



IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC PETITION NO. E040 OF 2021

IN THE MATTER OF ARTICLES 2, 10, 19, 22, 23, 35, 40, 42, 47, 70, 162, (2), (b), & 165 (3) (b) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT

ACT (NO.19 OF 2011)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

VALENTINE ODHIAMBO.....1ST PETITIONER

IRENE WAIGI.....2ND PETITIONER

NELSON MUNENE.....3RD PETITIONER

=VERSUS=

HF DEVELOPMENT & INVESTMENT LTD.....1ST RESPONDENT

NAIROBI CITY WATER AND SEWAGE COMPANY.....2ND RESPONDENT

RULING

Background

1. The 1st Respondent in this case filed a notice of preliminary objection dated 4th November 2021. The objection seeks that the petition herein and the Notice of Motion application dated 15th October 2021, filed by the petitioners be struck out. The objection raises 3 issues, namely

- a) The petition discloses no constitutional issue. It merely attempts to constitutionalize an ordinary civil dispute.*
- b) The petition offends the doctrine of constitutional avoidance by seeking application of the Constitution to matters fully addressed by statute.*
- c) The petition offends the doctrine of exhaustion in so far as it relates to the supply of water, in light of sections 92 and 121(2) of the Water Act, No.43 of 2016.*

Court's Directions.

2. The court directed that the preliminary objection be heard first and that it be canvassed by way of written submissions. All the parties

complied and filed their submissions.

Submissions by the parties.

3. The 1st Respondent's submissions in support of the preliminary objection are dated 10th November 2021. The 1st Respondent submits that the issues raised by the Petitioners though genuine are not constitutional. The first Respondent cites a number of authorities in support of its position. The position of the 1st Respondent is that the petition here is a trivialization of the constitutional jurisdiction of the Court. It laments that if the Constitution is allowed to be misused to the extent of collecting contractual service charge or billing for water supplies, then we might as well scrap the civil jurisdiction of the first instance courts. The 1st Respondent relied on the following authorities;

a) Earnest Muga Vs Attorney General (2018) eKLR

b) Sumayya Athmani Hassan vs Paul Masinde Simidi & another [2019] eKLR

c) Kenya Builders & Concrete Company Ltd Vs National Government Constituency Development Fund Committee Embakasi South & Another (2017) eKLR.

d) Garder General Trading Ltd Vs County government of Kilifi Department of Land, Housing & physical Planning and Another (2018) eKLR.

e) Margaret Bashforth Vs Woburn Estate Ltd & Another (2021) eKLR.

4. The 1st Respondent further submitted that the petition offends the exhaustion doctrine. This is in regard to the claim against the 2nd Respondent – Nairobi Water & Sewerage Company Ltd. The 1st Respondent expressed the opinion that the water Act, No. 43 of 2016 provides an adequate mechanism for resolution of disputes between water consumers and the water services provider citing the case of **CNM Vs WMG (2018) eKLR.**

5. The 1st Respondent submitted that where there is a clear well laid down procedure for redress of a particular grievance prescribed by either the constitution or statute, that procedure should be strictly followed.

Submissions by the 2nd Respondent

6. The 2nd Respondent supports the Preliminary Objection raised by the 1st Respondent. The 2nd Respondent cited the Supreme Court in petition No. 14 of 2014 **Communication Commission of Kenya Vs Royal Media Service Ltd & 5 Others.** In the petition, the Court defined, the principle of avoidance also known as "**Constitutional avoidance**".

7. The principle of avoidance entails that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. The supreme court quoted with approval, the South African case in S vs Mhlungu, 1995 (3) SA 865 (CC) where Kentridge A.J articulated the principle of avoidance as follows:-

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed".

8. The 2nd Respondent invited the Court to decline to hear this petition as the dispute herein is capable of being resolved by other means other than the present litigation. The dispute is more of a civil nature than constitutional. The Respondent further relied on the case of **COD and Ano Vs Nairobi City water & Sewerage Company (petition 419 of 2015 (2015) eKLR.** In the said case, the Court held that the Constitution cannot be used as a general substitute for normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the High court under article 163. The Court sitting as a constitutional Court must through the doctrine of avoidance steer clear of determining disputes as if there were constitutional questions being raised.

9. On the question of the exhaustion doctrine, the 2nd Respondent argues that the Water Act has sufficient mechanisms to redress water disputes.

Petitioners' Submissions

10. The Petitioners contended that their petition raised proper constitutional issues. Their petition is based on articles 35, 42 and 70 of the Constitution. They justify their petition with the provisions of article 70 of the constitution which provides that one does not need to demonstrate that any person incurred or suffered injury.

11. Further, the petitioners expressed the view that they were entitled to file a petition for redress even if the other legal remedies are available to them. They argued that the Environment and Land Court had the jurisdiction to determine their issues as presented in the form of a constitutional petition.

12. The petitioners went ahead to identify some of the constitutional issues in their petition. Number one being the failure by the 1st Respondent to put measures to prevent accidents to the residents of the estate. The right to supply clean water in adequate quantities had also been violated by the 2nd Respondent; but due to inaction by the 1st Respondent. They cite the right to information under article 35 of the

constitution too.

13. In view of all the grievances cited, the petitioners argued that a constitutional petition was the only forum available to the petitioners to ventilate their grievances against the Respondents.

14. The Petitioners further submit that, even if the court were to find that the dispute ought to have been ventilated in an ordinary civil suit rather than through a constitutional petition, the finding would not take away the Court's jurisdiction to adjudicate over the issues. In the interest of saving judicial time and in line with the provisions of article 159 of the Constitution, the court should proceed to hear and determine the petition. The petitioners' position was that justice should be administered without undue regard to procedural technicalities.

15. The petitioners referred the Court to the **Machakos High Court petition 13 of 2020, Martin Lemaiyan Mokoosio & another Vs Reshmaprafal Chandra Vadera & Another**. In that case, Justice Odunga expressed the view that; - *'the mere fact that a matter that ought to have been brought as an ordinary suit is framed as a constitutional petition, does not thereby deprive the Court of jurisdiction to entertain the same. The court may frown upon that course and may even strike it out for being an abuse of the process but that does not make it a jurisdictional issue'*.

16. On the 2nd issue, the petitioner's state that they have no business contract with the 2nd Respondent hence the Water tribunal established under the Water Act would not have the jurisdiction to determine their dispute with the 2nd Respondent, if any. Furthermore, their dispute is with the 1st Respondent.

17. Finally, the Petitioners in response to the 1st Respondent's submissions argue that there is no other mechanism they could have used to ventilate their issue of provision with clean water by the 2nd Respondent other than filing a constitutional petition as they did. Their issues cannot be determined in an ordinary civil suit.

Issues for Determination

18. The issues for determination are clearly spelt out in the preliminary objection by the 1st Respondent. For purposes of this ruling, the court will consolidate grounds 1 & 2 of the preliminary objection hence determine the issues as follows: -

a) Whether the petition offends the doctrine of constitutional avoidance by attempting to constitutionalize an ordinary civil matter.

b) Whether the petition offends the doctrine of exhaustion so far as it relates to the supply of water, in light of section 92 and 121(2) of the Water Act.

Analysis and Determination.

A. Whether the petition offends the doctrine of constitutional avoidance by attempting to constitutionalize an ordinary civil matter.

19. The petitioners in their petition bring to the fore an emerging trend in the housing sector. Estate developers have popularized the concept of gated communities in this country. The Estate developers built multiple residential housing units in an enclosed area that is accessed through controlled entrances often characterized by a closed perimeter fence. They have various shared amenities and common areas. For the purposes of maintaining the common areas and shared amenities they usually establish a Management Company. The residents pay a service charge periodically to the Management Company for the purposes of the shared services, maintenance of common areas and the other amenities.

20. This is the kind of arrangement the petitioners are in. Only that in their case, the Management Company which would have been responsible for taking care of the shared services, common areas and other amenities is yet to be established. The reason being that the Estate Developer is still on site or rather has not completed all the phases in the project. The project is not complete in simple terms. The Estate Developer who is the 1st Respondent in this case is therefore the one still in charge of the responsibilities that would have otherwise been undertaken by the Management Company.

21. It is imperative to establish how the petitioners and the Respondents came together in order to answer the 1st issue for determination. The answer is to be found in the petition and the supporting affidavit and verifying affidavits.

22. From the supporting affidavit sworn by Valentine Odhiambo on 15th October 2021, I gather the following information:-

a) That the Petitioners who have constituted themselves into an association known as Komarock Heights Owners Association are purchasers of houses from the 1st Respondent.

b) The 1st Respondent made representations to the petitioners that the houses sold to them were structurally sound and fit for habitation.

c) The Petitioners aver that the houses sold to them are structurally defective posing danger to life and limb of the petitioners.

d) The 1st Respondent had undertaken to finish the remaining project works as part of ensuring the safety of the petitioners in

the estate known as Komarock Heights.

e) That the 1st Respondent was in charge of common services to the petitioners including water, electricity, light security of common areas, cleaning common areas among others.

f) That the petitioners have been paying service charge to the 1st Respondent for purposes of (2) above.

g) That the 1st Respondent has failed in their responsibilities exposing the petitioners to various risks.

23. The Petitioners in their petition pray for various orders including declaration that their rights have been infringed by the Respondents, general damages, an order directing the Petitioner to complete the pending project works amongst others.

24. From the analysis of the Petition, it is clear to my mind that the Petitioners and the 1st Respondent are in a contractual relationship. The 1st Respondent as the seller of the housing units has contractual obligations and made representations to the petitioners which they have failed to perform or fulfil to the satisfaction of the Petitioners, thereby jeopardizing their welfare as home-owners. The petitioners by filing this petition seeks to compel the 1st Respondent to perform its contractual obligations. The real dispute herein is between the petitioner and the 1st Respondent.

25. The 2nd Respondent is a water services provider. As the petitioners have pleaded in their petition, it is the default by the 1st Respondent in paying the water bills that has led the 2nd Respondent to disconnect water supply to the Estate. Default has also led the interested party to discontinue cleaning services.

26. The 1st Respondent's objection which is supported by the 2nd Respondent is that the Petition offends the doctrine of constitutional avoidance. In so doing, the 1st Respondent referred to the Supreme Court decision in **Communications Commission of Kenya and 5 Others vs Royal Media Services Limited & 5 Others** (Supra). The Supreme Court held that the principle of avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition.

27. This Court agrees with the submissions of the 1st Respondent which are supported by the 2nd Respondent. The petition by the Petitioners herein is nothing more but a claim for breach of contract, merely clothed and framed in the 'Bill of Rights Language'.

B. Whether the petition offends the doctrine of exhaustion so far as it relates to the supply of water, in light of section 92 and 121(2) of the Water Act.

28. The 1st Respondent's submission in regard to this issue is that the Water Act has sufficient mechanisms to redress water disputes. The Petitioners' rejoinder was that they have no business contract with the 2nd Respondent, hence the Water Tribunal established under the Water Act would not have the jurisdiction to determine their dispute with the 2nd Respondent. The Petitioners categorically state that, "furthermore their dispute is with the 1st Respondent".

29. The doctrine of exhaustion was explained by the Court of Appeal in the case of **Geoffrey Muthiga Kabiru & 2 Others vs Samuel Munga Henry & 1756**

Others (2015) eKLR. The Court stated that:-

"It is imperative that where a dispute resolution mechanism exists

outside courts, the same be exhausted before the jurisdiction of courts is invoked."

30. The Court of appeal in upholding the doctrine of exhaustion as a sound doctrine expressed the view that Courts ought to be a fora of last resort and not the first port of call any time a dispute arose.

31. On the jurisdiction of the Water Tribunal established under the Water Act, this Court agrees with the Petitioners that it would not have the jurisdiction to determine any dispute (if any) between them and the 2nd Respondent. Section 121 of the Water Act, 2016 stipulates the jurisdiction of the Tribunal. First and foremost being to handle appeals from the decisions of the Cabinet Secretary, the Authority and Regulatory Board or any other person acting under their authority. Secondly, the Tribunal shall hear and determine any dispute concerning water resources or water services where there is a business contract and where parties have not otherwise agreed on alternative dispute resolution mechanism.

30. Accordingly, the 2nd Limb of the preliminary objection by the 1st Respondent fails for lack of merits.

32. The Court wishes to express itself on the issue of costs. Although the Court rules that the petition offends the doctrine of Constitutional avoidance, and will indeed proceed to strike it out for being an abuse of the process of Court, it does not mean that the Court does not have the jurisdiction to adjudicate over the issues between

the Petitioners and the Respondents when they are brought in the proper form. The Court agrees with the statement by Odunga J in the **Martin Lemaiyan Makoosio** Case (Supra). The Court's finding is only that the dispute ought to have been brought as an ordinary Civil Suit not a constitutional petition. For this reason the Court will not condemn the petitioners to pay the costs of the suit. The striking-out has also happened early enough even before the close of pleadings.

Conclusion

32. The upshot is that;-

(a) *The Court upholds points 1 and 2 of the 1st Respondent's **Preliminary Objection. Point 3 of the preliminary objection is disallowed.***

(b) *The Petition and the Notice of Motion dated 15th October, 2021 **be and are hereby struck out.***

(c) *Each party shall bear its own costs.*

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2021.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Kamwaro for the Petitioners

Mr. Kongere for the 1st Respondent

Ms. Nyabuto for the 2nd Respondent

Court Assistant: Hilda

M.D. MWANGI

JUDGE