



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**PETITION NO. 2 OF 2020**

**IN THE MATTER OF ARTICLES 22, 40, 42, 47, 69 AND 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION TO RIGHT TO ENJOYMENT OF PROPERTY**

**BETWEEN**

**THE BOARD OF MANAGEMENT MURANG'A  
HIGH SCHOOL (SUING ON BEHALF OF  
MURANG'A HIGH SCHOOL).....PETITIONER/APPLICANT**

**VS**

**THE WATER REGULATORY BOARD.....1<sup>ST</sup> RESPONDENT**

**MURANG'A WATER & SANITATION**

**COMPANY LIMITED (MUWASCO)..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AUTHORITY (NEMA).....3<sup>RD</sup> RESPONDENT**

**JAMES MUCHOKI MUTHONI..... INTERESTED PARTY**

**RULING**

1. What is before me is the Preliminary Objection dated the 12/6/2020 and filed on the 15/6/2020 by the 2<sup>nd</sup> Respondent. The gist of the objection is that the Court does not have jurisdiction to hear and determine the Petition and the Notice of Motion accompanying it. It sought the following orders;

- a. That the Petition and Notice of Motion application are misconceived and an abuse of the Court process.
- b. That the adjudication of all disputes arising from water services where there is a business contract is the province of the Water Tribunal which is established under Section 119(1) of the Water Act 2016.
- c. That the dispute in this matter revolves around the issue of whether the contract for provision of sanitation services to the Petitioner by the 2<sup>nd</sup> Respondent through the sewer line was for the exclusive use of the School and whether the infrastructure belongs to the Petitioner or the 2<sup>nd</sup> Respondent.
- d. That **Section 121(1) and (2) of the Water Act** is instructive on the jurisdiction of the Water Tribunal in the following terms:
  - i. **“121. (1)** The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine Appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or any person acting under the authority of the Cabinet Secretary, the

Authority and Regulatory Board.

ii. (2) In addition to the powers set out in the subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.”

e. That the parties herein have not agreed on any form of alternative dispute resolution mechanism hence the water tribunal is the only proper forum seized of powers to hear and determine the dispute herein.

f. That the Court has no jurisdiction to hear this matter and ought to down its tool in the earliest available opportunity.

g. That the elaborate procedure provided for resolution of the dispute has not been followed and therefore both the Petition and the Notice of Motion are ripe for dismissal since they are both premature.

2. It is the case of the 2<sup>nd</sup> Respondent that the adjudication of all disputes arising from water services where there is a business contract is in the province of the Water Tribunal established under the Water Act 2016. That the dispute herein revolves around whether the contract for the provision of the sanitation services to the Petitioner by the 2<sup>nd</sup> Respondent through the sewer line was for the exclusive use of the Petitioner and whether the said infrastructure belongs to the Petitioner or the 2<sup>nd</sup> Respondent.

3. In essence the contention of the 2<sup>nd</sup> Respondent is that the dispute resolution mechanism provided for in the Water Act has not been exhausted and therefore the Petition and the Notice of Motion are premature and should be dismissed.

4. The objection was met with opposition by the Petitioner who contested that the Court has jurisdiction to hear and determine the suit pursuant to Section 13 of the Environment and Land Court Act; That the Petitioner’s case revolves around the infringement of the rights to a clean and healthy environment, right to enjoyment of property and trespass to land which issues are within the jurisdiction of the Environment and Land Court Act; that the alleged water contract agreement between the Petitioner and the 2<sup>nd</sup> Respondent ended on the 8/5/2020. It urged the Court to dismiss the Preliminary Objection.

5. Equally in opposition of the Objection was the 3<sup>rd</sup> Respondent on the grounds that; Section 121 of the Water Act is not applicable to the case at hand as no evidence has been placed by the Applicant to show whether the actions of the 2<sup>nd</sup> Respondent were made under the authority of either the Cabinet Secretary, the Water Resources Authority or the Regulatory Board; That what is objected to are matters for the trial by Court and cannot be canvassed and disposed of in a Preliminary Objection; That there is no clear existence of a business contract between the parties.

6. Despite service of the Preliminary Objection, the 1<sup>st</sup> Respondent and the Interested Party did not file any response to the Preliminary Objection.

7. The parties elected to canvass the Preliminary Objection by way of written submissions which I have read and considered. The 2<sup>nd</sup> Respondent filed on the 15/7/2020; the Petitioner filed on the 10/7/2020 while the Interested Party filed theirs on the 24/7/2020.

8. The key issue for determination is whether the Court has jurisdiction to determine the suit.

9. The background of this suit is that the Petitioner has on its property a sewerage system in form of a bio-digester. On its property too, there is a sewer line managed by the 2<sup>nd</sup> Respondent. The Interested Party owns a property adjoining the school property. He contracted the 2<sup>nd</sup> Respondent to install a sewerage line to serve his property. His property was connected to the main sewer line on the Petitioners land. It is contended by the Petitioner that the 2<sup>nd</sup> Respondent connected the Interested Party to the main sewer on the school grounds without its knowledge and consent. That due to disrepair the said sewer is spewing waste onto the Petitioners playing grounds. The Petitioner’s other complaint is that unknown to it and during the closure of the school occasioned by the Covid-19 pandemic, the Interested Party with the connivance of the 2<sup>nd</sup> Respondent discharged raw waste/detergents to its bio-digester thus causing harm to it.

10. That despite demand in writing to stop the connections, the 2<sup>nd</sup> Respondent and the Interested Party have ignored the demand to cease interfering with its sewerage system.

11. In its Petition the Petitioner cited a raft of violations it alleges against the Respondents to wit; the right to enjoyment of property; the right to fair administrative actions; clean and healthy environment. It sought the following orders;

a. For a mandatory injunction restraining the 2<sup>nd</sup> Respondent, its agents and or servants/successors and or assignees from illegally interfering with the Petitioner’s sewerage system and bio-digester.

b. A declaration that the 2<sup>nd</sup> Respondent has violated the Petitioner’s rights under Articles 42 and Articles 40 due to the neglect and/or refusal of the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent failure to perform their mandatory statutory duties.

c. Costs of the Petition.

12. The Preliminary Objection is premised on the contention that this Court does not have jurisdiction to hear and determine the matter. The Objection was supported by the Interested Party in his submissions while the Petitioner and the 3<sup>rd</sup> Respondent opposed the same on the

grounds that the Court pursuant to the Art 162 of the Constitution read together with section 13 of the Environment and Land Court Act is empowered to adjudicate the suit.

13. The classical case in the definition of a Preliminary objection is **Mukisa Biscuits Manufacturers Ltd. ...Vs...West End Distributors Ltd. [1969] E.A. 696**, where the Court held 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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

Further Sir Charles Newbold in the same case stated as follows;

“The first matter relates to the increasing practices of raising points which should be argued in the normal manner quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises pure points of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained and if what is sought is the exercise of Judicial discretion. ....”

14. For one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

15. Jurisdiction of a Court flows from the Constitution and or statute or both. The Supreme Court in **Samuel Kamau Macharia and Another – v- Kenya Commercial Bank and 2 Others, Application No. 2 of 2011**, pronounced itself on jurisdiction thus:

“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. .... 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....”

16. The Supreme Court in **Samuel Kamau Macharia** (supra) stated that jurisdiction cannot be conferred by way of judicial craft and innovation which means that jurisdiction cannot be conferred by the art and craft of Counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute.

17. I concur with the Petitioners submissions on the jurisdiction of this Court which is pursuant to Article 162 (2)(b) of the Constitution as read together with section 13 of the ELC Act. Having said that it holds true that where a statute has provided for a mechanism of dispute resolution, the Court cannot abrogate that mechanism. A litigant must exhaust the said mechanism before moving to the next level. In the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

18. In the case of **Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura [2019] eKLR Mativo J** stated as follows;

The Court of Appeal provided the constitutional rationale and basis for the doctrine in **Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others,[43]** where it stated that:-

"It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

19. The rationale was aptly pronounced by the bench in the Matter of the **Mui Coal Basin Local Community,[44]** where the High Court stated thus:-

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that Courts respect the principle of fitting the fess to the forum even while creating what Supreme Court Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

20. A dispute resolution mechanism has been provided for in Section 121 of the Water Act which states as follows ;

“(1)The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.

(2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.

21. Section 124 of the Water Act provides that Appeals from the Tribunal shall be to the Land and Environment Court.

22. Applying the above two provisions of the law to the current suit and in particular section 121(2) of the Water Act it becomes clear to me that the dispute in this suit is in respect to the provision of sewerage services by the 2<sup>nd</sup> Respondent to the Petitioner and the Interested Party. The Petitioner has acceded to the fact that it had a business contract with the 2<sup>nd</sup> Respondent which contract it would appear was cancelled at its request. There is affidavit evidence which is accepted by the Petitioner that the 2<sup>nd</sup> Respondent is owed over Kes. 2 million in respect to unpaid services provided to the Petitioner. The Interested Party has confirmed that on application for sewerage services it was connected to the sewer line in the Petitioners premises upon payment of the requisite fees.

23. The acts of alleged illegal connections of 2<sup>nd</sup> Respondent's sewer into the Petitioner's bio digester complained of by the Petitioner occurred in or around the month of April whilst its business Contract with the 2<sup>nd</sup> Respondent is said to have been terminated on 8/5/2020 meaning at the time of commission of the said acts the business contract between the Petitioner and the 2<sup>nd</sup> Respondent was still in force hence the provisions of Section 121 of the Water Act would apply.

24. I have reviewed the pleadings and there is no evidence to support any effort by the parties to reach an alternative dispute resolution mechanism so as to oust the Jurisdiction of the Water Tribunal.

25. The Petitioner raised matters of infringement of its Constitutional rights to enjoyment of property and the right to clean and healthy environment that fall within the jurisdiction of this Court however I understand the core of the dispute herein is centred on the contractual relationship between the Petitioner and the 2<sup>nd</sup> respondent. The dispute refers to issues that ought not to have been done or irregularly done under the agreement and therefore follows that the fora with jurisdiction in the first instance is the Water Tribunal, of course with the option to appeal to this Court. In my view this is not a case that falls within the exception to the rule of exhaustion principle.

26. Having found as I did in para 23 and 24, it is therefore obvious that this suit ought to be filed at the Water Tribunal and not this Court. The original jurisdiction enjoyed by this Court cannot oust the jurisdiction of the Water Tribunal.

27. In the case of **Benard Murage - v - Fine serve Africa Limited & 3 others [2015] eKLR** the Supreme Court again stated that;

“Not each and every violation of the law must be raised before the High Court as a Constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

28. There is a trend that is growing in this country where litigants are giving every dispute a Constitutional angle. I must add that in my considered view this is a mere contractual dispute which has been given a Constitutional facemask.

29. Going by the dicta in the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] 1KLR** where the Court defined jurisdiction as thus;

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters that are presented in a formal way for its decision. The limits of this authority are imposed by stature, charter, or commission under which the Court is constituted, and may be extended or instituted in the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be whether 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 of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the Court or tribunal has been given power to determine conclusively whether the facts exist. 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 judgement is given.”

30. From the foregoing I reach the decision to down my tools to allow the parties to exhaust the dispute resolution mechanism provided by statute.

31. The Preliminary Objection is upheld. The Petition and the Notice of Motion are hereby dismissed.

32. The costs shall be payable to the 2<sup>nd</sup> Respondent and the Interested party by the Petitioner and the 3<sup>rd</sup> Respondent in equal share.

32. **It so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2020**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mr Thuo HB for Walubengo for the Petitioner

Ndungu HB for Ndegwa for the Respondents

2<sup>nd</sup> & 3<sup>rd</sup> Respondents – Absent

Mwangi and Njeri, Court Assistants