



REPUBLIC OF KENYA



KENYA LAW
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**Shahu & another v County Government of Wajir & 2 others (Petition
6 of 2023) [2024] KEHC 4861 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION 6 OF 2023
JN ONYIEGO, J
MAY 3, 2024
N THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA
AND
IN THE MATTER OF ARTICLES 2[1], 3[1], 10[1], [2][A] [B] [C], 27
AND 73 OF THE CONSTITUTION AND IN THE MATTER OF
ARTICLES 20[1], [2], [3] [A] 21[1], 22[1] [2] AND 23[1], [3] [A]
[B] [C] AND [E] OF THE CONSTITUTION
AND
IN THE MATTER OF PRINCIPLES OF PUBLIC FINANCE:
OPENNESS, EQUALITY, FAIRNESS, PRUDENCE AND PUBLIC
PARTICIPATION
AND
IN THE MATTER OF CONTRAVENTION OF ARTICLES 196, 201
AND 226 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA
AND
IN THE MATTER OF THE FINANCE MANAGEMENT ACT, NO. 18 OF
2015
AND
IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO.17 OF
2012
AND
IN THE MATTER OF THE COUNTY GOVERNMENT OF WAJIR**



BUDGET FY 2023/24
AND
IN THE MATTER OF ARTICLES 165[3] [A] [B] & [D] OF THE
CONSTITUTION AS READ WITH SECTION 4 OF KENYA
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS,
PRACTICE AND PROCEDURE RULES, 2015

BETWEEN

RASHID ADOW SHAHU 1ST PETITIONER
MOHHAMED GUHAD MOHAMED 2ND PETITIONER

AND

COUNTY GOVERNMENT OF WAJIR 1ST RESPONDENT
COUNTY ASSEMBLY OF WAJIR 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. *Vide* a petition dated 17th August 2023, the petitioners who described themselves as residents and service providers of Wajir county moved to this court seeking the following orders;
 - a. A declaration that the *Wajir Finance Act 2023* in its totality as enacted and assented is unconstitutional and against the provisions of Articles 196 and 201 of the *Constitution* of Kenya 2010.
 - b. A declaration that the Wajir County residents' right to participation in the process leading to the enactment of the *Wajir Finance Act 2023* and as guaranteed under Article 196 and 201 of the Constitution has been violated by the decision of the 1st and 2nd respondents to unilaterally enact the said Act.
 - c. An order of prohibition stopping the operations and/or implementation of the said *Wajir Finance Act 2023*.
 - d. Any other order that may deem to be fit and just to ensure that Law and Order is maintained and that the Rule of Law is upheld.
 - e. Costs of the petition.
2. Contemporaneously filed with the petition is a notice of motion of even date seeking;
 - a. That the Honourable Court be pleased to certify this application as urgent and to be heard during this High Court vacation and service of the same be dispensed with in the first instance.
 - b. That this Honourable Court be pleased to hear and grant the orders sought in the application herein during the current High Court vacation.



- c. That this Honourable Court does order stay of implementation of the County Government of *Wajir Finance Act, 2023* pending hearing and determination of this application.
 - d. That this Honourable Court does order stay of implementation of the County Government of *Wajir Finance Act, 2023* pending hearing and determination of this petition.
 - e. That this Honourable Court be pleased to grant any such further Order or Orders as may be just and appropriate.
 - f. That the costs of this application be provided.
3. The petition herein is pegged on the fact that the petitioners had on diverse dates rendered services on credit to Wajir County and between themselves, they were owed over Kes.20,000,000.00/-. They further claimed that the County Government of Wajir had passed the *Wajir County Finance Act, 2023* without carrying out public participation as stipulated under the constitution.
 4. It was argued that the pending bills currently stood at Kes. 4.5 billion and yet a meagre Kes. 250,000,000/- had been allocated, an amount according to the petitioners was highly insignificant. This court was therefore urged that the petitioners and other service providers were left out of the process to the enactment of the Act and in particular, they were not consulted on the budget allocation of pending bills which stood in arrears since 2018.
 5. That the amount allocated to settle pending bills was not commensurate to the amounts allocated by the County Assembly which stood at Kes. 853, 813,146. It was urged that the County Executive having been allocated Kes. 852,203,162, a colossal sum of Kes. 1,436,016,308 shall be expended. They expressed their fears that there is an imminent likelihood that there will be colossal sums of moneys belonging to the tax payers that were at risk of being wasted. This court was thus urged to allow the prayers sought.
 6. Upon being served, the 1st respondent through the firm of Gedi & Associates Advocates filed a notice of preliminary objection dated 01.09.2023 citing grounds that:
 - i. This Honourable Court lacks the jurisdiction to entertain the application and petition as they do not raise any constitutional issue since the dispute is a contractual/commercial one and ought to be litigated in a commercial/civil court.
 - ii. The matter herein is sub judice in nature as there are proceedings currently ongoing in Constitutional Petition E006 of 2023; *Mohamed Jelle Hussein t/a Alamagan Enterprise Group & 2 Others v County Government of Wajir & another* & Constitutional Petition E007 of 2023 *Ali Abdillab & 2 Others v County Government of Wajir* as consolidated with Constitutional Petition E008 of 2023 in the High Court at Garissa all touching on the constitutionality of the *Wajir County Finance Act 2023*.
 7. The court directed that the notice of preliminary objection and the application dated 17-08-2023 be canvassed by way of written submissions.
 8. The 1st respondent filed their submissions dated 19-10-23 thus submitting that the applicants/petitioners having attached Local Purchase Orders as evidence of having supplied goods to the 1st respondent, then, they ought to have sued for breach of contract in a civil court as that is the proper forum for ventilating their grievances.
 9. That the petitioners having faulted the process of enacting the *Wajir Finance Act 2023* by quoting some provisions of the constitution, the same was not enough to make this suit a constitutional



- petition. Reliance was placed on the cases of *Communications of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR and *COD & another v Nairobi City Water & Sewerage Co. Ltd* [2015] where the court stated that not every dispute has to be decided in a constitutional court.
10. That filing this matter as a constitutional petition is an outright abuse of the court process and should the Honourable Court be properly guided to strike out the suit herein, the petitioners will still have a remedy by filing another suit in the right court. In the same breadth, it was argued that this Court lacks jurisdiction for the reason that the constitutionality of the *Wajir County Finance Act* is pending determination before this very court. Reliance to that end, was placed on the case of *Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya* [2015] eKLR where it was held that ... multiplicity of suits between the same parties and over the same subject matter is to be avoided...
 11. That a look at the pleadings in the other matters reveals that the issues revolve around the issue of public participation in the enactment of the *Wajir Finance Act 2023*. That in as much as the parties in the other matters were essentially different, this court was urged to have in mind the need to avoid conflicting decisions over the same issue.
 12. The petitioners filed submissions dated 06.10.2023 submitting on two issues. Firstly, whether the matter is commercial in nature and secondly, whether the suit herein is sub judice.
 13. On the first limb, it was contended that the issue raised by the petitioners was a point of fact that could only be ascertained through the perusal of evidence and pleadings on record hence the same could not be determined by a preliminary objection. To that end, reliance was placed on the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where the court held that anything that purports to be a preliminary objection must not deal with disputed facts and must not derive its foundation from factual information which stands to be tested by rules of evidence.
 14. On the second limb regarding the rule of sub judice, it was contended that it was not a pure point of law capable of being considered as a preliminary objection. To buttress their argument, reliance was placed on the case of *Mucebiu Irungu v Martha Wanjiru Irungu & another* [2022] eKLR where the court rendered itself that: ...the issue of *sub judice* is not a pure point of law capable of being considered as a preliminary objection raised and does not meet the litmus test of what in law amounts to a preliminary objection.
 15. That in the instant case, the litmus test to sustain a preliminary objection was not met for the reason that the 1st respondent had not taken liberty to evince the existence of petition E006 of 2023 *Mohamed Jelle Hussein t/a Alamagan Enterprise Group & 2 Others v County Government of Wajir & another* and Petition E007 of 2023 *Ali Abdillab & 2 Others v County Government of Wajir* as consolidated with Petition No. E008 of 2023; That the parties in Petition E006 of 2023 *Moahmed Jelle Hussein t/a Alamagan Enterprises Group & 2 Others v County Government of Wajir & another*, Petition E007 of 2023 *Ali Abdillab & 2 others v County Government of Wajir* as consolidated with Petition E008 of 2023 and this matter Petition No. 6 of 2023 are different. That the aforesaid contravened the provision of section 6 of the *Civil Procedure Act* and the P.O dated 1st September, 2023 as drawn was not a pure point of law capable of being considered as a preliminary objection properly raised.
 16. The 2nd and 3rd respondents did not participate in the notice of preliminary objection herein despite being served.
 17. I have considered the preliminary objection herein, notice of motion dated 17-08-23 and written submissions by the parties. The sole issue for determination is whether this court is clothed with the jurisdiction to determine the notice of motion and petition before it.



18. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court expressed itself on the issue of jurisdiction as hereunder;
- “A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that 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 matter, for without jurisdiction, the Court cannot entertain any proceedings. [Also see Articles 165 (5) and 162 (2) of the constitution; and Section 13 of the Environment and Land Court Act].
19. It is trite that if a preliminary objection is allowed, the same may dispose off with finality the entire suit without giving parties the opportunity to be heard. Therefore, this has to be done with caution given that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process/es.
20. From the petitioners’ pleadings, it is outright that their discontentment comes from the fact that they are owed colossal amounts of money by the Wajir County Government and further, the said government allegedly did not involve them in the process of coming up with the *Wajir Finance Act 2023*. Does this ground raise a constitutional issue capable of determination and attract a constitutional remedy?
21. It is trite that for a party to succeed in an issue relating to violation or threat to violation of his constitutional right, he or she must establish or prove reasonably with some degree of precision the violated or threatened right and the constitutional provision relating to the violated or likely to be violated right. See *Anarita Karimi njeru v Republic* (1979)eKLR.
22. From the nature of the claim which commercial in nature, a constitutional court cannot arbitrate over all manner of claims including those that have clear legal provisions for enforcement. The fact that the 1st respondent’s pending bills stand at Kes. 4.5 billion and yet a meagre Kes. 250,000.00/- was the only amount allocated towards satisfaction of the said bills, an amount according to the petitioners is insignificant, does not warrant the issuance of the orders of this court in the manner prayed in the petition nor the motion.
23. As the 1st respondent clearly urged, the fact that the petitioners rendered services to the 1st respondent, leading to an amount of over Kes. 20,000,000/- owed, the same clearly falls under commercial law. In my view, the petitioners ought to have sued for breach of contract as a civil claim hence not a constitutional court.
24. Mere refusal by the 1st respondent to honour its contractual obligations to pay the petitioners for services rendered, does not amount to a constitutional breach to warrant declaration of the orders sought. Having found that the claim herein is purely a commercial transaction which calls for enforcement in a commercial court, this court cannot arrogate itself jurisdiction where there is none. As stated by Nyarangi J in *Owners of the Motor Vessel “Lillian S” v Caltex Oil Ltd (Kenya) Ltd* (1989)KLR, upon discovery that a court has no jurisdiction to entertain a matter, that court should down its tools. In this case, I am constrained to down my tools for there is nothing constitutional to pursue in terms of breach of contract.
25. On the question whether the matter was subjudice in view of the related or similar matters pending, the same can not attract a preliminary objection capable of disposing of the matter with finality. The



remedy lies on consolidation of the related suits. To that extent, the ground of subjudice is misplaced hence dismissed.

26. On the enactment of the Finance Act, this court has already pronounced itself on a related matter being Petition number E006 of 2023 Garissa high court *vide* its judgment delivered on 10th November 2023 by confirming that the enactment of the said finance Act was constitutional the same having been subjected to public participation hence the claim herein is moot as the cause of action is already spent. In a nutshell, the petition herein together with the accompanying notice of motion is not sustainable as the reliefs sought can not issue in the circumstances hence the preliminary objection is upheld.
27. In view of the above holding, it is my finding that:
 - i. The Notice of preliminary objection dated 01.09.2023 by the 1st respondent is upheld.
 - ii. The notice of motion and the petition herein dated 17th day of August 2023 be and are hereby struck out for lack of jurisdiction as well as being rendered moot.
 - iii. No order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MAY 2024.

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J. N. ONYIEGO

JUDGE

