



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CONSTITUTION PETITION NO.17 OF 2015

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER CHAPTER 4 ARTICLES
27, 35,40,46,47,48 AND 50 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: CONTRAVENTION OF ARTICLES 10, 174, 196,199, AND 201

AND

IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION UNDER ARTICLES 158

AND

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

AND

IN THE MATTER OF: THE NYERI COUNTY PUBLIC PARTICIPATION ACT 2014

AND

IN THE MATTER OF: THE NYERI COUNTY GOVERNMENT ACT 2014

AND

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

BETWEEN

ROBERT GAKINYA NJAU.....1STPETITIONER

JACKSON NDERITU WANJAGE...2ND PETITIONER

VERSUS

THE COUNTY GOVT OF NYERI.....RESPONDENT

RULING

INTRODUCTION

1. The petitioners being aggrieved by the infringement of their constitutional rights by the respondent, filed this instant Petition and sought the following orders;

i. THAT thus Honorable Court be pleased to declare the following provisions of the Draft Valuation Roll 2012 and the Nyeri

County Revenue Administration Act unconstitutional and therefore void:-

ii. **THAT** this Honorable Court be pleased to declare the Nyeri County Revenue Administration Act 2014, unconstitutional and therefore null and void, for failure to comply with constitutional and legal requirements of public participation in the law making process as mandated under Article 196 and 199 of the Constitution and Section 3(f) and 87 of the County Government Act of 2012.

iii. A declaration that the Nyeri County Revenue Administration Act 2014 is discriminatory, oppressive and constitutes a constitutional breach of the petitioners' fundamental rights in its demand for rates under its schedules thereof; with the cost of living in danger of rising due to multiple and oppressive rates.

iv. Costs of the Petition.

2. The petitioner's claim is supported by the grounds on the face of the Petition and on the Supporting Affidavit sworn by the petitioner, Jackson Nderitu Wanjage on behalf of all the other Petitioners

3. In opposition to the Application and Petition the Respondent filed its Grounds of Opposition dated 16/10/2015, a Notice of Preliminary Objection dated 20/01/2021 and a Further Notice of Preliminary Objection dated 8/02/2021 touching on the jurisdiction of this court to determine the Petition;

4. At the hearing hereof the Objector was represented by learned counsel Mr. Wahome Gikonyo whereas the Petitioners were represented by learned counsels Mr. Nderi and Ms Lucy Mwai; the parties were directed to canvass the Preliminary Objection by filing and exchanging written submissions; hereunder is a summary of the parties respective written submissions;

OBJECTOR's CASE

5. The objector submits that the petition 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 rate able property in Nyeri County. Therefore the court that should determine such issues would be the Environment and Land Court. The objector relied on Section 13(2) (a) of the Environment and Land Act No.19 of 2011, Article 162 (2) (b) of the Constitution of Kenya and relied on the renowned case of **Republic vs Karisa Chengo & 2 Others [2017] eKLR**;

6. The objector further submitted that the Petitioners had no Petition to rely on as the matter was marked as settled vide the Consent Letter dated 27/12/2020. The objector urged the court to down its tools and to uphold the Preliminary Objection by striking out the petition. The Application dated 2/03/2021 should accordingly fail and be dismissed.

PETITIONER's CASE

7. In response the petitioners opposed the Preliminary Objection and submitted that this Honorable Court had jurisdiction to determine the matter as their case touched on the infringement of their constitutional rights. That the petition is not a dispute as to the rates, rents and valuation but these form the foundational basis of the infringement to their rights.

8. They submitted that the jurisdiction to entertain a constitutional petition rests with the High Court under Article 165(3)(b) as reinforced by Article 23 and that the provisions of a statute (Act No.19 of 2011) cannot oust the provisions of the Constitution;

9. The Respondents posed the question on whether the Environment and Land Court takes away the jurisdiction of this court to hear and determine the infringement or threat to or enforcement of the Bill of Rights, they too relied on the case of **Karisa Chengo (supra)** and submitted that the Environment and Land Court is not allowed by law to take up jurisdiction of matters specifically meant for the High Court which is the Constitutional Court meant to deal with such issues;

10. The Respondents also relied on the case of **Leisure Lodges Limited vs Commissioner of Lands and 767 Others (2016) eKLR** where the court held that there exists a duality of concurrent and co-ordinate jurisdiction between the two courts and prayed that in order to expedite the matter the court herein ought to hear and determine the petition.

ISSUES FOR DETERMINATION

11. After reading the parties rival written submissions this court has framed only one issue for determination;

i. Whether this court has jurisdiction to hear and determine the issues raised, whether to uphold the Preliminary Objection thus to strike out the Petition;

ANALYSIS

Whether this court has jurisdiction to hear and determination the issues raised; whether to uphold the Preliminary Objection and to strike out the Petition;

12. The Preliminary Objection herein relates to a point of law on jurisdiction which the objector contends has arisen from the pleadings by clear implication and therefore urged this court to down its tools as it has no basis for continuing with the proceedings as it is without jurisdiction;

13. The leading case law on Preliminary Objections is the renowned case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** where it was held as follows;

‘.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the 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.’

14. This court reiterates that the preliminary objection is on a point of law and is on the issue of jurisdiction which arises by clear implication from the proceedings and this court is satisfied that the objection fits into the definition as set out in the forgoing case of **Mukisa Biscuit (supra)**. The court finds that the objector raised the issue at the earliest opportunity.

It is trite law that a courts’ jurisdiction flows either from the Constitution or from legislation or both, this was also the holding in the case of the Supreme Court in the case of **Samuel Kamau Macharia vs KCB & 2 Others Civil Application No.2 of 2011** where it held that;

“...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”.

15. Jurisdiction is everything and when a court of law finds that it lacks jurisdiction that court will have to down its tools and take no further steps; this was the position that was held in the celebrated case of **Owners of the Motor Vessel ‘Lilian S’ vs Caltex Oil (Kenya) Ltd [1989] eKLR** where the court held as follows;

‘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....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.’

16. It is not disputed by both parties that Article 165(3) of the Constitution of Kenya 2010 confers jurisdiction upon this court. The Article 165 (3) reads as follows;

(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.

17. The above Article is clear on the jurisdiction as to the determination on the question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, it should be noted that this jurisdiction is subject to Article 165(5) which reads as follows;

‘(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).

18. The above mentioned Article 162(2) of the Constitution creates the Environment and Land Court. The Environment and Land Act No.19 of 2011 was thereafter enacted and at Section 13(2) jurisdiction is conferred on the Environment and Land Court and the section provides 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 planning, 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, choses in action or other instruments granting any enforceable interests in land; and

e. Any other dispute relating to environment and land.

19. The petitioners issues are on the breach or violation Articles 27, 35, 40, 46, 47, 48 and 50 of the Constitution and looking at the prayers sought it is quite obvious that the same are ancillary to the main issue of land rates, The petition therefore touches on issues of land rates which this court opines fall within the purview of Section 13(2) of the Environment and Land Act, the mere fact that the petition also raises constitutional violations and constitutional prayers this in itself cannot oust the jurisdiction of the Environment and Land Court and any contest to the issues touching on land rates is a preserve of the Environment and Land Court as provided by the Constitution and by Statute;

20. The principle that Environment and Land Court while dealing with disputes relating to environment and land can also deal with claims relating to breaches of fundamental rights associated with land rate issues was enunciated in the case of **ELC Case No.63 of 2017 Christopher Ngusu Mulwa & 28 Others vs The County Government of Kitui & Another**; the holding of the court was as follows;

‘Consequently and considering that a dispute to land or environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matter. The two courts cannot have concurrent jurisdiction in such matters because they are two distinct courts.’

21. This court reiterates that any contest to the issues touching on land rates is a preserve of the Environment and Land Court as provided by the Constitution and by Statute his court therefore lacks jurisdiction to hear and determine the Petition and the court best suited to canvass these issues would be the Environment and Land Court.

22. Although the objector had prayed for the striking out of the Petition and indeed this court has this very strong power and has also considered this option however. This inherent jurisdiction is drastic and should be exercised sparingly and with extreme caution. The court having interrogated the co-ordinate jurisdiction of the two courts and also having taken into consideration the age of the matter, that it has been in the corridors of justice for five years this courts view that it would be in the interest of justice if the court aimed at sustaining the Petition rather than terminating it by striking it out; therefore the Petition will be retained and will be forwarded to the Environment and Land Court for hearing and determination of the matter in the interest of justice.

FINDINGS & DETERMINATION

23. For the forgoing reasons this court makes the following findings and determinations;

- i. This court finds that this Honourable court lacks jurisdiction to hear and make a determination in the Petition. The Preliminary Objection is therefore hereby upheld;
- ii. The court best suited to canvass all the issues touching on the land rates and constitutional prayers is found to be an Environment and Land Court;
- iii. The Petition is hereby transferred to the Environment and Land Court for hearing and determination; and
- iv. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 16TH DAY OF SEPTEMBER, 2021

HON. A. MSHILA

JUDGE