



**Maweu alias Agnes Mutiso Ndungwa & 3 others v Makueni
County Assembly & another (Environment & Land Petition
4 of 2020) [2022] KEELC 15307 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15307 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 4 OF 2020
TW MURIGI, J
DECEMBER 7, 2022**

BETWEEN

**AGNES NDUNGWA MAWEU ALIAS AGNES MUTISO
NDUNGWA 1ST PETITIONER
CHRISTINE MWIKALI MAWEEU ALIAS MAWEU CHRISTINE
MWIKALI 2ND PETITIONER
KEVIN YULU MAWEU 3RD PETITIONER
VICTOR MUIA MAWEU 4TH PETITIONER**

AND

**MAKUENI COUNTY ASSEMBLY 1ST RESPONDENT
BEN KYENGO KILONZI 2ND RESPONDENT**

RULING

1. The petitioners herein filed this petition on March 4, 2020 seeking the following orders against the respondents:-
 - i. That this honourable court be pleased to issue an order of permanent injunction restraining the respondents herein or their servants, agents and/or employees from entering upon or remaining upon the applicants parcel of land or using the same for any purpose whatsoever which is inconsistent with the petitioner's constitutional and property rights whether by their employees, servants or agents or their visitors or others claiming through it or in any other manner interfering with the petitioners right to use or possess the said suit property either by themselves or by their authorized agents.



- ii. That a declaration that the exercise by the respondent threatens and has or contravened the petitioners right to property under article 40 of the Constitution and threaten further violation of the dignity of the petitioners under article 28 of the Constitution 2010.
 - iii. That a declaration that the petitioners right to equal protection and enjoyment of the law (article 27(1) of the Constitution, right to acquire and own private property (article 40 of the Constitution), right to fair administrative action (article 47 of the Constitution) and right to fair hearing (article 50 of the Constitution), due process and the rules of natural justice have been threatened, infringed and/or violated.
 - iv. That a declaration be and is hereby issued that the petitioners protected constitutional rights to their properties has been violated by the respondents acts of encroachment onto, trespass upon, and threatening to terminate the petitioners contractual obligations.
 - v. That a declaration that the 1st respondent herein (County Assembly of Makueni) has no jurisdiction to stop or terminate the petitioners contracts after all approvals by various National Government authorities have been obtained.
 - vi. A declaration that the respondents have acted in breach of the rules of natural justice and have acted in breach of the due process.
 - vii. An order compelling the respondents to pay damages to the petitioners for the loss and damage suffered.
 - viii. Costs of the petition.
2. Alongside the petition, the petitioners filed a notice of motion application dated March 2, 2020 seeking the following orders:-
- i. Spent.
 - ii. That this honourable court be pleased to issue conservatory order restraining the respondents herein or their servants, agents and/or employees from entering upon or remaining upon the applicants parcels of land or using the same for any purpose whatsoever which is inconsistent with the petitioners constitutional and property rights whether by their employees servants, or agents or their visitors or others claiming through them or under their instructions, directives and/or control in any other manner whatsoever interfering with the petitioners right to use or possess the said suit property either by themselves or by their authorized agents pending hearing and determination of the application inter partes.
 - iii. That this honourable court be pleased to issue conservatory order restraining the respondents herein or their servants, employees from entering upon or remaining upon the applicants parcels of land or using the same for any purpose whatsoever which is inconsistent with the petitioners constitutional and property rights whether by their employees, servants, or agents or their visitors or others claiming through them or under their instruction, directives and/or control in any other manner whatsoever interfering with the petitioners right to use or possess the said suit property either by themselves or by their authorized agents pending the hearing and determination of the petition.
3. The application was opposed by the respondents by way of a notice of preliminary objection dated April 28, 2020 on the following grounds:-



1. The application dated March 2, 2020 falls short of the doctrine of res-subjudice under section 6 of the *Civil Procedure Act* as the issues raised therein are currently under consideration by the 1st respondent.
2. The application is filed contrary to section 8 of the *County Assemblies Powers and Privileges Act* and therefore the honourable court lacks jurisdiction to grant the orders prayed for.
4. The preliminary objection was canvassed by way of written submissions.
5. Vide its ruling delivered on September 13, 2021, the court upheld the objection and held that it has no jurisdiction to grant the orders sought in the application. The application dated March 2, 2020 was struck out with costs to the respondents.
6. The respondents thereafter filed a notice of preliminary objection dated September 27, 2021 on the following grounds:-

The honourable court lacks jurisdiction to hear and determine this matter. A determination on this issue has already been reached by this court on September 13, 2021.
7. The respondents urged the court to dismiss the petition.
8. The preliminary objection was canvassed by way of written submissions.
9. As at the time of writing this ruling the respondents had not filed or placed its submissions on record.

The Petitioners' Submissions

10. The petitioners' submissions were filed on July 21, 2021.
11. Counsel for the petitioners submitted that the only issue for determination is whether this court has jurisdiction to hear and determine this petition.
12. In defining jurisdiction, counsel cited the *Halsbury laws of England* and further placed reliance on the petitioners' digest of authorities.
13. Counsel submitted that the petitioners moved the court immediately after their constitutional right to own and use their private properties was threatened and violated by the respondents who trespassed onto their properties and threatened to stop all the activities including scooping murram despite the petitioners having been cleared by NEMA.
14. Counsel submitted that the respondents cannot ride on section 11 of the *County Assembly Powers and Privileges Act* to abuse, violate and or threaten the constitutional rights of the petitioners herein.
15. Counsel submitted that a court's jurisdiction is derived from the *Constitution*, an act of parliament or a settled judicial precedent. He went on to submit that under article 165(3) of the *Constitution*, the court is seized with the requisite jurisdiction to hear and determine this petition.
16. Counsel contended that in constitutional petitions, the petitioner has to demonstrate the right, fundamental freedom or the part of the *Constitution* it alleges has been violated or threatened with violation, the manner or evidence of violation or threatened violation and the relief it seeks for the violation or threat to violation, by presenting evidence either in an application or at the full hearing of the petition.



17. Counsel submitted that the respondents are relying on section 11 of *County Assemblies Powers and Privileges Act* to the detriment of the petition which seeks to prevent the violation and or threat of the petitioners constitutional rights.
18. Counsel submitted that petition is anchored on article 22 of the *Constitution* and therefore a full trial should be allowed for the petitioners to tender their evidence and a determination be made on merit. He urged the court to dismiss the objection.

Analysis And Determination

19. Having considered the preliminary objection and the submissions by the petitioners, I find that the only issue that arises for determination is whether this court has jurisdiction to hear and determine this petition.
20. The question of jurisdiction was discussed in the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Justice Nyarangi of the Court of Appeal held as follows;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

21. Similarly, the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) eKLR*.

“.....the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the mater, for without jurisdiction, the court cannot entertain any proceedings.”

22. It is trite law that the court must determine whether it has jurisdiction to hear and determine the matter before it.
23. The respondents preliminary objection is based on the ground that the court has no jurisdiction to hear and determine this petition as the issues raised in the petition were substantially determined in the ruling delivered on the September 13, 2021.
24. The petitioners on the other hand submitted that by dint of article 162(3) of the *Constitution*, this court is seized with the requisite jurisdiction to hear and determine this petition. Counsel argued that in constitutional petitions, the petitioners should prove their case by presenting evidence in court.
25. I have carefully perused the ruling of Hon Justice Charles Mbogo delivered on May 13, 2021. The ruling was in respect to the notice of motion dated the application dated March 2, 2020 and not on the entire petition. The ruling stated as follows in part:-

“I do note that the respondent have only raised the preliminary objection in respect of the application and not the petition.”



26. In their petition, the petitioners are seeking for declaratory orders against the respondents as captured in prayers (b) to (f) of the petition. As correctly noted by Hon Justice Mbogo, the respondents have raised the preliminary objection in respect to the application and not on the petition.
27. The preliminary objection was not raised in respect to the declaratory orders sought in the petition. The same were not canvassed during the hearing of the application. It is therefore not correct to state that the issues raised in the petition were substantially determined in the application dated March 2, 2020.
28. The declaratory orders sought by the petitioners can only be determined upon the parties herein presenting their evidence either by affidavits, written submissions or oral evidence as envisaged by rule 20(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*.
29. In the end I find that this court is seized with the requisite jurisdiction to hear and determine this petition.
30. Accordingly, the preliminary objection dated September 27, 2021 is devoid of merit and the same is dismissed with costs to the petitioners.

Hon T MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF DECEMBER, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr Kwemboi

Ms Kyalo for the respondents

