



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

PETITION NO. 5 OF 2015.

WILSON OGOLA

FREDRICK OPPELLE OLWANDE.....PETITIONERS

versus

1. WATER SERVICES REGULATORY BOARD

2. LAKE VICTORIA NORTH WATER SERVICE BOARD

3. COUNTY GOVERNMENT OF BUSIA.....RESPONDENTS

RULING

1. This ruling relates to a notice of preliminary objection dated 7th September, 2015 raised by the 2nd Respondent — **LAKE VICTORIA NORTH WATER SERVICES BOARD**. The objection is to the effect that the entire petition herein is premature and improperly before the court, having been filed contrary to section 68 of the water Act, 2002. The court is said to have no jurisdiction to entertain the petition and it therefore cannot hear and/or determine it.

2. The objection was argued before me on 12th October, 2015. The petition referred to was filed here on 24th August, 2015 by two petitioners — **WILSON OGOLA** and **FREDRICK OPELLE OLWANDE**. It is against the three respondents — **WATER SERVICES REGULATORY BOARD** (1ST Respondent), **LAKE VICTORIA NORTH WATER SERVICE BOARD** (2nd Respondent), and **COUNTY GOVERNMENT OF BUSIA** (3rd Respondent).

3. The petition alleges violation of an array of petitioners' constitutional rights including articles 42, 43, 46 & 47. It also at alleges violation of some provisions of the Water Act 2002. The petitioners seek various declarations breach of breach of both Constitutional and statutory provisions. And various orders are also sought as redress for the breach.

4. When time came for hearing, Kuchio for 2nd Respondent, Ashioya for interested party, Muluka for 1st Respondent, and Makokha for 3rd Respondent were all on one side while Olendo and Kibe Mungai for petitioners were on the other side. Kuchio led the others in arguing, interalia, that the petition flies in the face of section 68 of the Water Act, 2002 which provides for the procedure of handling a complaint against a licensee. The licensee is the 2nd Respondent in this case. According to Kuchio, the 1st Respondent should have been the first to handle the petitioners complaint. According to Kuchio too, the complaint is essentially about the 2nd Respondents licence and the 1st Respondent could handle it.

5. And if the 1st Respondent happened to handle the complaint in a manner that was not satisfactory to

the petitioners, Kuchio averred that the petitioners were at liberty to go to Water Appeals Board. He said that the court would be usurping the powers of the 1st Respondent if it entertains the petition given that the petitioners should have made the 1st Respondent their first Port of call before coming to court.

6. Various decided cases were availed for guidance, among them being **JOSEPH OJWANG OUNDO VS NEMA & 2 OTHERS PETITION NO. 8/2015, BUSIA** , **PROF S. NJUGUNA NDUNGU VS THE ETHICS & ANTI-CORRUPTION COMMISSION (EACC) & 3 Others: PETITION NO. 73/2014, NAIROBI. AUTHORITY: CIVIL APPEAL NO. 84/2010 NAIROBI**, and **MUTANGA TEA & COFFEE COMPANY LTD VS SHKARA LIMITED & Another: CIVIL APPEAL NO. 54 OF 2014, MOMBASA.**

7. I have read the decisions and the common thread running through them is that where an avenue is provided for to seek redress, parties should not rush to court before first resorting to the avenue. I also noted that apart from one - **JOSEPH OJWANG OUNDO'S CASE** — which was a ruling arising from an objection, all the others were judgments delivered after the respective cases had ran their full mile in court. Some cases also had no constitutional issues.

8. The counsels for the other parties on the respondents side chipped in to support with Ashioya, for instance saying that a party should start at the lowest point and averring that a party who rushes to the High court in the first instance is denying the same court the chance of playing its supervisory role. The same kind of support was evident in Muluka's averments. He observed, interalia, that at the core of the suit was the issue of the 2nd respondents licence and that the water Act shows it is the 1st Respondent that should have handled the complaint first. The same supportive thrust is noticeable clearly in Makokha's arguments. Makokha was for 3rd Respondent.

9. When Kibe's turn arose, he argued, interalia, that there is no proper preliminary objection in court. He noted that the objection is pegged on section 68 of the Water Act, 2002, with the allegation being that a complaint was not filed before the 1st Respondent as that statute would require. Kibe seemed to fault that allegation, saying it was not demonstrated well. He also termed it a factual issue and asserted that a preliminary objection is about points of law, not facts.

10. Kibe averred further that section 68 of the Water Act, 2002, does not impose an obligation on the petitioners to first go to 1st Respondent. According to Kibe too, you have be a licensee — much like 2nd Respondent — in order to use the forum provided for in the Water Act. As a further argument too, it was stated that the petitioners are alleging violation of their constitutional rights. It was averred too that the reliefs being sought are not available under the Water Act. And noting that the other side had focused mainly on the water Act, Kibe said their dispute is also under the Environment Management & Co-ordination Act (E.M.C.A).

11. Some responses were made to Kibe's averment by counsels on the other side but such responses were mainly an emphasis and/or re-statement of what the same counsels had stated earlier.

12. I have considered the preliminary objection as formulated, the rival arguments, and the judicial pronouncements availed by both sides. As formulated, the objection is based on section 68 of the Water Act, 2002. The other provisions came later when the respondents counsels were trying to articulate their positions during hearing. And to my mind, section 68 is addressing a situation where a complaint is lodged with the Water services Regulatory Board against an entity or person licenced to provide water by that same board.

13. The Water Services Regulatory Board - which is sued as first - Respondent in this case — is supposed to handle the complaint and give directions or orders upon finding that the licensee is at fault. And where the licensee is dissatisfied with any orders or directions given, recourse can be had to the Water Appeals Board Constituted under section 84 of the Act And under section 85, a person who may have complained against a licensee to the Water Services Regulatory Board and lost can also prefer an appeal before the water Appeals Board. And it seems clear that this is tie route the respondents would have proffered the petitioners to follow.

14. I think it is necessary now to contextualize the petitioners complaint from a legal and factual stand point. The complaint is premised not on the licence issued to 2nd Respondent, but on a letter dated 3/7/2015 addressed to the head of County Government, Busia, by 2nd Respondent intimating inability to provide safe quality water from Mundika Water Treatment Plant owing to likely pollution from ongoing construction of a sugar factory by Busia sugar Industries Limited. The said construction was said to be taking place about 2 kilometres upstream from the intake of Mundika Water Treatment Plant along River Suo.

16. It is clear that the petitioners see the respondents failure to play their appropriate roles as a violation of both constitutional and statutory law. The prayers sought are in the first place declaratory to affirm violation of the law and in the second place remedial to rectify, stop or compensate likely or occurred wrongs.

17. It is important to note that the petitioners complaint has the same source or origin . And it is important also to consider whether all the three respondents as sued could have the grievances against them ventilated at the forum urged by them. It is important to consider whether the prayers or orders sought can be granted at that forum.

18. But before I consider that, I wish to point out that the objection herein seems aimed at ensuring that the petitioners suit never sees the light of the day. If the objection is upheld, the petitioners are supposed to kiss their petition good-bye. I observed that most of the decided authorities availed by the respondents counsel to support their position were judgments, meaning that the legal positions espoused in them were arrived at after all the evidence was in. What I would be shutting out here is precisely such evidence or input.

19. I think it is necessary also to consider whether the objection as raised qualifies as a proper preliminary objection in law. Kibe seemed to allude to this when he averred at the beginning of his arguments that the objection is predicated on fact not law. In my view, Kibe did go far enough. , And so it is necessary to ask: what is a preliminary objection? The answer is in the paragraph that follows.

20. In **MUIRURI VS KIMEMIA [2002] 2.KLR 677**, the court addressed the Issue by holding, interalia, that a preliminary objection is in the nature of a demurrer in that it raises a pure point of law. That point of law is argued on the assumption that all facts pleaded by the other side are correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. This same position was articulated yet again in the case of **SIRMA VS KIPRONO [2005] 1 KLR 197**. I am not aware of any decision that abrogates this position.

21. I emphasize here that a preliminary objection is in the nature of a demurrer. In the olden days, a demurrer used to arise where the pleading raised by the other side was deemed correct but the law would still operate to forestall the claim. In our case here, nothing raised by the petitioner is admitted or deemed correct. The respondents are disputing almost everything. But even assuming the facts were deemed correct, there is still another hurdle namely, a preliminary objection does not lie where what is sought involves the exercise of judicial discretion.

22. In this matter, one of the prayers sought is issuance of injunction. There is no denying that an injunction is a discretionary remedy. A question then begs whether it was proper for the second respondent to raise the issue as a preliminary objection instead of raising it as a point to be considered during hearing of the main suit. I think the latter would be a more prudent option.

23. I took pains to give an overview of the petitioners complaint. From the overview, it is clear that the petition as brought has both constitutional and statutory underpinnings. On the constitutional aspect, one would then ask whether the statutory bodies referred to by the respondents have the legal mandate to delve into binding constitutional interpretation. And the answer to this is an obvious "NO". The respondents would have us believe that the constitutional issues raised are a red herring, meant mainly to remove the matter from the jurisdictional ambit of the statutory bodies.

24. But I seem to see that the letter upon which the petition is premised raised the issue of safe quality water. It raised the issue of pollution. The issue of pollution is obviously an environmental concern. The issue of safe quality water would go to the root of consumer protection. When the petitioners then raise these issues as constitutional issues, are they engaging in an exercise of legal ingenuity? I think not. The bearing on the relevant articles in the constitution seem to me plain and obvious.

25. I stated earlier that the complaint of the petitioners has the same source. The petitioners seem to have figured out that the three respondents are responsible for their predicament. According to the respondents, the petitioners should have first gone to the first respondent. But a question arises here: How can you go to an entity to decide your matter when you are also complaining against that entity? How can you go to such entity when you clearly view it as part of the problem, not the solution? I think it would be too much to ask the petitioners to go to 1st Respondent.

26. And what about the 3rd Respondent? Could it also be taken to bodies created under the Water Act? The 3rd Respondent is not part of the system created under the Water Act. The petitioners are not part of that system either. Could the petitioners force the 3rd Respondent to submit to that system? I think the answer is "NO". and since the petitioners had reckoned that the 3rd Respondent and the others should be held responsible together, where else can that take place apart from the Courts? Obviously if the 3rd Respondent was taken to the entities created by the Water Act, that move would run into some legal headwinds and would not go far. Given this scenario, I think coming to court was more prudent.

27. Given that I have observed that the petitioners possibly have genuine issues of environmental concern, and given that one of the declarations sought directly seeks to affirm that concern (see prayer 5), it is necessary to appreciate the import of article 70 of our constitution. That article in the relevant part reads as follows:

Article 70, (1) If a person alleges that a right to a clean and healthy environment recognized and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter

(2).....

(3).....

28. The import of article 70 (1) is that where an environmental right seems or is the basis of violation, a party can still litigate over it as a constitutional matter in addition to or in spite of any other remedy that may be available through other avenues. This would mean that in spite of any remedy available under the Water Act, 2002, or any Environmental statute, the petitioners are within their rights to agitate it as a constitutional issue. It is not possible therefore for anybody to fault them for coming to court the way they did. And the aim of the court should be to decide the matter on merits, not to end it preliminarily.

29. The upshot of what I have said heretofore is ultimately this: That for expedient and effective adjudication of the issues raised by the petitioners, and given that the issues look prima facie arguable, the right forum for the petitioners complaint is this court. The 2nd Respondent is not suitable given that the petitioners view it as part of the problem and considering also that a party like the 3rd Respondent would seem to be an outsider to that forum.

30. I therefore find the preliminary objection herein unmeritorious and dismiss the same with costs.

A. K. KANIARU

ENVIRONMENT & LAND COURT,

JUDGE.

DATED AND DELIVERED ON 11TH DAY OF NOVEMBER 2015.

IN THE PRESENCE OF

PETITIONERS.....

RESPONDENTS.....

JUDGE.