



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CONST. PETITION NO.6 OF 2018

IN THE MATTER OF ARTICLES 2(1), 3(1), 19, 20, 21, 22, 23, 27, 28, 42, 48, 50, 70 AND 165 (3) (b) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 24, 47 & 69 (i), (f) & (g) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 4, 5 AND 6 OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015

BETWEEN

JOB OTIENO.....1ST PETITIONER

OBUYA OLANG BERNARD.....2ND PETITIONER

MILTON OBOTE.....3RD PETITIONER

AND

SUKARI INDUSTRIES LIMITED.....1ST RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION.....INTERESTED PARTY

RULING

[1] In the Notice of Motion dated 9th September 2018, the applicants/petitioners i.e. **JOB OTIENO, OBUYA OLANG BERNARD** and **MILTON OBOTE**, seek orders of the court against the first respondent, **SUKARI INDUSTRIES LIMITED**, and the second respondent, **NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY**, to the effect that pending the hearing and determination of the petition dated 9th September 2018, the first respondent by itself or through its agents/servants/ employees or any person acting with its authority be compelled by a mandatory injunction to immediately stop the release of raw sewage into river kuja and to take measures to cure the pollution its caused in the said river by reckless discharge of the sewage therein

and also to compel the second respondent by a mandatory injunction to carry out an Environmental Audit at the first respondent's factory and the surrounding areas particularly to determine the effect of reckless discharge of the raw sewer into Kuja River and submit an immediate report to the court.

[2] The grounds in support of the application are in the body of the notice of motion and supported by the averments contained in a supporting affidavit deponed by the second applicant dated 9th September, 2018.

Grounds of opposition dated 17th September 2018 were duly filed by the first respondent together with a notice of preliminary objection dated 17th September 2018.

The Ethics and Anti-Corruption Commission (EACC) is enjoined in the petition as an Interested Party.

Both the second respondent and the interested party are yet to put in their respective responses to the petition and/or application.

[3] Nonetheless, this court did on the 29th September 2018, direct that the preliminary objection be heard in priority to the notice of motion and in that regard parties were allowed to file their respective submissions on the objection.

Accordingly, submissions dated 25th November, 2018 were filed by applicants through **H. Obach & Partners Advocates**, while those of the first respondent dated 26th September 2018, were filed through **Olendo, Orare & Samba Advocates LLP**.

The second respondent's submissions dated 22nd October 2018, were filed by **Cynthia Sakami Advocate**, but no submissions were filed by the Interested Party.

[4] The preliminary objection seeks to have the notice of motion and the entire petition struck out with costs on grounds that:-

i) This court has no jurisdiction to hear and determine this matter by dint of Article 162 (2) (b) of the Constitution of Kenya as the jurisdiction of this suit under the said provisions lies with the Environment and Land Court.

ii) This court further lacks jurisdiction to hear and determine this petition by dint of Section 125 and 126 (2) of the Environmental Management & Co-Ordination Act, which establishes the National Environmental Tribunal to hear and determine all environmental issues.

[5] The objection therefore pre-supposes that the dispute herein relates to matters of land and the environment falling within the domain of the Environment and Land Court or the National Environmental Tribunal and not certainly this High Court.

In arguing the preliminary objection, the first respondent cited several court decisions among them, **THE OWNERS OF MOTOR VESSEL "LILLIAN'S" –VS- CALTEX OIL (K) LTD., REPUBLIC –VS- KARISA CHENGO & OTHERS (2017) e KLR**, **LAW SOCIETY OF KENYA NAIROBI BRANCH –VS- MALINDI LAW SOCIETY & OTHERS (2017) E KLR**, **KENYA URBAN ROADS AUTHORITY –VS- MINISTRY OF ROADS & ANOTHER (2017) e KLR**, **RE- THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] e KLR** and **DAVID RAMOGI & OTHERS –VS- THE CABINET SECRETARY MINISTRY OF ENERGY & PETROLEUM AND OTHERS (2017) e KLR**.

[6] Several other decisions were cited by the second respondent in support of the objection.

In opposing the objection, the petitioners/applicants relied on the decisions in **JOHN KIPNG'ENO KOECH & OTHERS –VS- NAKURU COUNTY ASSEMBLY AND OTHERS (2013) e KLR**, **PATRICK MUSIMBA –VS- THE NATIONAL LAND COMMISSION & OTHERS NBI PETITION NO.613 OF 2014 found at (2016) e KLR** and **LEISURE LODGE LTD –VS- COMMISSIONER OF LANDS AND OTHERS (2016) e KLR**.

Clearly, all the aforementioned decisions of the superior courts in Kenya demonstrate that the subject of the jurisdiction of the High Court in matters of land and environment, employment and labour and also Corruption and Economic Crimes has been discussed fully in the highest forums of the judicial system and what has evidently emerged are conflicting decisions. However, the Supreme Court of Kenya (SOCK) being the apex court has clearly pronounced itself on the subject in a number of its decisions which other courts are bound to follow.

[7] In the celebrated case on the issue of jurisdiction i.e. **THE OWNERS OF MOTOR VESSEL LILLIAN'S –VS- CALTEX OIL (K) LTD** (supra), the Court of Appeal firmly stated that jurisdiction is everything and without it a court has no power to make one more step. It must down its tools in respect of the matter before it the moment it holds the opinion that, it is without jurisdiction.

The importance of any issue regarding jurisdiction cannot be under estimated and must always be considered first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the merits of any matter would be futile. (See, **AIR ALFARAS LIMITED –VS- PAYTHEON AIR CRAFT CREDIT CORPORATION & ANOTHER (2000) KLR 62**).

[8] In **KAKUTA MAIMAI –VS- HAMISI PERIS TUBIKO & OTHERS (2013) e KLR**, the Court of Appeal stated that:-

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned.

It is a threshold question and best taken at inception.

It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a desideration imposed on courts out of decent respect for economy and efficiency, and a necessary eschewing of a polite but ultimately futile

undertaking of proceedings that will end in barren cul de sac.

Courts like nature, must not sit in vain.”

[9] It is a settled fact that jurisdiction is a matter regulated by the constitution and statute law. This was aptly demonstrated by the Supreme Court in **RE-MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION** (supra).

Indeed, in **SAMWEL KAMAU MACHARIA & ANOTHER –VS- KENYA COMMERCIAL BANK AND TWO OTHERS SUPREME COURT CIVIL APPLICATION NO.2 OF 2011**, the jurisdictional frontiers within which courts of law must operate was set out in the following terms:-

“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”.

[10] So, would this court be arrogating itself jurisdiction which it does not have if it were to hear and determine this petition and the interlocutory application coming under it?

The respondents’ answer to the question would be in the affirmative but not the petitioners going by their rival arguments.

But, this court guided by the provisions of **Article 165** of the **Constitution** and the other provisions of the Constitution and those of the Fair Administrative Action Act under which this petition is founded would find it axiomatic that it is vested with the necessary jurisdiction to deal with this matter and cannot without good cause divest itself of the jurisdiction to hear and determine the matter in its entirety.

[11] Under **Article 165 (3) (a)** of the **Constitution**, this court has unlimited original jurisdiction in criminal and civil matters. This matter is a civil matter concerned with the **Bill of Rights** under **Chapter Four (4)** of the **Constitution** and this explains why **Articles 24** and **47** of the **Constitution** have been invoked by the petitioners together with the relevant provisions of the **Fair Administrative Action Act**.

Article 165 (3) (b) also confers jurisdiction to this court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Further, under **Article 23 (1)** of the **Constitution**, jurisdiction is granted to this court in accordance with **Article 165** to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

[12] Under **Article 258 (1)** of the **Constitution**, every person has the right to institute court proceedings, claiming that the Constitution has been contravened or is threatened with contravention. This is precisely what the petitioners are claiming and hence, this petition. Under **Article 259 (1)**, the constitution shall be interpreted in a manner that:-

- (a) Promotes its purposes, values and principles;
- (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.

[13] Clearly, the jurisdiction of this court to hear and determine this petition is cemented on all the aforementioned provisions of the Constitution. However, under **Article 165 (5)** of the **Constitution**, it would appear that the seemingly exclusive jurisdiction of the High Court is divested and shared with other courts of equal status i.e. the Environment & Land Court and the Employment & Labour Relations Court. The provisions provides that the High Court shall not have jurisdiction in respect of matters –

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

Under **Article 162 (3)**, parliament shall determine the jurisdiction and functions of the courts contemplated in **Clause (2)**.

[14] Accordingly, the jurisdiction of the Environment and Land Court is specified in **Section 13 (1)** of the **Environment & Land Court Act** to wit:-

“(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to head 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) -----
- (c) -----

(d) -----

(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 healthy environment under Articles 42, 69 and 70 of the Constitution.”

[15] It would therefore follow that the Environment and Land Court does also have the jurisdiction to deal with Constitutional issues relating to a clean and healthy environment. It is a court of equal status with the High Court and the Employment and Labour Relations Court and was established together with the Employment and Labour Relations Court for purposes of achieving specialization. The two are specialized courts of equal status but with distinct jurisdictions. They are not strictly speaking, the High Court, as status denotes hierarchy while jurisdiction involves the power of the court to deal with matters presented before it or as the Supreme Court stated in **Republic –vs- Karisa Chengo & others** (supra), that jurisdiction covers the sphere of the court’s operation and went on to re-affirm its position that the jurisdiction of the courts is derived from the Constitution or legislation as held in its decisions in **Re- The Matter of the Interim Independent Electoral Commission** (supra) and **Samwel Kamau Macharia & another –vs- KCB and others** (supra).

[16] In so far as this petition revolves around a “cocktail” of constitutional provisions some of which clearly fall under the jurisdiction of the Environment and Land Court, the jurisdiction of the High Court in a matter such as the present one would safely be described as “hybrid” as it is shared in some aspects with that of the specialized courts such as the Environment and Land Court. Both the High Court and the Environment and Land Court have a concurrent and/or co-ordinate jurisdiction on the Constitutional matters raised in this petition. (See, **Leisure Lodges Ltd –vs- Commissioner of Lands & others** (supra).

However, considering that the substratum of the petition are the constitutional provisions dealing with socio-economic rights and the right to a clean and healthy environment as well as the use and protection of the environment and natural resources and also taking into account the need to promote sustainable and consistent jurisprudence on environmental and usage of land matters as well as to have disputes arising from such matters efficiently, effectively

and expeditiously disposed of, this court hereby divests its jurisdiction to deal with this petition in favour of the Environment and Land Court.

[17] In sum, the preliminary objection is overruled in its entirety with an order that this petition and any interlocutory application made under it be and is hereby transferred to the Environment and Land Court at Migori for hearing and final disposal.

J.R. KARANJAH

JUDGE

07.03.2019

[Read and signed this 7th day of **March, 2019**].