



Africa Center for Corrective and Preventive Action & 11 others v Murang’a County Government & 3 others; Attorney General (Interested Party) (Constitutional Petition E002 of 2024) [2025] KEHC 10268 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG’A
CONSTITUTIONAL PETITION E002 OF 2024**

CW GITHUA, J

JULY 10, 2025

IN THE MATTER OF ARTICLE 2, 3, 10, 21, 22, 23, 27 (1), 35, 43, 46, 47, 159 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF VIOLATION, INFRINGEMENT OF AND/OR THREAT TO THE RIGHT TO CLEAN AND SAFE WATER IN ADEQUATE QUANTITIES

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF ACCESS TO INFORMATION ACT

AND

IN THE MATTER OF WATER ACT, 2016

AND

IN THE MATTER OF MURANG’A COUNTY WATER AND SANITATION SERVICES ACT

BETWEEN

AFRICA CENTER FOR CORRECTIVE AND PREVENTIVE ACTION 1ST PETITIONER
GERALD KIMUNYU MUTHIGA 2ND PETITIONER
JAMES MWANGI CHEGE 3RD PETITIONER
MWANGI JOSEPH IRUNGU 4TH PETITIONER
GITAU JOSEPH MUIRURI 5TH PETITIONER
MARY NGIMA NYAGUTHIE 6TH PETITIONER



HENRY MWANGI NGOBU 7TH PETITIONER
FRANCIS KARANGU NGOBU 8TH PETITIONER
PETER KIMANI NJOGU 9TH PETITIONER
BEATRICE WAMBUI GITAU 10TH PETITIONER
JOHN MUIRURI MBURU 11TH PETITIONER
MARTIN KAMAU GATHUKI 12TH PETITIONER

AND

MURANG'A COUNTY GOVERNMENT 1ST RESPONDENT
WATER SERVICES REGULATORY BOARD 2ND RESPONDENT
MURANG'A SOUTH WATER & SANITATION CO. LTD 3RD RESPONDENT
MURANG'A WATER AND SANITATION CO. LTD 4TH RESPONDENT

AND

THE HON. ATTORNEY GENERAL INTERESTED PARTY

RULING

1. This ruling is in respect of a preliminary objection filed by the 4th respondent, Murang'a Water & Sanitation Co. Ltd dated 29th April 2024 seeking that the Petition filed on 6th March 2024 together with the Notice of Motion dated 9th April 2024, be struck out on grounds that this court lacked jurisdiction to hear and determine the Petition.
2. The preliminary objection is based on grounds that the correct forum for resolution of the dispute constituting the petition was the Water Tribunal established under Section 119 of The *Water Act* (hereinafter the tribunal); that since the petitioner's dispute fell under the jurisdiction of the tribunal, the petitioners ought to have sought the alternative remedies available before the tribunal before approaching this court and as they failed to do so, the petition and the accompanying Notice of Motion were premature and ought to be dismissed.
3. The background against which the preliminary objection was filed is that the petitioners filed the instant petition on their own behalf and on behalf of residents of Maragua or Muranga County who were consumers of water services provided by the 3rd respondent, Muranga South Water & Sanitation Co. Ltd.
4. According to the petitioners, after his Excellency the President of the Republic of Kenya commissioned the Maragua dam which was supposed to serve the Murang'a South region, a semi-arid part of Murang'a County, the 1st respondent, The Murang'a County Government, directed that water from the dam would be managed by Murang'a Water and Sanitation Company, the 4th respondent, against their legitimate expectations.
5. The petitioners claimed that together with the class of persons they represented, they were some of the intended beneficiaries of the dam water project and to that end, they had entered into a contract for supply of water services with Murang'a South Water and Sanitation Company Limited, the 3rd



- respondent, who had already been licensed to provide water within their jurisdiction. They were aggrieved by the change of water providers allegedly without a coherent plan and without participation of the consumers who had existing contracts for water provision from a different water provider.
6. In addition, the petitioners averred that the 1st respondent's directive was not only inconsistent with their legitimate expectations but also violated the national values of good governance envisaged by *the Constitution*. They also complained that the directive undermined the principle of self-governance by the people and their participation in decisions affecting them which was set out in Article 174 (c) of *the Constitution*.
 7. Based on the foregoing, the petitioners sought various declaratory and other reliefs as follows:
 - a. A declaration that the 1st and 2nd respondents' arbitrary grant of licensing to the 4th respondent without due process violated Article 10, 43, 46, 47, 174 and 186 of *the Constitution* and the provisions of the *Water Act* 2016 on geographical jurisdiction with regard to licensing.
 - b. A declaration directed at the 2nd respondent to ensure compliance with *the Constitution* and the law in relation to the enforcement of water providers licenses of the 3rd and 4th respondent.
 - c. A declaration that the infringement of the geographical jurisdiction of the 3rd respondent by the 4th respondent, in violation of the license issued by the 2nd respondent, was a violation of the petitioner's legitimate expectation.
 - d. A declaration that the infringement of the geographical jurisdiction of the 3rd respondent by the 4th respondent was a violation of the petitioners' social economic rights under Article 46 of *the Constitution* and in particular, the right to protection of their economic interests.
 - e. Orders of judicial review in the nature of Certiorari, to remove and quash the decision or directive of the 1st respondent to grant water provision services to the 4th respondent in a geographical area that does not fall within its licence.
 - f. Orders of judicial review in the nature of Mandamus, to compel the 2nd respondent to enforce the licensing conditions under the 4th respondent's water provider's license, particularly the condition limiting its geographical jurisdiction..
 8. The preliminary objection was prosecuted by way of written submissions. The written submissions by the 4th respondent dated 25th November 2024 were filed on its behalf by its advocates on record Ms. Triple N.W & Co. Advocates LLP while those by the petitioners were filed by their advocates Ms. Njoroge, Gilbert & Associates Advocates. The 5th respondent and the interested party despite being given ample time and opportunity by the court failed to file their submissions. The 1st and 3rd respondents opted not to file submissions but they indicated through their advocates on record that they were supporting the 4th respondents preliminary objection.
 9. In its submissions, the 4th respondent contended that the adjudication of all disputes arising from water services where there was a business contract was within the purview of the water tribunal established under Section 119 (1) of the *Water Act*, 2016; that where there was a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of parliament, that procedure must be strictly adhered to.
 10. The 4th respondent further submitted that under the doctrine of constitutional avoidance or exhaustion, this court ought to decline to deal with a matter where there existed another remedy provided for by the law which the aggrieved party had not utilized before moving the court. It



submitted that this court had no jurisdiction to hear the petition and it ought therefore to down its tools at the earliest opportunity.

11. The petitioners on their part submitted that they were rightly before this court as the main issue in the petition was the infringement of their various rights and fundamental freedoms protected under inter alia, Articles 10,35,43 and 46 of *the Constitution* of Kenya; that this court was the only court with jurisdiction to hear the petition under Article 165 (3) as read with Articles 22 and 23 of *the Constitution* and there being no other judicial or quasi-judicial process prescribed by law for adjudication of disputes concerning violation of human rights, the doctrine of constitutional avoidance did not arise.
12. The petitioners further submitted that the tribunal lacked requisite jurisdiction to hear and determine their grievances; that there was no business relationship between them and the 3rd and 4th respondents since they were consumers of a public resource from which they did not derive any commercial benefit, gain or profit; that this court was seized of jurisdiction to determine the constitutional questions they had placed before it.
13. I have duly considered the preliminary objection, the rival written submissions made by the 4th respondent and the petitioners and having done so, I find that this being an objection to the courts jurisdiction, it meets the threshold of a preliminary objection as defined in the celebrated case of *Mukisa Biscuit Company Versus West End Distributors Ltd* [1969] EA 696 where Sir Charles Newbold at page 701 defined it as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

14. Having established that the objection raised by the 4th respondent qualifies to be a preliminary objection, I find that the only issue arising for my determination is whether this court has jurisdiction to hear and determine the petitioners’ petition and the accompanying Notice of Motion.
15. Jurisdiction, simply put, is the courts power or authority to adjudicate on and determine disputes placed before it. As held by the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others* [2012] eKLR, a courts jurisdiction is conferred by either *the Constitution* or other written law. A court cannot arrogate to itself jurisdiction exceeding the one given to it by the law or through judicial craft or innovation.
16. Where a court establishes that it does not have jurisdiction to entertain a matter, it had no choice but to down its tools. This is so because as held by Nyarangi J in the locus classicus case of *Owners of Motor Vessel “Lillian S” V 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...”

17. The 4th respondent has claimed that the correct forum for adjudication of the Petitioners’ grievances is the water tribunal.

Section 121 (1) and (2) of the *Water Act* 2016 (the Act) clearly stipulates the jurisdiction of the tribunal as follows;

“(1) (1) The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any



person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.

- (2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.”
18. Section 124 of the Act provides that a person aggrieved by a decision made by the tribunal can appeal to the Environment and Land Court within 21 days from the date of the decision.
19. A reading of the petition clearly shows that the Petitioners grievances emanate from a directive allegedly issued by the 1st respondent which had the effect of arbitrarily changing their water service provider from the 3rd Respondent to the 4th Respondent. According to the petitioners, the 1st respondents decision was made without public participation and grossly violated their fundamental rights and freedoms enshrined in the Constitution of Kenya 2010.
20. From the foregoing, it is clear that the petitioners grievances are not anchored on a decision or order made by the Cabinet Secretary, the Authority or the Regulatory Board (2nd Respondent) or any person acting under their authority. It cannot also be said that the dispute between the petitioners and the respondents stem from a business contract. It is also obvious that the petition is lodged in this court as a court of first instance and it is not an appeal from a decision made by the tribunal in which case the correct forum would be the Enviroment and Land Court and not this court.
21. Having found as I have above and considering the reliefs sought in the petition, I have no doubt in my mind that the Water Tribunal does not have jurisdiction to determine the instant petition. Besides, some of the reliefs sought involve interpretation of the Constitution and a determination whether the Petitioner’s Constitutional rights and fundamental freedoms were violated by the respondent’s alleged conduct and it is only this court that has original jurisdiction to determine such matters under Article 165 (3) of the Constitution. The Water Tribunal is not seized of jurisdiction to determine the issues raised in this Petition or to issue the reliefs sought and therefore, the doctrine of constitutional avoidance and the doctrine of exhaustion are not applicable in this case.
22. For the above reasons, it is my finding that the 4th respondent’s preliminary objection has no merit and it is hereby dismissed with costs to the Petitioners.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 10TH DAY OF JULY 2025.

HON. C. W GITHUA

JUDGE

In the presence of:

Ms. Njoroge for the Petitioners

Mr Nderitu for the 3rd Respondent

Ms Mwangi for Kiroko Ndegwa for the 4th Respondent

Mr Allan Kibet for the 2nd Respondent

No Appearance for the 1st and 5th Respondent



Ms. Susan Waiganjo , Court Assistant

