



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 30 OF 2019

GEORGE MAKATETO.....1ST PETITIONER/APPLICANT

EXPORT PROCESSING

ZONE AUTHORITY.....2ND PETITIONER/APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....INTERESTED PARTY

RULING

1. This ruling relates to the preliminary objection dated 28.10.2019. filed by the interested party herein.
2. The gist of the preliminary objection is that the court has no jurisdiction to hear the petition in view of the provisions of Article 165(5) of the Constitution and section 13 of the Environment and Land Court Act No. 19 of 2011.
3. The court directed that the preliminary objection be canvassed vide written submissions. It is only the submissions of the interested party that are on record.
4. According to counsel for the interested party, the instant matter is an environmental prosecution and that the court with jurisdiction is the Environment and Land Court. The court was urged to dismiss the petition with costs.
5. It is trite law that a preliminary objection on a point of law must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
6. Discussing what constitutes a preliminary objection, Law JA in **Mukisa Biscuit Manufacturers Ltd vs. West End Distributors Ltd**(1969) E.A 696 at Page 700 said:-

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."

7. In the words of **Sir Charles Newbold P** at page 701, B:-

"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase

costs and, on occasion, confuse the issues, and this improper practice should stop.”

8. Having looked at the definition of a preliminary objection, the issue for determination is whether this court has jurisdiction to entertain the petition.

9. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the same, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **OWNERS OF MOTOR VESSEL “LILIAN S” VS CALTEX OIL (K) LTD [1989] KLR 1** that:-

“Jurisdiction is everything without which a court of law has no power to make one more step where a court of law 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 the moment it holds the opinion that it is without jurisdiction.”

10. According to the pleadings before the court, the crux of this matter is the prosecution of the 1st petitioner in relation to charges under the Environmental Management and Coordination Act (EMCA).

11. In law no court or person assumes jurisdiction. Jurisdiction is a creation of statute. In Kenya, all courts derive their power from the Constitution under Article 159. In selecting a court with power over the type of litigation, regard must be made to the enabling law which empowers such court to hear such a case. I say so because the dispute relates to an environment matter. It is not in dispute that Parliament enacted the Environment and Land Court Act that sets in details, the jurisdiction of the Court. This was in compliance with the constitutional imperative by dint of article 162(2) thereof. Section 13 of the Act outlines the jurisdiction of the court as follows:

13 Jurisdiction of the Court

1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

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 environmental 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 interest in land; and

e) any other dispute relating to environment and land.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court

5) Deleted by Act No. 12 of 2012

6) Deleted by Act No. 12 of 2012

7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

a) interim or permanent preservation orders including injunctions;

b) prerogative orders;

c) award of damages;

d) compensation;

e) specific performance;

f) restitution; or

g) declaration; or

h) costs

12. I am satisfied that the court clothed with jurisdiction to address the concerns of the applicant is the Environment and Land Court. The interested party's preliminary objection therefore has merit and must be allowed.

13. The interested party has sought for the dismissal of the petition. Even though this ought to be the ultimate result, I am of the view that a transfer of the matter to the court with the requisite jurisdiction is appropriate in the circumstances. There is no need to saddle parties with increased costs yet they will finally meet at the relevant court. Suffice to add that the matter herein relates to a petition over violation of rights and which might border on the public interest and which costs will be granted at the discretion of the court dealing with the matter. The overriding objective of the Civil Procedure Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and or affordable resolution of civil disputes governed by the Act. In the furtherance of this overriding objective, the courts are mandated to ensure the just determination of proceedings, **efficient disposal of business of the court, the efficient use of available judicial and administrative resources** and the timely disposal of proceedings at a cost affordable by the respective parties. I find it would be efficient to allow the case now pending before this court to be determined by the Environment and land Court. A transfer of the suit would be in the best interest of both parties.

14. To this end, the interested party's preliminary objection dated 28.10.2019 is allowed to the extent that the petition dated 16.10.2019 is hereby transferred to the **Environment and Land Court at Machakos** for determination. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 6th day of October, 2020.

D.K. Kemei

Judge