



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

JUDICIAL REVIEW NO.2 OF 2018

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION:

AND

IN THE MATTER OF: THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILUNGU

AND

IN THE MATTER OF: HONOURABLE E. MUIRU, SENIOR RESIDENT MAGISTRATE AND HONOURABLE P. WAMBUGU SENIOR RESIDENT MAGISTRATE

AND

IN THE MATTER OF: MAKUENI SAND CONSERVATION AND UTILISATION AUTHORITY

AND

IN THE MATTER OF: MAKUENI SAND CONSERVATION AND UTILISATION ACT, 2015

AND

IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLE 1, 6, 10, 47, 159, 160, 176, 183, 185, 186 & 189 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE PRINCIPLES OF THE RULE OF LAW

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

HONOURABLE E. MUIRU

SENIOR RESIDENT MAGISTRATE KILUNGU.....1ST RESPONDENT

HONOURABLE P. WAMBUGU,

SENIOR RESIDENT MAGISTRATE KILUNGU2ND RESPONDENT

AND

1. ROBERT KILONZO MWANIA

2. LEWIS MAKAU MUTHOKA

3. HIGHWAY MULTI ENTERPRISES INTERESTED PARTIES

EX-PARTE

1. MAKUENI SAND CONSERVATION

AND UTILIZATION AUTHORITY

2. COUNTY GOVERNMENT OF MAKUENI

JUDGEMENT

1. By their Notice of Motion application expressed to be brought under Order 53(3) of the Civil Procedure Rules, 2010 and Sections 8 & 9 of the Law Reform Act the Ex-parte Applicants pray for orders: -

1) (i) Civil case No.180 of 2017 (Kilugu) – Robert Kilonzo Mwanja Versus Makueni County Sand Conservation and Utilization Authority.

(ii) Civil Case No.205 of 2017 (Kilungu) - Lewis Makau Muthoka Versus Makueni County Sand Conservation and utilization Authority.

(iii) Civil Suit No.147 of 2017 (Kilungu) – Highway Multi Enterprises Versus Makueni County Sand Conservation and Utilization Authority.

2) An Order of prohibition, prohibiting the 1st Respondent from issuing orders interfering with the enforcement and/or application of the Makueni Sand Conservation and Utilization Act, 2015.

3) An Order of prohibition prohibiting the 1st Respondent from issuing orders of injunction against the Ex-parte Applicants a Government as presupposed under the Constitution of Kenya, 2010.

4) A declaration that the 1st Respondent is in violation of Article 1, 10, 159 (2) (e) of the Constitution of Kenya 2010 and Section 16 of the Government Proceedings Act, Cap (sic) 40 Laws of Kenya.

The application is dated 19th March, 2018 and was filed in Court on even date. It is accompanied by the statement dated 26th February, 2018 as well as the verifying affidavit sworn at Nairobi on the 27th February, 2018 by Paul Wasanga, the County Secretary of the 2nd Ex-parte Applicant.

2. The Respondents have opposed the application vide the grounds of opposition dated 29th June, 2018 and filed in court on 02nd July, 2018. The Respondents contend that the application: -

1. **THAT** the Application is frivolous, vexatious and an abuse of the court process.

2. **THAT** the 1st Petitioner have failed to adhere to Article 189 of the Constitution of Kenya at subsection (3) which provides as follows:

In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

3. **THAT** the petitioners have failed to adhere to the procedure of dispute resolution as envisioned by Article 189 of the Constitution of Kenya 2010 at subsection (4) which provides as follows: -

National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

4. **THAT** the National Assembly passed the Intergovernmental Relations Act No.2 of 2012 to give effect to the Article 189(3) and (4) of the Constitution of Kenya 2010.

5. **THAT** Part IV of the Act provides a detailed dispute resolution mechanism between the national and county governments.

6. **THAT** under Section 31 of the Intergovernmental Relations Act No.2 of 2012, prescribes the measures for dispute resolution between the national and county governments as follows:

national and county governments shall take all reasonable measures to – (a) resolve disputes amicably; and (b) apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.

7. **THAT** under Section 33 of the Intergovernmental Relations Act No.2 of 2012 provides the procedure for a formal declaration of a dispute as follows: -

(1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.

(2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.

8. **THAT** under Section 34 of the Intergovernmental Relations Act No.2 of 2012 Procedure after formal declaration of a dispute is prescribed as follows: -

(1) Within twenty-one days of the formal declaration of a dispute, the Summit, the Council or any other intergovernmental structure established under this Act shall convene a meeting inviting the parties or their designated representatives-

(a) To determine the nature of the dispute, including-

(i) the precise issues in dispute; and

(ii) any material issues which are not in dispute; and

(b) to-

(i) identify the mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist in settling the dispute, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties; or

(ii) subject to Article 189 of the Constitution, agree on an appropriate mechanism or procedure for resolving the dispute, including mediation or arbitration, as contemplated by Articles 159 and 189 of the Constitution.

9. **THAT** the Intergovernmental Relations Act No.2 of 2012 therefore specifically precludes judicial proceedings before the application of the dispute resolution procedures contained therein.

10. **THAT** since the 1st Petitioner has not formally declared a conflict as envisaged by the above provisions thereby making this suit incompetent ad bad in law.

11. **THAT** the 1st and 2nd Respondents contend that the 1st Petitioner has not engaged it as provided both constitutionally and statutorily.

12. **THAT** as demonstrated above, the notice of motion is therefore incurable defective and should be dismissed with costs.

13. **THAT** without prejudice to the foregoing, the Exparte Applicants cannot purport to direct the 1st and 2nd Respondent in the manner in which they will discharge their official duties.

14. **THAT** the Interested Parties in their respective cases demonstrated entitlement to the injunctions granted following the establishment of the legal threshold required in issuance of temporary injunctions.

15. **THAT** the application is an affront of judicial independence and is contrary to Article 159 and 160 of the Constitution of Kenya 2010 and is in essence an act of intimidation of judicial officers.

16. **THAT** parliament has not amended the Government Proceedings Act to cover County Governments which are not deemed as part of the National Government.

17. **THAT** the Statutory Notice dated 14th March, 2018 is not sufficient for the purposes of Section 13A of the Government Proceedings Act.

3. The 1st and 2nd Interested Parties have also opposed the application vide the replying affidavit of Lewis Makau Muthoka, the 2nd Interested Party herein, sworn at Nairobi on the 04th June, 2018 and filed in court on 07th June, 2018.

4. Parties herein filed their respective submissions pursuant to the Court's directions to dispose off the application by way of written submissions.

5. According to the Ex-parte Applicants, the issues for determination are: -

- 1. Whether the Ex-parte applicants are entitled to the orders sought in the application dated 13th March, 2018;**
- 2. Whether the High Court has supervisory jurisdiction over the 1st and 2nd Respondent's;**
- 3. Whether the 1st Ex-parte Applicant is a constitutional body;**
- 4. Whether an order of injunction can issue against the Ex-parte Applicants.**

On the other hand, the Respondent's Counsel framed the issues for determination as follows: -

- 1) Whether the application is frivolous, vexatious and an abuse of the court process.**
- 2) Whether the application threatens the judiciary's independence.**
- 3) Whether Section 13A of the Government Proceedings Act applies in this matter.**

On his part, the Counsel for the 1st and the 2nd Interested Parties was of the view that the issues for determination were: -

(a) Whether Hon. P. Wambugu (SRM – Kilungu) – the 1st Respondent herein had the authority and or jurisdiction to issue and or grant the temporary injunction in favour of the Interested Parties as against the 1st Exparte applicant?

(b) Whether the Exparte Applicants are a 'Government' as presupposed under the Government Proceedings Act (Cap 40) i.e. whether the 1st and 2nd Respondents violated Section 16(2) of the Government Proceedings Act;

6. In my judgement, I will consider all the issues together. The Counsel for the Ex-parte Applicants submitted that the orders issued by the 1st and 2nd Respondents are tainted with illegality and procedural impropriety. The Counsel went on to submit that the Ex-parte Applicants were never heard as to why the action of issuing temporary order of injunction against them could not suffice as the same was an infringement of the Provisions of Section 16 of the Government Proceedings Act.

7. The Counsel further submitted that the functions attributable to the County Governments are provided for under **Part 2 of the Fourth Schedule of the Constitution** as follows: -

“Implementation of specific national government policies on natural resources and environmental conservation, including-

(a)soil and water conservation; and

(b)forestry.”

That in view of Article 185 of the Constitution, the Legislative Assembly is not derived from an Act of Parliament for the time being in force or from an applied law or from an Act of legislation of another County but from the express and specific provision of the Constitution.

8. The Counsel went on to submit that it is in light of these provisions that the County Assembly of Makueni passed the Makueni County Sand Conservation and Utilization Act, 2015 to among other objectives regulate, ensure sustainable conservation and utilization of sand and to provide for protection of the environment. It was further submitted that the 1st Ex-parte Applicant is established under Section 4(1) of the aforementioned Makueni County Sand Conservation and Utilization Act, 2015. That Section 6(1) of the Act provides thus: -

6(1) The object and purpose for which the Authority is established is to exercise general supervision and co-ordination over all matters relating to sand conservation and utilization and to be the principal instrument of the County Government in the implementation of all policies relating to sand as a natural resource.

The Counsel pointed out that the Interested Parties have not challenged the Constitutionality or any provisions under the aforementioned Act and that the same remains a legal statute unless so challenged and ordered by the court.

9. Regarding the issue of whether an order of injunction can issue against the Exparte Applicants, it was submitted that the Constitution of Kenya, 2010 created two levels of government, the National and the County Governments. That Article 176 provides that the County Government consists of the County Assembly and the County Executive.

10. The Exparte Applicant's Counsel went on to submit that Article 185(2) of the Constitution clearly states that the County Assembly may make laws that are necessary for, incidental to, the effective performance of a function and exercise of the powers of the County Government under the fourth Schedule. That Section 6 of the County Government Act, 2012 stipulates that the County Government is responsible for County legislation in accordance with Article 185 of the Constitution. That Section 6(2)(c) of the County Government Act states that the County Government may delegate any of its functions to its officers, decentralized units or other entities within the County.

11. Arising from the above, the Counsel submitted that the question that begs asking is whether the provisions of the Government Proceedings Act apply to the County Governments or rather the National Government in isolation. The Counsel submitted that the 1st and 2nd Respondents cannot issue orders of injunction against the Exparte Applicants as this would violate the express provisions of Section 16 of the Government Proceedings Act as the 1st Exparte Applicant is a body corporate created under the mandatory provisions of Article 185 of the Constitution and performing functions which are a preserve of the County Government. In support of his proposition, the Counsel cited the cases of **Josephat Gatheo Kibuchi vs. Kirinyaga County Council [2015] eKLR and Republic vs. Attorney General & Another exparte Stephen Wanyee Roki [2016] eKLR**.

12. On the other hand, the Counsel for the Respondents submitted that **Article 189(3) and (4)** of the Constitution provides that: -

3. In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

4. National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

The Counsel went on to submit that to give effect to Article 189(3) and (4) of the Constitution, the National Assembly passed Intergovernmental Relations Act No.2 of 2012 which establishes mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6(2) and 189(3) and 4 of the Constitution.

13. **Article 6(2) of the Constitution** provides as follows: -

6(2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

Section 31 of the Intergovernmental Relations Act No.2 of 2012 provides as follows: -

“The national and County Governments shall take all reasonable measures to-

(a) Resolve disputes amicably; and

(b) Apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.”

14. The Counsel further cited the cases of **Council of County Governors vs. Lake Basin Development Authorities & 6 others [2017] eKLR and County Government of Migori & 4 others vs. Privatization Commission of Kenya & Another [2017] eKLR** to buttress his argument that the Exparte Applicants are in contravention of both the Constitution and statute, as they have not followed the prescribed procedure for resolving the dispute. The Counsel was of the view that the application is premature and consequently a waste of Court's time. It was also the Counsel's view that the application is misconceived and that the orders sought are not merited. The Counsel added that the Exparte Applicants should first seek alternative dispute resolution before they can institute judicial review proceedings.

15. On the issue of whether or not the application threatens the Judiciary's independence, the Counsel for the Respondents submitted that the Judiciary has its authority derived from the people as prescribed in **Article 159(1) of the Constitution** which provides that: -

159(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

16. The Counsel cited the case of **Republic vs. Principal Secretary, Ministry of Lands, Housing and Urban Development & 4 others exparte Kenyatta Peter & 3 others [2018] eKLR** where G.V. Odunga J held that;

“A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to feely decide what court orders to obey and which ones to ignore. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In exercising judicial authority, the Courts and Tribunals are, inter alia, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets by law; or (c) makes or implements public policy decisions.

Under clause 2(a) of the same Article the national values and principles of governance include the rule of law.”

In addition, the Counsel cited **Article 160(1) of the Constitution** which provides as follows: -

(1) *“In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”*

(5) *A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”*

Arising from the above, the Counsel submitted that by instituting judicial proceedings seeking orders that impede on the judicial action of the 1st and 2nd Respondents, the Exparte Applicants were subverting the independence of the judiciary. To buttress his proposition, the Counsel cited the case of **Charles Lutta Kasamani vs. Concord Insurance Co. Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division [2018] eKLR** where the court held: -

“The Deputy Registrar was acting in his/her official capacity as the officer responsible for ensuring that the decree was executed and was the one to commit the Petitioner where there was default. He/she was therefore performing judicial functions. Article 160(5) of the Constitution and Section 45 of the Judicial Service Act insulated judicial officers from suits arising from the performance of their official duties. Joining the Deputy Registrar as a party to the suit was therefore a violation of the Constitution and statute.”

17. On the issue of whether or not Section 13A of the Government Proceedings Act applies in this matter, the Respondent’s Counsel submitted that the Act has not been amended to include the procedure of civil proceedings by and against the County Governments.

18. **Section 13A of the Government Proceedings Act** provides as follows:-

(1) *No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the government in relation to those proceedings.*

(2) *The notice to be served under this section shall be in the form prescribed in the Third Schedule to this Act and shall include the following particulars – (a) the full names, description and place of residence of the proposed plaintiff; (b) the date upon which the cause of action is alleged to have accrued; (c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant; (d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen; (e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.*

(3) *The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction.*

19. The Counsel for the 1st and 2nd Interested Parties submitted that the 1st and 2nd Respondents exercised their judicial authority as delegated to them by the people of Kenya under Article 159(1) of the Constitution. The Counsel further submitted that the 1st Exparte Applicant has usurped judicial powers, rules and functions. The Interested Parties agreed with the Respondents that Government Proceedings Act does not apply to County Governments. In support of their proposition, their Counsel cited the case of **James Muigai Thungu vs. County Government of Trans Nzoia & 2 Others [2015] eKLR** where E. Obaga J while issuing injunctive orders against the County Government of Trans Nzoia and others stated thus: -

“The first issue for determination in this application is whether an injunction can issue against a County Government. The Counsel for the Respondents submitted that an injunction cannot issue against a County Government. He cited the provisions of the Government Proceedings Act Cap 40. Section 16(2) of the Government Proceedings Act provides as follows: -

The court should not in any Civil Proceedings grant any injunctive or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

The aforesaid Act forbids courts from giving an injunction against the Government. The section quoted hereinabove extends the same protection to Government Officers. This Act was in place even before the devolved system of Government came into force. The question which then arises is whether the Act can extend to the County Government. The County Governments are body corporate with power to sue and be sued. There is no provision in the County Government Act of 2012 which protects them from injunction orders. I do not think that it was the intention of the legislature that the County Governments were to enjoy the same status as the National government. If this was the intention, the Government Proceedings Act would have been amended to expressly include County Governments. I therefore do not find that the County Government can come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers.”

The Counsel further cited the case of **George Albert Ambuga vs. Kajiado County Government & Another [2015] eKLR** where Onguto, J held thus: -

“With regard to the 1st Defendant, I would also have a brief answer. There is no doubt that pursuant to Article 23 of the Constitution of Kenya, injunctive orders can nowadays be issued against the National Government where threats to fundamental rights are alleged by a subject. In civil proceedings however, the Government Proceedings Act (Cap 40) at Section 16 is rather explicitly. Such relief is not permitted against the government. The said Section however permits the court to issue declaratory

orders in lieu of the injunction prayed for. The Section does not suggest in any manner that an application for injunction against the government will be a nonstarter but rather grants powers to the court to issue a declaratory order instead. In effect a preliminary objection intended to dispose off a suit or application on the basis of Section 16 in a summary manner ought not succeed.....

Perhaps, I may also add that in my view the “Government Proceedings Act (Cap 40) applies to the National Government. It does not apply to county or devolved governments. The latter are rather independent of the National Government and under Section 6(1) of the County Governments Act, No.17 of 2012 are corporate bodies with perpetual succession. It is certainly unlikely that the intention of Kenyans in promulgating the Constitution in 2010 was that the County Governments were to wield the same powers and enjoy the same privileges as the National Government. Consequently, unless and until the Government Proceedings Act is amended to extend its application expressly to County Government, the Act cannot be deemed by implication to apply to the devolved or County Governments. The two levels of government though Constitutionally expected to liase and cooperate with each other are not equal partners and do not enjoy the same powers and privileges, unless expressly stated under the Constitution or any written law.”

The Counsel pointed out that it is clear that the Exparte Applicants proposition that the 1st and 2nd Respondents acted in violation of the provisions of Section 16 of the Government Proceedings Act by issuing orders of injunction against them is not only misleading but also misguided.

20. The Counsel was also of the view that even if it were to be assumed that the 1st and 2nd Respondents have no jurisdiction to issue injunctive orders against the 2nd Exparte Applicant herein by virtue of the Government Proceedings Act, the instant judicial review application would still be unmerited because all the orders in the lower court civil cases were specifically directed against the 1st Ex-parte Applicant which is a body corporate with perpetual succession and a common seal, capable of suing and which by all intent and purposes cannot be said to fall under the Government Proceedings Act.

21. Having read the application together with the grounds of opposition by the Respondents as well as the replying affidavit by the 1st to 2nd Interested Parties and the submissions that were filed, I am of the view that the only issues for determination are whether or not the Exparte Applicants are entitled to the orders sought in the application dated 13th March, 2018 and whether an order of injunction can issue against the Respondents. I will start by answering the 2nd issue. My finding on this issue is that the Government Proceedings Act chapter 40 of the Laws of Kenya does not apply to the two Exparte Applicants and more particularly the 1st Applicant since they are not the National Government. I agree with my brothers Obaga J and Onguto J in James Muigai’s case (supra) and George Albert Ambuga’s case (supra) that if the intention of the legislature was to extend the Act to the County Governments, then it would have amended the Government Proceedings Act to expressly include them in the said Act. As such, I hold that the 1st and 2nd Respondents had jurisdiction to issue an order of injunction against the Exparte Applicants. What were the Exparte Applicants expected to do once the order of injunction was issued against them? In my view, the avenue open for them was to either apply for setting aside of the order or to appeal against the said order. In the circumstances, I do agree with the Respondents and the Interested Parties that the orders sought by the Exparte Applicants are unmerited. To act otherwise would amount to allowing the Exparte Applicants to usurp and to subvert judicial authority.

22. The upshot of the foregoing is that the application by the Exparte Applicants must fail. In the circumstances, I hereby proceed to dismiss it with costs to the Respondents and the 1st to the 2nd Interested Parties. It is so ordered.

Signed, Dated and Delivered at Makueni this **06th** day of **November, 2019**.

MBOGO C. G

JUDGE

In the presence of: -

Mr. Hassan holding brief for Mr. Nyamu for the Ex-parte Applicant

No appearance for the Respondents

No appearance for the 1st and 2nd Interested Parties

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

06/11/2019.