



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC PETITION NO. 04 OF 2020

AGNES NDUNGWA *alias* AGNES MUTISO NDUNGWA1ST PETITIONER

CHRISTINE MWIKALI MAWEU *alias* MAWEU CHRISTINE MWIKALI....2ND PETITIONER

KELVIN YULU MAWEU3RD PETITIONER

VICTOR MUIA MAWEU.....4TH PETITIONER

VERSUS

MAKUENI COUNTY ASSEMBLY.....1ST RESPONDENT

BEN KYENGO KILONZI.....2ND RESPONDENT

RULING

1. What is before this court for ruling is the Respondent's Notice of Preliminary Objection dated 28th April, 2020 and filed in court on even date. The Respondents contends that;

1) The application dated 2nd March, 2020 falls short on 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.

2. The Preliminary Objection was canvassed by way of written submissions.

3. In his submissions the counsel for the Respondents identified two issues for determination. The two issues were;

i) Whether the application dated 2nd March, 2020 falls short of the doctrine of 'Res subjudice'?

ii) Whether this honourable court has jurisdiction to grant the orders prayed for?

4. On whether the application dated 2nd March, 2020 falls short of the doctrine of "Res Subjudice" the counsel for the Respondents cited Article 196 of the constitution which provides for powers, privileged and immunities of County Assemblies. He added that pursuant to Article 196(3) of the Constitution, Parliament enacted the County Assemblies Powers and Privileges Act which at Section 11 provides that;

"No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to a county assembly or a committee, or by reason of any matter or thing brought by him or her therein by a report, petition, bill, resolution, motion or other document written to a county assembly."

5. The counsel further cited Section 11(2) of the same Act which provides;

"No civil suit shall be commenced against the speaker, the leader of majority party, the leader of the minority party, a chairperson of a committee or any member for any act ordered by them in discharge of the function of their office."

6. The counsel submitted that the 2nd Respondent who is the member of the County Assembly of Makueni representing Kiima Kiu Kalanzoni Ward where the suit properties are situated received complaints from the public in Kiima Kiu ward of illegal excavation of murrum and subsequently reported the matter to the County Assembly Committee of Environment and Climate Change for investigation and inquiry into and compilation of a report for tabling in the house. The counsel went on to submit that the 2nd Respondent also notified the department of Environment and Climate Change that is responsible for matters related to land, environment and climate change in the County Government and pointed out that at the time of filing the petition, the committee on Environment and Climate Change was seized of the matter.

7. Arising from the above, the counsel submitted that Section 11 bars this court from entertaining any litigation that questions the proceedings of the County Assembly Committee. That the institution of these proceedings offends the principle of institutional comity between the arms of government which must not be endangered by the unwarranted intrusions into the working of one arm by another. The counsel relied on the case of **Mumo Matemo -Vs- Trusted Society of Human Rights Alliance & 2 Others [2013] eKLR** where the Court of Appeal considered the scope of the application of the separation of powers doctrine, and adopted the High Court's stand point in the following terms;

“[Separation of powers] must mean that the courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondent also concede, the courts have an interpretive role – including the last word in determining the constitutionally of all governmental actions...”

8. The counsel submitted that the Respondents are immune to any proceedings before this court, and any undue interference with the running process of the Respondents is outright overlap and intrusion or the workings of the Respondent before a final decision can be made on the Petitioner's activities.

9. On whether the court has jurisdiction to grant the orders prayed for, the counsel submitted that by virtue of the doctrine of the absolute parliamentary privilege, this court is divested of its requisite jurisdiction. The counsel cited Section 10 and 11 of the County Assemblies Powers and Privileges Act which ousts the jurisdiction of this court to question the proceedings and decision of the Assembly or Committee and barring of institution of civil proceedings against a member of the County Assembly.

10. On the other hand, the counsel for the Petitioners submitted that the suit properties are private land exclusively owned by the Applicants. He pointed out that there is no provision in law that mandates anyone or any institution to interfere and/or dictate anyone on how to use his or her private land. The counsel relied on Article 64 of the constitution which provides;

Private land consists of: -

(a) Registered land by any person under any freehold tenure.

(b) Land held by any person under leasehold tenure; and

(c) Any other declared private land under an Act of Parliament.

11. The counsel went on to submit that the Constitution provides for Bill of Rights which includes the right to own property. The counsel cited Article 20 which provides;

1) The Bill of Rights applies to all law and binds all state organs and all persons.

2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

3) In applying a provision of the Bill of Rights, a court shall: -

a) Develop the law to the extent that it does not give effect to a right or fundamental freedom; and

b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote: -

a) The values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

b) The spirit, purport and objects of the Bill of Rights.

12. He also cited Article 22 which provides;

1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by: -

- a) *A person acting on behalf of another person who cannot act in their own name;*
- b) *A person acting as a member of, or in the interest of, a group or class of persons;*
- c) *A person acting in the public interest; or*
- d) *An association acting in the interest of one or more of its members.*

3) *The Chief Justice shall make rules providing for the court proceedings referred to in his Article, which shall satisfy the criteria that;*

- a) *The rights of standing provided for in clause (2) are fully facilitated;*
- b) *Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;*
- c) *No fee may be charged for commencing the proceedings;*
- d) *The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and*
- e) *An organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.*

4) *The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.*

13. Arising from the above the counsel submitted that the Petitioners moved this court once their rights were threatened and/or violated by the Respondents herein. The counsel pointed out that the assertion by the Respondents that their immunity as provided for under Section 11 of the County Assemblies Powers and Privileges Act cannot surpass the provisions of the Constitution.

14. Having read the Preliminary Objection and the rival submissions filed by the counsel on record for the parties, I am of the view that the issue for determination is whether this court has jurisdiction to grant the orders sought. In grounds 20 and 22 upon which the application is predicated on, the Petitioners concede that the 1st Respondent and members of the 1st Respondents Environmental and Climate Change Committee visited the suit property and that it was the 1st Respondent who identified the said property to the 1st Respondent's committee. The Petitioners complains that they were not served with a written notice prior to the visit by the 1st Respondent and the members of the 1st Respondent's environment and Climate Change Committee. Whereas that may be so, it is clear that the 1st Respondent has already commenced proceedings to address the complaints reported to it by the 2nd Respondent who in turn received the same from the members of public.

15. The issue is, should the court gag the 1st Respondent from carrying its mandate as provided for by the Constitution and the statute? My answer to this question is certainly in the negative in view of Article 196(3) of the Constitution and Section 11(1) and (2) of the County Assemblies Powers and Privileges Act No. 6 of 2017. However, as was held in the case of **Mumo Matemu -Vs- Trusted Society of Human Rights Alliance and 2 Others [2013] eKLR**, that does not mean that the Petitioner cannot challenge the decision to be made by the 1st Respondent over the dispute. As it were, the 1st Respondent has the power and privilege to carry out its mandate as provided for the Constitution and statute.

16. I do note that the Respondent have only raised this preliminary objection in respect of the application and not the petition.

17. This court therefore lacks jurisdiction to grant the orders sought. The upshot of the foregoing is that the preliminary objection has merits and the application dated 2nd March, 2020 is struck out with costs to the Respondents.

Signed, dated and delivered at Makueni via email this 13th day of **September, 2021**.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi