitioner cannot make a serious claim for judicial review orders by way of an Interlocutory Application. The Petitioner, has however, in my view, correctly invoked the jurisdiction of this Court under the provisions of **Article 23** of the **Constitution** which empowers the Court, in determining a Petition brought under **Article 22**, to grant appropriate relief, including orders of judicial review. In my view, should the Petitioner at the hearing of the Petition make out a case for grant of the orders that it seeks in enforcing the environmental rights of the citizens of Kenya ordinarily resident within the jurisdiction of the County Council of Karuri i.e. the 2nd Respondent, this Court would have jurisdiction to grant the orders sought. Accordingly, I find that the provisions of the Law Reform Act and the Civil Procedure Rules 2010 cannot to the latter extent fetter access to this Court under **Article 23** of the **Constitution** and I am persuaded by the reasoning in Dominic Arony Amolo vs Attorney General,

**Misc. Application No.494 of 2003** where Court held that;

***“Claims under the Constitution are neither claims in tort nor contract so that the redress can be given based on the Constitution and the Constitution alone”***

I also find support in the case of **Republic vs. Judicial Commission of Inquiry Ex Parte Mwalulu & Others Misc. Civil Application No.1279 of 2005** where the Court stated thus;

***“It follows therefore the legality of acts or decisions including nullities goes beyond the provisions of Order 53 Rule 2 and 7 ... yet the High Court in England has jurisdiction to grant orders of certiorari and prohibition. We think we have the same powers and even more because we have in addition powers under a written Constitution.”***

11. However, having so said, the 1st Respondent contends that this Court cannot issue the orders sought in the Application before me at this interlocutory stage as they are final in nature and would determine the suit at this stage. I agree as I have stated elsewhere above.

12. I have perused the orders sought in the Application before me and also the Petition dated 23rd January 2012 and I notice that the orders sought are similar. In the circumstances, I am in agreement with the 1st Respondent that if this Court determines the merit of the Application as framed, it would in essence mean that the Petition has been determined at the interlocutory stage. **Article 159(1) (b)** of the **Constitution** provides that in exercising judicial authority Courts shall ensure that justice is not delayed. It is therefore in the wider interests of justice to let the parties set the Petition herein for hearing on a priority basis and all issues in contest can then be resolved.

13. In conclusion the final orders are that the Application dated 23rd January 2012 is dismissed with no order as to costs. In the meantime, Parties are free to enjoin any necessary or Interested Party in the Petition, if they so wish.

14. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Irene – Court clerk*

*Mr. Gichumu holding brief for Mr. Mwaura for 2nd Respondent*

*No appearance for other Parties*

**Order**

*Ruling duly read.*

**ISAAC LENAOLA  
JUDGE**

**Futher Order**

*Parties to file Submissions in respect of the Petition dated 23/1/2012 for hearing on 26/3/2013*

*Notice to issue*

**ISAAC LENAOLA-JUDGE**