



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CONSTITUTIONAL PETITION NO. 3 OF 2018**

**ALFRED JAMES MURIUKI (Suing as the Secretary General of**

**Embu Citizens Oversight Network).....PETITIONER**

**VERSUS**

**THE GOVERNOR EMBU COUNTY.....1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER**

**WATER IRRIGATION ENVIRONMENT AND**

**NATURAL RESOURCES EMBU COUNTY.....2<sup>ND</sup> RESPONDENT**

**EMBU WATER & SANITATION CO. LTD.....3<sup>RD</sup> RESPONDENT**

**AND**

**WATER SERVICES AND REGULATION BOARD.....INTERESTED PARTY**

**R U L I N G**

**A. Introduction**

1. This is ruling for the application dated 3<sup>rd</sup> June 2018 by the 1<sup>st</sup> & 2<sup>nd</sup> respondents who seek inter alia that there be a stay in this case and this court proceed to refer this matter to arbitration as per the Memorandum and Articles of the 3<sup>rd</sup> respondent.
2. It is the 1<sup>st</sup> & 2<sup>nd</sup> respondents' contention that the petitioner has not exhausted the dispute resolution mechanism as set out in article 117 of the Memorandum and Articles of the 3<sup>rd</sup> respondent and as such the current suit is pre mature.
3. In rejoinder, the petitioner filed grounds of opposition dated 19<sup>th</sup> October 2018 in which he states inter alia that arbitration cannot be used to solve constitutional matters and further that the Memorandum and Articles of Association of the 3<sup>rd</sup> respondent only establish dispute resolution mechanism as between the Company, Directors and shareholders of the company and not members of the public.
4. The 3<sup>rd</sup> respondents also filed their grounds of opposition to the application stating that the reference to arbitration offends the doctrine of constitutionality and that this court has original jurisdiction to determine the instant suit and finally that arbitration cannot be compelled in the current circumstances as it only avails on a mutual agreement of the parties.
5. The parties disposed of the application by written submissions.

**B. 1<sup>st</sup> & 2<sup>nd</sup> respondents' Submissions**

6. It is submitted that there is a clear arbitration clause binding between the parties, specifically article 117 of the Memorandum and Articles of Association of the 3<sup>rd</sup> respondent, herein and as such the matter should be referred to arbitration. Further it is submitted that there is a

dispute between the parties herein, one of interference with the 3<sup>rd</sup> respondent's affairs, and thus the matter should be referred to arbitration.

7. It is submitted that the application for referral to arbitration was made timeously in accordance with Order 46 Rule 1 of the Civil Procedure Rules and section 6 (1) of the arbitration act.

### **C. Petitioners' Submissions**

8. It is the petitioner's submission that a constitutional issue cannot be referred to arbitration. The petitioner further submits that the arbitration clause in article 117 of the Memorandum and Articles of Association of the 3<sup>rd</sup> respondent only applies where the dispute involves the company, the directors and members and that Article 165 (3) (b) gives the High Court sole jurisdiction to determine the question of breach, infringement or violation of a right or fundamental freedom as was held in the case of **Petition No. 466 of 2014, High Court of Kenya at Nairobi, Royal Media Services V The Attorney General & Others.**

### **D. 3<sup>rd</sup> Respondents Submissions**

9. It is submitted that the instant petition raises fundamental Human Rights infringement that can only be determined by the High Court which has original jurisdiction as was established in the case of **Benson L Vioya V George Wasonga & 3 Others [2012] eKLR.**

10. It is further submitted that as long as a matter is determined to be a violation of fundamental rights, then an arbitration clause shall not be used as a means to oust jurisdiction of the High Court as was held in the case of **David Kasika & 4 Others V Music Copyright Society of Kenya Limited & Another [2016] eKLR.**

11. The 3<sup>rd</sup> respondent further submits that arbitration cannot be compelled in the circumstances of this case as it only avails on a mutuality of agreement of the parties. Reliance is placed on the cases of Kenya **Pipeline Company Limited V Kenol Kobil Limited [2013] eKLR, Martin Otieno Okwach & Charles Ongondo Were T/A Victoria Clearing Services V Kenya Post Office Savings Bank [2014] eKLR,** and that of **Xxcel Africa Limited T/A Mathare United Football Club (MUFC) V Kenya Premier League Limited** where the courts in both instances held that court only refers matters arbitration where the parties consent to proceed thereto.

### **E. Interested Party's Submissions**

12. It is submitted that the arbitration clause cited by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is binding only upon members of the 3<sup>rd</sup> respondent and does not apply to the petitioner who is not a member of the 3<sup>rd</sup> respondent and as such staying proceedings in the instant case would deny the petitioner justice as was held in the case of **Muslims for Human Rights (MUHURI) V Municipal Council of Mombasa & Another [2018] eKLR.**

13. It is further submitted that the application dated 3<sup>rd</sup> June 2018 does not meet the criteria for stay of proceedings under section 6 of the Arbitration Act and that it is the High Court that has jurisdiction to determine questions of breach, infringement or violation of a right or fundamental freedom.

### **F. Analysis & Determination**

14. I have considered the issues raised in this application for determination by this court as twofold: -

*a) Whether this is the appropriate forum for the determination of this matter;*

*b) And if so, whether the application is merited.*

15. The 1<sup>st</sup> & 2<sup>nd</sup> respondent allege that the suit herein ought to be referred to arbitration by virtue of article 117 of the memorandum and articles of association of the 3<sup>rd</sup> respondent. All the other parties in this suit have filed pleadings in opposition to this position citing inter alia that the aforementioned article only applies to members of the 3<sup>rd</sup> respondent and that this court has original jurisdiction to entertain claims of breach of rights and fundamental freedoms and that parties can only be referred to arbitration where there is mutual consent among them.

16. In **Owners of Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Limited [1989] KLR 1** with regard to jurisdiction Nyarangi J.A expressed the importance of jurisdiction in the following terms:

*"I think that 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. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

17. The High court has very wide jurisdiction conferred by Article 165(3) of the Constitution. This provision of the Constitution, so far as is relevant for present purposes, is to the effect that subject to clause (5), the High Court shall have:

*"Unlimited original jurisdiction in criminal and civil matters;*

***Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

***Jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of:***

***The question whether any law is inconsistent with or in contravention with the Constitution;***

***The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;***

18. At Article 22, the Constitution grants to every person the right to institute court proceedings alleging violation or threat of violation of a right or fundamental freedom. Article 23 grant the Court jurisdiction, in accordance with Article 165, to hear and determine applications for redress of violations, infringement or threat of violation or infringement of constitutional rights.

19. I have perused article 117 of the Memorandum and Articles of Association of the 3<sup>rd</sup> respondent and note that it is clear that arbitration will be the appropriate forum where the dispute, ***“arise between the company and the directors on the one hand, and any of the members or their representatives on the other hand or between any member or classes of members or between the directors ...”*** It is not in dispute that the petitioner herein is not a member of the 3<sup>rd</sup> respondent. He is suing on behalf of the Embu Citizens Oversight Network in his capacity as the Secretary General.

20. It is noteworthy that this petition relates to the alleged violation of the petitioner’s constitutional rights. This is a claim that falls for determination by this court in exercise of its constitutional jurisdiction. Should the court find that the facts disclose a constitutional violation in the requirements of the Copyright Act, then it will give an appropriate remedy as mandated by law.

21. It is therefore my finding that this petition, in so far as it seeks determination of the question whether there has been a violation of the petitioner’s constitutional rights is properly before me this court and that this court is possessed of jurisdiction to deal with the petition. The application meets the threshold of a constitutional petition in m considered opinion.

22. The upshot of the above is that the application dated 3<sup>rd</sup> June 2018 lacks merit and is hereby dismissed. Costs in the cause.

23. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Wambui Gitau for 3<sup>rd</sup> Respondent**

**Ms. Wambui Maina for Kamwaro for the Petitioner**