



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO. 16 OF 2015

IN THE MATTER OF: ARTICLES 1, 2, 3(1), 10, 22(1), 23, 27, 35, 47, 174, 176(2), 185(4)(b), 196(1) and 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: RULES 3, 4, 10, 11, 13, 20 AND 23 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013.

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 35(1)(b), 40, 47, 60, 64(b), 175(b), 176(2), 184(1)(c) AND 196(1) OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT AND THE NYERI COUNTY REVENUE ADMINISTRATION ACT, 2014

AND

IN THE MATTER OF: THE VALUE FOR RATING ACT, CAP 266 AND THE RATING ACT CAP 267

AND

IN THE MATTER OF: INCREMENT OF LAND RATES

AND

IN THE MATTER OF: THE ATTACHMENT OF HOUSE RENT BY THE COUNTY GOVERNMENT OF NYERI

BETWEEN

PETER WACHIRA WARURU.....1ST PETITIONER

JOSEPH BENARD NDUNGU.....2ND PETITIONER

MARTIN NGETHA NGATIA.....3RD PETITIONER

MICHAEL GATHUNGU KAHUTHU.....4TH PETITIONER

JACINTA WANJIRU KARUGU.....5TH PETITIONER

LUCY WANJUGU GITONGA.....6TH PETITIONER

LYDIA WANJIKU WAMBUGU.....7TH PETITIONER
PRISCILLA KIUMBIRO MURIITHI.....8TH PETITIONER
GRACE WANJIRU NDIRITU.....9TH PETITIONER
GLADWELL WAMBUI GACHANGA.....10TH PETITIONER
DADSON GITUTO MAINA.....11TH PETITIONER
PETER KINGORI NGUMBI.....12TH PETITIONER
CHARLES KIRERA KARIUKI.....13TH PETITIONER
PAUL WACHIRA KARANJA.....14TH PETITIONER
LIVINGSTONE NGUTHIRU NGATIA.....15TH PETITIONER
LYDIA NJOKI WANJOHI.....16TH PETITIONER
JAMES MURIITHI KIMOTHO.....17TH PETITIONER
GLARACE GATHONI MURIUKI.....18TH PETITIONER
REUBEN MWANIKI GITUNJA.....19TH PETITIONER
ALICE GATHIGIA KARIUKI.....20TH PETITIONER
BEATRICE MUTHONI MURIUKI.....21ST PETITIONER
BALDEV SINGH.....22ND PETITIONER
SERAH WANDIA NDERITU.....23RD PETITIONER
JOSHUA WERU ICHANG’I.....24TH PETITIONER
PETER WACHIRA MATHENGE.....25TH PETITIONER
JAMES KIHUNGU KAHIGA.....26TH PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF NYERI.....RESPONDENT

RULING

Brief Facts

1. By a Petition and Notice of Motion dated 30th June 2015 and filed in court on the same date, the 1st petitioners invoked **Articles 10, 12(1), 20(2), 22(1), 23, 35, 47(1), 165, 174 and 258(1) of the Constitution**. The petitioners thus seek the following prayers:-

a. A declaration that there was no proper proceedings by the respondent to adopt a new Valuation Roll for 2012 increasing the Land Rates payable by the petitioners as provided for under Sections 9, 10 and 11 of the Value for Rating Act, it breached the petitioners’ constitutional rights under Articles 10(2), 27, 35, 47(1), 48, 56(a) and 174 of the Constitution of Kenya, 2010 and the proceedings were therefore null and void for all intents and purposes;

b. A judicial review order of Certiorari to remove into this Honourable Court and quash the proceedings by the respondent approving the Valuation Roll for the impugned land rates;

c. An order for judicial review for Mandamus to remove into this Honourable Court and compel the respondent to restart the process of valuation, publication, and notification for revision of rates as set out in the Value for Rating Act in a more inclusive and participatory process by all people of Kiganjo Township/Nyeri County.

d. Costs of the petition.

The Petitioners' Case

2. Briefly the petitioners allege that the respondent revised plot rates payable to it upwards by more than 400% and without involving them contrary to the Valuation for Rating Act. No valuation of the parcels of land was conducted and no publication was done or notice issued and the petitioners state that the petitioners learnt of the new rates as they were paying rates. As such, the respondent is in breach of Section 9(2), (3) and (4), 10 and 11 of the Value for Rating Act.

3. Further, the petitioners aver that new rates are not sustainable in Kiganjo Township because the town has stagnated economically. The respondent ought to have carried out a valuation and collected the views of the petitioners which would have informed them of arriving at a less percentage increase.

4. Further, the petitioners have been forced to pay the new rates plus penalties and the respondent has issued notices of attachment of rent to the tenants of the petitioners requiring them to pay their monthly rent in account number xxxxxxxxxxxxxx Equity Bank, Nyeri, starting 1st July 2015.

5. It is the petitioners' case the acts by the respondent are illegal and breach the petitioners and the residents of Kiganjo Township of their constitutional rights to a fair and administrative action and the right to participate in determining matters affecting their livelihood and economy.

The Respondent's Case

6. Precisely, the respondent contends that the petitioners do not need to be notified when preparing a valuation pursuant to section 3 of the Valuation for Rating Act. The respondent only needed the approval of the Minister for Local Government which approval it obtained vide Gazette Notice Number 12590. The respondent adds that it carried out a valuation before any increase in land rates. Further, the respondent invited any grievances by the public on the Draft Valuation Roll which was to take effect from January 2012. The respondent did this by sending a notice in the newspaper dated 23rd November 2012 and a Gazette Notice 17654. Despite these notices, no grievances were articulated and thus the petitioners cannot after 4 years object to the new rates when they did not exercise their right to present any objections to the said rates.

7. The respondent adds that it invited members of the public to a public meeting to be held on 28th April 2015 to air their grievances when the respondent was implementing the Draft Valuation. However, the petitioners did not attend the said meeting nor were there any grievances raised. The respondent further contends that the petitioners were given sufficient avenues to raise their grievances which they did not and it would be unfair to the other ratepayers within the county to accord special treatment to the petitioners in this case.

8. The petitioners filed a Supplementary Affidavit dated 27th October 2015 and stated that there is no law which excluded the consultation and inclusion of the petitioners in coming up with the Valuation for rates Roll.

9. The respondent filed a Further Replying Affidavit dated 23rd November 2015 stating that there was a Judicial Review Application No. 6 of 2013 before this court touching on the same issues and thus the respondent averred that it would raise a preliminary objection to the present petition. The respondent added that the Valuation Roll has been in force since 2012 and there was no good reason of upstaging the same.

10. The respondent subsequently filed a Notice of Preliminary Objection dated 16th February 2021 in which it states that the court has no jurisdiction to determine this matter; that the petition raises issues of a commercial dispute and not constitutional issues; the petition does not raise violation of any specific rights as required and that the petition is misconceived and incompetent.

11. Parties hereby disposed of the preliminary objection by way of written submissions.

Respondent's Submissions on the Preliminary Objection

12. The respondent submits that the from perusal of the petition, it discloses that it is about land rates under the Rating Act, the Valuation of Rating Act, the Draft Valuation Roll 2012 and imposition of land rates for rateable property in Nyeri County and therefore the court to determine the matter herein would be the Environment and Land Court. The respondent relies on **Section 13(2)(a) of the Environment and Land Court Act No. 19 of 2011, Article 162(2)(b) of the Constitution of Kenya** and the case of **Republic vs Karisa Chengo & 2 Others [2017] eKLR**. The respondent urges the court to down its tools and strike out the petition.

Petitioners' Submissions on the Preliminary Objection

13. According to the petitioners, the respondents infringed on their constitutional rights by not adhering to **Articles 10, 35(1)(b), 40 and 47 of the Constitution** as they were not afforded the right to publicly participate in the process of the increased land rates. Further, the notice was not circulated widely as required because it was placed in the People's daily newspaper which does not circulate widely within Nyeri.

14. The petitioners contend that this Honourable court has the jurisdiction to determine the matter as their case touches on the infringement of their constitutional rights. This principle is enshrined in Article 165(3)(b) of the Constitution of Kenya and the cases of **Lipisha Consortium Limited & Another vs Safaricom Limited High Court of Kenya at Nairobi, Constitutional Petition No. 512 of 2015 [2015] eKLR and Attorney General & Another vs Uasin Gishu Memorial Hospital Limited & Another [2021] eKLR**. The petitioners further contend that the court should not take the drastic step of striking out the petition in the event the court finds that it has no jurisdiction.

The petitioners thus urge this honourable court to transfer the matter to the appropriate court.

Issues for determination

15. On perusal of the petition, application and the submissions, there arises one main issue for determination:-

- a. Whether this Honourable Court has jurisdiction to hear and determine the issues raised herein;

The Law

16. A preliminary objection is a point of law when if taken would dispose of the suit. The Respondent's preliminary objection fits the definition of a preliminary objection as per the leading case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. 696** where Law JA held:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

17. The locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows:-

“I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

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18. Similarly in the case of **Owners and Masters of the Motor Vessel “Joey” vs Owners and Masters of the Motor Tugs “Barbara” and “Steve B” [2007] eKLR** the Court of Appeal (Omolo JA, Tunoi JA (as he then was) Githinji JA) expressed itself as follows:-

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and 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 pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as this is done, the court should hear and dispose of that issue without further ado.”

19. Clearly, for the above decisions, if this court lacks jurisdiction, the matter will be at an end as this court will have to down its tools and take no further step.

20. A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011** stated thus:-

“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. This court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011. 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.”

21. **Article 165(3) of the Constitution** confers the High Court with jurisdiction and provides:-

(3) Subject to clause (5), the High Court shall have-

- a. Unlimited original jurisdiction in criminal and civil matters;**
- b. Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

22. While it is clear that High Court has jurisdiction to determine a question as to whether a right on fundamental freedoms has been infringed, it is instructive to note that the jurisdiction is subject to **Article 165(5) of the Constitution** which provides:-

(5) The High Court shall not have jurisdiction in respect of matters:-

- a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**
- b. Falling within the jurisdiction of the courts contemplated in Article 162(2).**

23. Pursuant to **Article 162(2) of the Constitution**, the **Environment and Land Court Act 2011** was enacted and in **Section 13** it confers the Environment and Land Court with jurisdiction as follows:-

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-

- a. Relating to environment planning and protection, climate issues, land use plannings, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- b. Relating to compulsory acquisition of land;**
- c. Relating to land administration and management;**
- d. Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and**
- e. Any other dispute relating to environment and land.**

24. Having restated the relevant law on jurisdiction, it is prudent to establish the crux of the instant petition. The bone of contention in the instant petition is that the new rates imposed by the respondent is unconstitutional and infringes on the petitioners rights since it is alleged that no meaningful public participation or consultations were held by the respondent. The petitioners thus contend that by implementing the new rates without following the constitution contravenes their fundamental rights and freedoms, specifically Articles 10, 35(1)(b), 40 and 47 of the Constitution.

25. The petitioners seek three prayers in this petition. Firstly; that a declaration to the effect that the acts of the respondents be declared null and void; secondly, that the said proceedings by the respondent be quashed, thirdly, that an order of mandamus be issued compelling the respondents to restart the process and allow participation of the petitioners.

26. Although the petitioners filed this petition as a constitution petition, they have not pleaded specific violations of their Constitutional rights but have extensively dwelt on the provisions of the Valuation Act alleging that its provisions were not complied with. It is my considered view that this petition does not pass the test of a Constitutional petition. A Constitution petition must plead specific violations of individual and fundamental rights under the Bill of Rights. The relevant principles were clearly set out in the case of **Anarita Karimi Njeru and Mumo Matemu case**.

27. Under Section 162(2) of the Constitution and Section 13 of the Environment and Land Court Act jurisdiction on issues relating to land and rates are within the exclusive jurisdiction of the Environment and Land Court(ELC). The matters before the court relate to the Valuation Act and ought to be determined by the ELC court.

28. The Petitioners made a plea that instead of dismissing this petition for want of jurisdiction, the petition ought to be referred to the right court for determination. On perusal of the petition and the prayers sought, I am of the considered view that this petition ought not to be referred to the ELC court. The Petitioners ought to draft fresh pleadings seeking for remedies that fall within the jurisdiction of the ELC court in the event that their suit will be successful.

29. Consequently, I find that this court lacks jurisdiction to determine this petition.

30. In my considered view, the preliminary objection has merit and it is hereby upheld.

31. The petition is hereby struck out with costs.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 15TH DAY OF JULY, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 15TH DAY OF JULY, 2021.