



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 15 OF 2019

**IN THE MATTER OF: ARTICLES 2, 10, 22, 23, 40, 42, 47 AND 258 OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER THE ABOVE ARTICLES OF THE CONSTITUTION

AND

IN THE MATTER OF: EXPORT PROCESSING ZONES ACT, CAP 517 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: WATER ACT, 2016

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF: LEGAL NOTICE NO. 74 OF 1997 ISSUED UNDER KENYA GAZETTE

SUPPLEMENT NO. 42 PUBLISHED ON 6TH JUNE 1997

BETWEEN

EXPORT PROCESSING ZONES AUTHORITY.....PETITIONER

VERSUS

MAVOKO WATER & SEWERAGE COMPANY LIMITED....1ST RESPONDENT

NAIROBI WATER & SEWERAGE COMPANY LIMITED....2ND RESPONDENT

MINISTRY OF WATER & SANITATION.....3RD RESPONDENT

THE HONORABLE THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. This ruling relates to the preliminary objection dated 20th May 2019 that was filed by the 2nd Respondent in response to the petition.

2. The petitioner approached the court via undated certificate of Urgency filed on 7th May, 2019. Together with the certificate of Urgency was a notice of motion dated 7th May, 2019 filed under Articles 22 and 23 of the Constitution of Kenya 2010 as well as a petition and supporting affidavit filed the same day seeking injunctive reliefs listed in the said petition.
3. In response to the petition is a preliminary objection dated 20th May, 2019 objecting to the jurisdiction of the court to hear the instant matter as well as stating that the petition offends the sub judice rule and hence the suit should be dismissed.
4. The objection was canvassed vide written submissions that were highlighted on 25.6.2019. Learned counsel for the 1st Respondent vide submissions filed on 20th June, 2019 analysed the petitioners claim as two-fold: that is a claim for ownership of the water works done in the locus in quo and a claim to be a bonafide undertaker under the repealed Water Act 1997 vide legal Notice 74 of 1997. Learned counsel submitted that the water Act 2016 provides that disputes arising from the usage and management of water are adjudicated by the Water Tribunal as per Section 121(2) of the said act and that as per Section 124, appeals in respect of the decisions of the tribunal are to be heard by the Environment and Land Court. Learned counsel cited the case of **Mohammed Said v City Council of Nandi (2013) eKLR** where it was observed that the ELC was not precluded from entertaining disputes seeking for redress in respect of violation or infringement of or threats to the rights or fundamental freedom relating to clean and healthy environment under Articles 42, 69 and 70 of the Constitution. Counsel prayed that the suit be transferred to the appropriate forum.
5. Learned counsel for the 2nd Respondent vide submissions filed on 20th June, 2019 submitted that the definition of Land under Article 260 of the Constitution includes any body of water on or under the surface and natural resources completely contained on or under the surface and therefore constitutionalization of the claim does not give the court jurisdiction to hear it. Learned counsel cited the case of **David Ramogi & 4 Others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others (2017) eKLR** that spoke to the concern of filing suits as constitutional petitions in the High Court when they ought to have been filed on specialized courts and the court observed that the net effect of such stunts was a multiplicity of suits in various registries, possibility of duplication of judicial efforts and wastage of courts time. Counsel urged the court to dismiss the suit with costs for lack of jurisdiction.
6. Learned counsel for the petitioner vide unsigned submissions filed on 26th June, 2019 framed three issues for determination, *to wit*; whether the 2nd Respondent's preliminary objection is proper in law, whether the honourable court had jurisdiction to determine the instant petition and whether the 2nd Respondent is entitled to the reliefs sought. On the first issue, learned counsel submitted that the issue of jurisdiction can be inferred from the pleadings of the parties and the issue of jurisdiction cannot be ascertained by way of a preliminary objection. Therefore the objection cannot be sustained. On the 2nd issue, learned counsel submitted that the first basis for the petition is interference with the petitioner's right of use and ownership of the water infrastructure and the second basis is the respondent's alleged interference with the performance of the petitioner's duties as a water undertaker. Learned counsel cited the case of **Spree Club Limited v Medical Officer of Health, Uasin Gishu Government & Another (2019) eKLR** where the court found that the petitioners had not demonstrated that the cause of action is derived from land, use, title or occupation and the bone of contention was based on Section 151 of the Public Health Act that provided that basements are not to be occupied without permission.
7. According to counsel, the bone of contention in the petition raises wider constitutional issues and in this regard, Article 22(1) of the Constitution grants the petitioner right to institute court proceedings and under Article 23 the High Court has jurisdiction and further under Article 165 (3) (b) to determine the question whether a right has been infringed or threatened. Learned counsel urged the court to desist from piecemeal interpretation of the constitutional provision under Article 162(2) (b) and that the constitutional question is the interference with the petitioner's property rights in the water infrastructure and its statutory license as a water undertaker. *A fortiori*, that the said question is not related to a dispute over land as contemplated under Section 13(2) of the ELC Act. Learned counsel submitted that the principle of constitutional avoidance could not apply because the principle of exhaustion of alternative remedies was not absolute as per the case of **Okiya Omutata Okoiti v Commissioner General, Kenya Revenue Authority & two others (2018) eKLR**. Counsel submitted that striking out of a pleading would be too drastic a measure and that the court had inherent powers to transfer the suit to an equal status court as per the holding in **Pamoja Women Development Programme & 3 Others v Jackson Kihumbu Wangombe & Another (2016) eKLR**. Learned counsel concluded that the preliminary objection ought to be dismissed.
8. Arising from said objection, item one raises a question of law which touches the entire root of the trial. If what the 2nd respondent raises is found in the affirmative, then it has an effect of disposing of even the main petition. I will resolve the question raised by the respondent on whether the petition meets the jurisdictional threshold under Article 165(3) of the Constitution and in determining the same, it would be necessary to determine what is the cause of action in the matter before the court and this can only be established by the pleadings that are undisputed. Jurisdiction of Court can only be granted by law. If proceedings are conducted by a court without jurisdiction, they are a *nullity*. This was the case in **Desai v Warsaw (1967) EA 351**. Therefore any award or judgment arising from such proceedings of a Court without jurisdiction is also a *nullity*.
9. The jurisdiction of the High Courts is laid out in the **Article 165 of the Constitution**. Article 165(3)(a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that 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). Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land.
10. It is therefore clear that the High Court no longer has original and unlimited jurisdiction in all matters. Parliament enacted the Environment and Land Court Act and set out in detail the jurisdiction of the Court. 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

11. A reading of the petition as drawn reveals that the petitioner developed a water and sewerage project as part of its support infrastructure and was appointed as a water undertaker. The import of the same is that certain proprietary rights are alleged to have been acquired by the petitioner and the same rights are also alleged to be taken away by the 2nd Respondent and that the 1st Respondent interfered with the petitioner's statutory mandate to the detriment of the petitioner and to the programme. Relevant Articles of the Constitution have been identified and stated. The questions for the court at the hearing of the Petition will be whether what has been identified as constituting proprietary interest is "property" within the provisions of Article 40 and whether the same has been arbitrarily expropriated in contravention of Article 47 of the constitution. The petition seems to suggest that property for purposes of the petition is the water infrastructure that has been interfered with and that the petitioner is threatened by the risk of investors being scared away and that the immediate consequence is water shortage within the EPZ at Athi River. There arises a need to initiate an action for the petitioner to ventilate its grievances before the appropriate forum.

12. Looking at the petition, the question therefore is whether the petition filed by the petitioner was governed only by the Bill of Rights and the cited provisions of Article 22, 40 and 47 of the Constitution; the property in this case is the infrastructure, the grievance is with regards to the infrastructure formed as a result of the use of the property and the said infrastructure is water infrastructure. I am of the view that this was not an action based exclusively on Articles 22, 40 and 47 and hence the court does not have unlimited jurisdiction, but rather its jurisdiction is limited to the cited Articles 22, 40 and 47 whereas the bulk of the dispute cannot be handled by the court because the nature of remedies sought will involve the application of the Water Act and the requisite bodies that are set up for determination of the disputes. The injunctory orders sought shall not serve to resolve the substance of the grievance that the petitioner has; *qua*, they are inappropriate for there seems to be a need to remove and redirect water meters and or repair the water infrastructure and the nature of such orders are not

covered by the petition. In this regard I am of the considered view that the grievance can be better resolved by recourse to Statutory Land Law and Water Law. As pointed out in the beginning, the petitioner presented the petition as an ELC petition and indicated the same in the citation and on other pleadings has not indicated the same. I find the same to be an indication that the petitioner had in its mind to file the suit in the ELC court and in a move to get the best of both worlds has argued the matter before this court. Again the pleadings filed by the parties reveal the existence of other suits involving the parties before the ELC which are pending determination. Even if the petitioner's grievances revolve around violation of rights, the same can still be addressed by the ELC as it has jurisdiction to do so by dint of Article 162 (2)(b) of the Constitution.

13. I disagree with the petitioner that the petition is one where the court holds unlimited jurisdiction and it would be an error in law to arrogate the court jurisdiction in the petition. The effect of this finding is that the petition cannot stand as the court has no jurisdiction. The holding by Nyarangi J in **The Owners of Motor Vessel 'Lillian' "S" Vs Caltex Oil Kenya Ltd (1989) KLR 163** is still good law. The Court of Appeal 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.”

As has been noted from the pleadings herein, there appears to be other pending suits in which the parties are involved. Hence the filing of this matter before this court has the effect of introducing a multiplicity of suits which is not helpful at all to the parties in the end other than increasing costs. In the case of **Okiya Omtatah Okoiti v Communication Authority of Kenya & 21 others (2017) eKLR Odunga - J** held that it is important that the court demarcates its jurisdiction to deal with matters which are purely commenced as constitutional disputes and matters which are ordinary civil litigation since litigating civil disputes by way of constitutional petitions amounts to abuse of court process. The petitioner's petition as a whole raises issues which would be best resolved in other forums.

14. In the result it is my finding that the preliminary objection dated 20th May 2019 (paragraph (a)) thereof has merit. The same is allowed. The petitioner's petition dated 7th May 2019 is struck out. The conservatory orders earlier granted are discharged. Each party to bear their own costs.

It is so ordered.

Dated and delivered at **Machakos** this **4th** day of **July, 2019**.

D.K. KEMEI

JUDGE