



**Hoko and Shalete Shallow Wells Co-operative Society Limited & another v
Wajir Water, Sewerage & Sanitation Company Limited & 3 others (Petition
E009 of 2021) [2024] KEHC 15470 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E009 OF 2021
JN ONYIEGO, J
DECEMBER 6, 2024
IN THE MATTER OF CONTRAVENTION OF NATIONAL VALUES
AND
PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10 AND ECONOMIC AND
SOCIAL RIGHTS UNDER ARTICLES 43 OF THE CONSTITUTION OF KENYA, 2010
AND
UNDER RULES 3,4(1),8 AND 10 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

**HOKO AND SHALETE SHALLOW WELLS CO-OPERATIVE SOCIETY
LIMITED 1ST PETITIONER**

LAN BIB SOUTH - LOCATION COMMITTEE 2ND PETITIONER

AND

**WAJIR WATER, SEWERAGE & SANITATION COMPANY
LIMITED 1ST RESPONDENT**

WORLD BANK - KENYA OFFICE 2ND RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

WATER RESOURCES MANAGEMENT AUTHORITY 4TH RESPONDENT



JUDGMENT

1. The petitioner instituted this suit by way of a petition dated 18.10.2021 filed together with a notice of motion of even date seeking for orders that:
 - i. A declaration that the respondents have jointly and severally breached the rights and fundamental freedoms of the residents of Lan Bib south, Umbi, Rifed and Shalete of Wajir South within Wajir County under articles 10, 42, 43 and 70 of *the constitution* by drilling, funding and or allowing drilling of boreholes in their area without their participation and or consent.
 - ii. A permanent injunction restraining the 1st respondent from drilling, proceeding to drill and or operating the boreholes in Lan Bib south, Umbi, Rifed and Shalete of Wajir South within Wajir County.
 - iii. A mandatory injunction directing the 3rd and 4th respondents to stop the 1st respondent from drilling, proceeding to drill and or operating the boreholes in Lan Bib south, Umbi, Rifed and Shalete of Wajir South within Wajir County without the requisite licenses from the two state agencies.
 - iv. The cost consequent upon this petition be borne by the respondents jointly and severally.
 - v. The court do make such other or further orders as it may deem just and expedient in the circumstances to remedy and/or stop the violation of the fundamental rights and freedoms of the residents of Lan Bib south, Umbi, Rifed and Shalete of Wajir South within Wajir County.
2. Petitioners' case is pegged on the fact that the 1st respondent through the funding of the 2nd respondent embarked on drilling boreholes in Lan Bib South and the wider Wajir South under Contract No. KE-WAJWASCO – 226565 without carrying out public participation exercise in violation of the rights of the said residents as provided under article 10 constitution of Kenya. That before the commencement of the said project, consent of the residents was not obtained. Additionally, that the 1st respondent failed to carry out proper hydrogeological survey and environment impact assessment before embarking on the project. That the said drilling was done next to the traditional shallow wells of their forefathers thus creating a likelihood of the said wells drying up.
3. That the 2nd respondent is funding the project and thereby aiding and abetting the violations of the residents' rights. It was alleged that the 3rd respondent on the other hand prior to drilling the said boreholes failed to carry out an impact assessment report thus contravening articles 42, 43 and 70 of *the constitution*. It was urged that the 4th respondent failed its mandate of safeguarding and protecting the residents' rights to safe and sufficient water supply as provided under article 43, clean environment under articles 42 and 70 by allowing the 1st respondent to drill the said boreholes next to the residents' shallow wells.
4. The 1st respondent through its managing director, Ali Bashane swore an affidavit on 12.11.2021 deponing that the petition was brought before this court in bad faith. That the petitioners did not demonstrate how the 1st respondent violated their rights and specifically point the alleged infringements. It was averred that through Contract No. KE-WAJWASCO – 226565 which is a public document, the 1st respondent embarked on a project to provide clean, safe, and adequate water to the residents of Lan Bib South, Umbi, Rifed and Shalete areas of Wajir South within Wajir County. That as an organization, public participation was conducted before the tender was awarded. In the same



- breadth, it was averred that hydrogeological survey and environment impact assessment were also done before the said drilling was commenced.
5. To that end, it was urged that the petition was filed with ill motives meant to derail the project. This court was urged to strike it out for the reason that it lacked the requisite jurisdiction to ear the matter.
 6. The 4th respondent through Mr. Joseph Lang'at swore an affidavit on 17.11.2021 deponing that it is designated under the *Water Act*, 2016 as an agent of the National Government responsible for regulating the management and use of water resources in the country. That by virtue of that mandate, the Authority is empowered under section 12(d) of the Act to receive permit applications for water abstraction, water use and enforce conditions of those permits amongst others. It was averred that under section 40 of the Act together with Part II of the Water Resources Management Rules 2007, the same make provision for the manner in which applications for permits ought to be made to the 3rd respondent.
 7. That sometime in April 2021, they wrote to the 1st respondent informing it that it was legally required to apply for authorization and water permit assessment and approval before undertaking any water development activity. It was deponed that the 1st respondent informed the 4th respondent that it had begun regularizing their boreholes and to that extent, it furnished the 4th respondent with the Hydrogeological Assessment Report that was prepared and annexed to the application. It was stated that it only came to learn that the 1st respondent was yet to fully regularize the necessary documents required before commencement of the project. This court was therefore urged to allow the 4th respondent more time to enabled the 1st respondent act in accordance with the directives it had issued to it which required a 14-day period.
 8. The 2nd respondent filed a preliminary objection dated 14.07.2022 in response to the petition. The same was prosecuted and via a ruling delivered on 29.09.2023, the court in dismissed the suit against the 2nd respondent on grounds that there was no cause of action against them.
 9. Via a Notice dated 17.05.2023, the petitioners filed a notice to withdraw the suit against the 3rd respondent.
 10. The court gave directions that parties file and exchange their respective written submissions. The petitioners in their submissions dated 12.07.2024 came up with three issues for determination:
 - i. Whether public participation was undertaken before the project was implemented?
 - ii. Whether in implementing the project, the respondents acted in violation of articles 42, 43 and 69 of *the constitution*.
 - iii. Whether the necessary permits and licenses for the project were validly issued after due process.
 11. On the first issue, it was submitted that the 1st respondent embarked on drilling of boreholes under Contract No. KE-WAJWASCO – 226565 without carrying out public participation in violation of the rights of residents in Lan Bib South, Umbi, Rifed and Shalete areas of Wajir South within Wajir County in total disregard of article 10 of *the constitution*. That the consent of the residents was not obtained and their concerns were not taken into consideration. It was contended that drilling the said wells near the shallow wells owned by the residents would lead to the drying up of the wells in the area hence violating the rights of the residents.
 12. On whether, the respondents acted in violation of articles 42, 43 and 70 of *the constitution*, the petitioners urged that; the project violated the residents' rights to clean and healthy environment; the



- respondents failed to ensure whether the development was sustainable; whether it would conserve and not compromise the environment.
13. Lastly, it was contended that necessary permits were not acquired as stipulated by the law. That the lack of proper permits and licenses not only undermined the legality of the 1st respondent's actions but also posed substantial risks to the local environment and the socio-economic rights of the residents as initially detailed in the petition. Counsel opined that the absence of a proper hydrogeological survey exacerbated the potential negative impacts of the project thus necessitating a thorough review and immediate remedial action to rectify the procedural and legal deficiencies.
 14. It was urged that an environmental impact assessment being a critical examination of the effects of a project on the environment as it identifies both negative and positive impacts of any development activity, the respondents prior to commencing this project, did not carry out the same and therefore, it was only merited that the orders sought herein be granted.
 15. The 4th respondent filed submissions dated 10.09.2024 wherein it coined one issue for determination as to whether the petitioners are entitled to the reliefs sought. It was urged that the petition did not disclose any cause of action against it. To be precise, the 4th respondent stated that as at the time of filing this suit, it had not issued any approvals to the 1st respondent to drill as alleged. Additionally, it was stated that the petitioners did not demonstrate that the 4th respondent issued the said approvals or that the 4th respondent breached the rights and fundamental freedoms of the petitioners. Reliance was placed on the case of *Matalinga & Others vs Attorney General* [1972] E.A. 578 where the court held that: before a declaration can be granted, there must be a real and not a theoretical question in which the person raising it must have a real interest; and there must be someone with the present interest in supporting it.
 16. It was urged that this court ought not make orders in vain as the petitioners did not demonstrate they are entitled to the orders sought. This court was therefore urged to dismiss this petition with costs to the 4th respondent
 17. The 1st respondents did not file their submissions
 18. I have read and understood the pleadings before me. The main contention by the petitioners is that via Contract No. KE-WAJWASCO – 226565, without carrying out public participation in violation of the rights of residents in Lan Bib South, Umbi, Rifed and Shalete areas of Wajir South, the respondents embarked on a process of drilling wells near the shallow wells in the geographical areas of the said region. Additionally, that the required permits prior to commencement of such a project were not acquired as stipulated by the law.
 19. It was argued that the absence of a proper hydrogeological survey further exacerbated the potential negative impacts of the project necessitating a thorough review and immediate remedial action to rectify the procedural and legal deficiencies. Additionally, that the respondents did not carry out an environmental impact assessment yet the same was critical in determining the viability of such a project on an environment.
 20. Having laid bare, the background of the case and the nature of the orders sought, it is trite that in as much as no party raised the issue of jurisdiction in submission, the first respondent raised it although without specificity. However, a court can even suo moto still raise the same more so if the court is of the view that it is deficient of the jurisdiction it has been urged to assume. [See the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR] where Nyarangi J stated that jurisdiction is everything and without it a court must down its tools and move no further step.



21. It is trite that the jurisdiction of this court is stipulated under article 165 of *the constitution*. Equally, the Supreme Court in Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others (2012) eKLR while discussing the issue of jurisdiction rendered itself as follows:

“(68)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... 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...Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

22. The question is whether it is this court which has jurisdiction or the Environment and land court. It is worth noting that both courts can issue constitutional remedies prescribed under Article 23(3) of *the Constitution*. In the instant case, the petitioners’ contention is that the respondents did not conduct public participation before embarking on the water drilling exercise. In this respect, the two courts share jurisdiction.

23. However, there is more to it than the face value of the word public participation. The crux of the suit is drilling a bore hole without the requisite permit and approvals plus the impact assessment report from the necessary departments. Further, the petitioner contended that the project had an effect on the environment. With these three extra aspects, the predominant aspect or question of the petition is purely an environment matter which calls for ELC’s jurisdiction hence the lack of jurisdiction by the high court.

24. In the case of Thomas Mutuku Kasue vs Housing Finance Company Ltd (HFC) & Another [2021] eKLR Angote J quoted with approval the holding in Keter v *Ecobank Kenya Limited (Civil Case 16 of 2018)* [2022] where the court held that:

“The substratum of the suit relates to the legal charges and the subsequent statutory power of sale. The High Court has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the charge. In Thomas Mutuku Kasue vs Housing Finance Company Ltd (HFC) & Another [2021] eKLR the court held; The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

19. We are primarily dealing with a legal charge here and the subsequent statutory notice of sale, which is what the applicant intends to stop and which cannot be separated from the applicant’s claim of purchase, which in my view can be challenged in the High Court by opposing the creation of that legal charge and all allegations raised here can be ventilated there.



Having said so, I find that this Court based on the reliefs sought, and a red flag having been raised the earliest, that this Court lacks jurisdiction to proceed further to consider the claim as raised in the plaint and, in the same breath deal with the pending application for an injunction, I down tools.

25. In the instant case, the petitioners were dissatisfied with the fact that the respondents commenced drilling the boreholes without carrying out an environmental assessment impact on the viability of the project and not to mention other permits required before a commencement of such a project. In the same breadth, that there was no public participation before the same was launched. In my view therefore, the aforementioned issues project themselves as the predominant issues in the suit herein. In regards to the aspect of public participation, it is trite that a special court under article 162 can equally deal with issues of human rights and as such, it is not the duty of the High court to solely deal in such. [See *Murungi v Attorney General & 2 others (Environment and Land Constitutional Petition E007 of 2023)* [2024].
26. Clearly, the issue raised herein ought to have been raised before the court with the right jurisdiction to determine the concerns of the petitioners. Having noted as above, it is my view that this court lacks jurisdiction to determine the suit herein and therefore, it must down its tools. To that extent, I need not delve into the merits of the petition as that will be the duty of the trial court with jurisdiction. Accordingly, this court is under obligation to down its tools and therefore strike out the suit with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE

