REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CONSTITUTIONAL PETITION NO.4 OF 2019

IN THE MATTER OF ARTICLES 20, 22, 23, 29, 48, 50 AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE RULES, 2013

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 29 (a, b, c, d, e and f) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

CAROLINE AUMA OUMA...1ST APPLICANT

DISMAS OPINYA OBWAYA ....2ND APPLICANT

BERNARD OPIYO MUGA..3RD APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE

(OYUGIS LAW COURT) ....1ST RESPONDENT

THE HON. ATTORNEY GENERAL ....2ND RESPONDENT

MICHAEL OCHIENG OBWAYA ....3RD RESPONDENT

MARY ACHOLA OCHIENG ....4TH RESPONDENT

RULING

[1] The petition dated 8th July 2019 was filed herein by the three petitioners, **Caroline Auma Ouma** (first petitioner), **Dismas Opinya Obwaya** (second petitioner) and **Bernard Opiyo Muga** (third petitioner) against the four respondents, **The Principal Magistrate- Oyugis Law Courts** (first respondent), **The Hon. Attorney General** (second respondent), **Michael Ochieng Obwaya** (third respondent) and **Mary Achola Ochieng** (fourth respondent).

[2] In effect, the petitioners seek declaratory orders to issue against the respondents in the following terms:-

> "**That**, the first petitioner having not been a party to the suit mounted by the second and third respondents i.e. **Oyugis PMCC No.121 of 2017** and the two respondents having resisted the first petitioner's application to be joined in the suit and the court having declined to grant the application, then any attempt at enforcing and/or executing the resultant decree against the first petitioner is unconstitutional and illegal **and that** the second and third petitioners having been sued for acts carried out in the course of their official duties as chief and Assistant Chief – East Kamagak location and Kachieng sub-location respectively, the resultant judgment and decree in the case aforementioned is incapable of being executed against them individually and personally in contravention of Section 21 of the Government Proceedings Act, is unconstitutional and illegal and the Notice to show cause already served upon

them requiring their attendance in court on the **10th July 2019**, to show cause why they should not be committed to civil jail for non-payment of the decretal amount or any attempt at executing the resultant decree against the second and third petitioners individually or personally is null and void, unconstitutional and unlawful".

[3] The petition is based on the grounds set out in the petition as fortified by the supporting affidavit dated 8th July 2019, deponed by the first petitioner.

A Notice of Motion also dated 8th July 2019, was contemporaneously filed with the petition seeking interim conservatory orders of stay of execution of the judgment decree dated 28th November 2018 issued against the petitioners and the hearing of the Notice to show cause why the petitioners should not be committed to civil jail for alleged failure to personally satisfy the decree issued in Oyugis PMCC No.121 of 2019 scheduled for 10th July 2019.

[4] The petitioners also seek conservatory orders against the respondents prohibiting them from executing the decree issued in the aforementioned case against the petitioners or committing them to civil jail or proceeding with the Notice to show cause proceedings initiated in execution of the decree dated 28th November 2019.

The grounds on which the application is based are set out in the Notice of Motion and augmented by the facts contained in the supporting affidavit of the first petitioner/applicant deponed by herself on 8th July 2019.

[5] The first and second respondent did not file any response in opposition to the application or otherwise, neither did they appear in court for hearing or directions thereof.

However, the third and fourth respondents opposed the application on the basis of the grounds contained in their replying affidavit deponed by the third respondent on 19th July 2019, and filed in court on 22nd July 2019, together with a **Notice of Preliminary Objection** also dated 19th July 2019.

[6] On 24th July 2019, the court directed that the preliminary objection be argued in priority to the Notice of Motion by way of written submissions.

Accordingly, the petitioners' submissions dated 14th October 2019, were filed on the same date by **O.M. Otieno & Co. Advocates**, while those of the third and fourth respondents dated 27th August 2019 were filed on 29th August 2019 by **M/s Oguttu, Ochwangi, Ochwal & Co. Advocates**.

The first and second respondents did not file any submissions.

[7] This court having given due consideration to the preliminary objection in the light of the rival submissions would generally state that the presupposition that a preliminary objection is normally raised on a point or points of law and its determination may well dispose of the suit, applies to all suits including constitutional petitions. This principle was enunciated in the celebrated case of **Mukisa Biscuit Manufacturing Co. Limited –vs- West End Distributors Ltd (1969) EA 969**.

[8] It was held therein that:-

> **"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 had to be ascertained or if what is sought is the exercise of judicial discretion".**

It was stated in the same case that 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.

[9] In applying the principles aforementioned to the third and fourth respondents' notice of preliminary objection dated 19th July 2019, it becomes apparent that the issues or points raised as Nos.3, 4, 5, 6, and 7, would more or less require evidence, in which case they cannot be dealt with by way of preliminary objection and are hereby overruled.

This leaves us with points No.1 and 2 only.

The first point is most important as it raises the issue of jurisdiction. In that regard, the third and fourth respondents contend that this court lacks the necessary jurisdiction to deal with the subject dispute by dint of **Section 34** of the **Civil Procedure Act**.

[10] In the treatise **"words and phrases legally defined Vol.3"** by John Beecroft Saunders, jurisdiction is defined in the following terms:-

> **"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics ------- where a court takes upon itself to exercise a jurisdiction which it does not possess, its**

decision amounts to nothing.

Jurisdiction must be acquired before judgment is given."

[11] Indeed, jurisdiction is everything and goes to the root of any litigation as forcefully reiterated in the **"locus classicus"** decision in the case of **Owners of M/V Lillian "s" –vs- Caltex Oil Kenya Ltd. 1989 KLR 1**, where it was held that jurisdiction is everything and without it a court cannot make a move. It has to down its tools the moment it finds that it lacks jurisdiction to deal with a matter.

[12] The jurisdiction of the High Court is set out in **Article 165 (3)** of the **Constitution**. This includes unlimited original jurisdiction in criminal and civil matters and the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened **"inter alia"**.

Under **Article 165 (6)**, "the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court".

[13] The Supreme Court in the **IEBC Advisory Opinion**, adopted the **M/V Lillian "S" case** (Supra) and stated that:-

> **"Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.**
>
> **Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon parliament to set the jurisdiction of the court of law or tribunal the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law"**.

[14] The question here is whether the jurisdiction of this court to deal with the petition and all other interlocutory matters coming under it is ousted or divested by **Section 34**of the **Civil Procedure Act** which under **Subsection (1)** provides that:-

> **"All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit"**.

In essence, this petition is a separate suit as contemplated by the aforementioned provision of the Civil Procedure Act – which is an Act of Parliament to make provision for procedure in civil court.

[15] In effect, the petition raises a civil dispute emanating from the execution of a lawful decree issued by the subordinate court in **Oyugis PMCC No.121 of 2017**, following lawful civil proceedings in which the first petitioner and indeed the rest of the petitioners were never denied the opportunity to be heard and put fourth their defences or claims against the third and fourth respondents.

[16] To say the least, the petition smacks of a gross abuse of the court process in as much as it is an appeal against the decision and process of the subordinate court disguised as a genuine constitutional petition yet it is demonstrated in the pleadings and prayers therein that the petitioners are aggrieved by the outcome of the subject civil case which adversely affects them. But, rather than mount a proper appeal under the Civil Procedure Act, they deemed it fit to create a **"short cut"** by invoking constitutional provisions and filing the present petition.

[17] In fact, it would appear that matters which ought to have been raised before the trial subordinate court or were indeed raised by the petitioners are now being raised in the petition yet a trial court is deemed to have the professional competence to consider and evaluate any constitutional issues which may be raised as was held by the Court of Appeal in the case of **Dr. Alfred N. Mutua –vs- The Ethics & Anti-Corruption Commission & Others - Civil Application No.31 of 2016**.

[18] In sum, this petition is really not a dispute relating to the interpretation and application of the constitution but rather raises a civil dispute or claim triable under the Civil Procedure Act intended to put into question the integrity of the impugned civil suit and indeed, the trial court.

This court must therefore sustain point No.1 of the preliminary objection and hold that the jurisdiction of this court to deal with issues arising from the execution of a lawful decree is ousted or divested by **Section 34** of the **Civil Procedure Code**.

[19] With regard to point No.2, **it is provided under** section 7 **of the** Civil Procedure Act that:-

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"**.

The orders or prayers sought in this petition clearly demonstrate that the petitioners are attempting to have a re-trial of matters which were directly and substantially in issue in the impugned civil suit involving them and the third and fourth respondents.

[20] This court must therefore sustain point No.2 and find that this petition is indeed **"res-judicata"**.

In the end result, this petition and indeed the Notice of Motion dated 8th July 2019, are hereby struck out and dismissed for want of jurisdiction and for being **"res-judicata"** with costs to the third and fourth respondents.

Ordered accordingly.

J.R. KARANJAH

JUDGE

17.10.2019

[Dated and delivered this **17th** day of **October, 2019**]