



IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 41 OF 2014

**IN THE MATTER OF ARTICLES 1, 2, 3, 23, 35, 42, 47, 48, 54, 56, 60, 61, 69, 70, 72 & 165 (3) OF
THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER ENVIRONMENTAL MANAGEMENT & COORDINATION ACT OF 1999

AND

IN THE MATTER OF SECTION 59, 60, & 61 OF THE PUBLIC PROCUREMENT ACT

AND

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL (PREFERENCE AND
RESERVATIONS) (AMENDMENT) REGULATIONS 2013**

AND

IN THE MATTER OF PROTECTION AND DISCRIMINATION

AND

IN THE MATTER OF ABUSE OF OFFICE BY THE 1ST, 2ND, 3RD, AND 4TH RESPONDENTS

BETWEEN

RICHARD KETER (Suing on behalf

of residents of) KERICHO COUNTY.....1ST PETITIONER

JOHN MUTURI NDUNGU.....2ND PETITIONER

LYDIA KIGEN.....3RD PETITIONER

NJERU RICHARD.....4TH PETITIONER

GEOFFREY NGETICH..... 5TH PETITIONER

AND

SIMIYU WASIKE, DEPUTY DIRECTOR IN CHARGE

OF PLANTATIONS AND ENTREPRENEURSHIP.....1ST RESPONDENT

CALEB MANYALA, ECOSYSTEM

CONSERVATOR KERICHO COUNTY.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....3RD RESPONDENT

NEMA DIRECTOR, KERICHO COUNTY.....4TH RESPONDENT

DAVID MBUGUA, DIRECTOR

KENYA FOREST SERVICE.....5TH RESPONDENT

KENYA FOREST SERVICE.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

RULING

The petitioners herein brought the notice of motion dated 6th June, 2014 seeking to restrain the respondents from further tendering, processing of tender applications or supervising or licensing any harvesting and or destruction of forest and forest materials within all state forests within the County of Kericho pending the hearing and determination of the application and the petition.

On 6.6.2014, the application was certified urgent and the petitioners were ordered to serve it on the respondents for *inter partes* hearing on 25/6/2014.

When the matter came up for hearing on 25/6/2014, it emerged that two preliminary objections (hereinafter referred to as P.O.) had been filed against the application and the petition.

The preliminary objections are dated 18/6/2014, filed by the 3rd respondent, while that dated 24.6.2014 was filed by 1st, 2nd, 5th and 6th respondents.

Mr. Macharia urged the preliminary objection dated 24/6/2014. Mr. Gitonga who filed the preliminary objection dated 18/6/2014 did not attend court. Kr. Kirui, counsel for the 7th respondent associated himself with submissions made by Mr. Macharia.

As both P.Os challenge this court's jurisdiction to hear and determine the issues raised in the application and petition, the court ordered that the P.Os be heard and determined first.

The 3rd respondent's preliminary objection was to the effect that this court lacks jurisdiction to hear matters of environmental and land in terms of Articles 162(2)(b) and 165(5) of the Constitution and urged the court to strike out the petition. Mr. Gitonga did not attend the court but since it touches on jurisdiction, even in his absence the court cannot ignore it.

The first issue taken by Mr. Macharia, counsel for the 1st, 2nd, 5th and 6th respondents, is that the petition is incompetent because it is based on the notice of motion dated 6/6/2014 instead of a substantive petition.

Mr. Macharia submitted that all issues raised in the petition are tendering/procurement issues; that there are no constitutional issues raised in the petition and that the application/petition had been prematurely brought to this court. Terming the dispute herein a tendering/procurement dispute, Mr. Macharia submitted that this court cannot get seized of the dispute unless it is demonstrated that the procedure/process provided for under the Public Procurement & Disposal Act (PP& DA) has failed. That any party with an issue touching on tendering or procurement must first go to the tribunal set up under the said Act. In support of that contention, Mr. Macharia referred to the decision in **Nairobi High Court Petition No.359 of 2012; Francis Gitau Parsinei v. National Alliance Party & 4 others (2012)eKLR** where it was held:-

“where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used.”

Mr. Macharia also referred to **Rich Products Ltd v. Kenya Pipeline Ltd Company & another Nairobi High Court Petition No. 173 of 2014** where Mumbi Ngugi J., observed:-

“I have not heard any demonstration of the unconstitutionality of the acts of the 1st respondent. It appears to have complied with the requirements of the Public Procurement and Disposal Act, and to have answered satisfactorily the concerns of the institution charged with the mandate to oversee public procurement. More importantly, it cannot be open to a party which has not participated in a procurement process to lodge a constitutional reference that in effect asks the court to enter into the mandate of the 2nd respondent at the behest of a party that has not qualified under the provisions of the relevant statute, (emphasis supplied).

To argue that the respondents are not entitled to the orders sought as tenders were advertised and there is no evidence that those exploiting the forest resources are doing so without a licence.

In reply, Mr. Kipkoech for the petitioners, submitted that the competency or otherwise of the petition is not a point of law to warrant raising of a preliminary objection. He submitted that under Article 10, 35, 47 and 69 of the Constitution, the petitioners have a right of access to information; to be treated fairly and to be involved in utilization of resources. The petitioners contend that, in violation of both the Constitution and the Forest Act, 2005, the respondents failed to supply the petitioners with information concerning the contractors that had prequalified to extract forest materials and also failed to involve them in utilization of the forest resources.

Unlike the respondents who have termed the dispute herein a tendering/ procurement one, petitioners have argued that the dispute is about protection of the environment and exploitation of the resources. The petitioners contend that the activities of the respondents are in violation of the Forest Act, 2005.

Concerning the question of this court's jurisdiction to hear and determine the dispute herein, the petitioners submitted that Article 165(3)(b) of the Constitution gives this court jurisdiction to determine issues touching on the bill of rights.

Without agreeing with the respondents' contention that this court lacks the jurisdiction to hear and determine the dispute herein, the petitioners urged the court to refer the suit to the body with the jurisdiction if it finds itself to be without jurisdiction.

In support of the contention that a court can transfer a dispute to the body with the requisite jurisdiction for hearing and final determination, the petitioners referred to **East Africa Railways Corp. v. Anthony Sefu Dar-Es-Salaam HCCA NO.19 of 1971 (1973) E.A 327** where Mwakasendo, Ag J. observed:-

“It is, I think, a well established principle that no statute shall be so construed as to oust the

jurisdiction of the superior courts, in the absence of clear and unambiguous language to that effect.”

That decision was applied by G.V Odunga J., in **the Cabinet Secretary, Ministry of Mining & another v. National Environment Management Authority & 3 others Ex-parte Cortex Mining Kenya** (<http://www.kenyalaw.org-page13/14>) to transfer a dispute lodged in the High Court to the Environment and Land Court for determination. In so doing the judge observed:-

“Accordingly, I find that since the reliefs which were being sought by the applicant at the time these proceedings were instituted were well within the jurisdiction of this court to grant, the application seeking to terminate these proceedings based as it is on the issues raised therein, it is my view that justice in this case is better served by having the same heard and determined before the Environment and Land Court.”

From the preliminary objections herein and the submissions by the respective parties, the sole issue for determination is whether this court has jurisdiction to hear and determine the dispute herein?

The import of a court's jurisdiction was stated by Nyarangi J.A (as he then was) in ***Owners of the Motor Vessel “Lilian S” V. Caltex Oil (K) Limited*** [1989] KLR 1 thus:-

“...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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Contrary to Mr. Macharia's submissions that the petition dated 6/6/2014 is incompetent because the petitioners have come to court by way of notice of motion, I do agree with Mr. Kipkoech that the petition is not incompetent by way of its form. This is because there is a petition dated 6/6/2014 filed simultaneously with the notice of motion dated 6/6/2014 pursuant to Rule 22 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

In the case of **Mukisa Biscuit Co. V Westend Distributors (1969) EA 689**, the Court defined a preliminary objection as:-

“A preliminary objection is in the nature of what used to be called 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...”

In the instant case the facts are not agreed upon. Whereas the respondent contend that the issues herein touch on procurement, the petitioners are of a different view; that it all touches on rights under Article 42 right to clean environment; Article 35, that petitioners are entitled to information from Kenya Forest Service on prequalification, but are not interested in taking part in the tender.

Since evidence is required to conclusively determine the actual nature of the dispute between the petitioners and the respondents, taking note of the fact that no evidence is required to determine issues raised in a preliminary objection unless it is all agreed, it is not possible to determine these issues on a preliminary objection.

I therefore proceed to consider the P.O. raised by the 3rd respondent, whether this court has jurisdiction to determine land and environmental matters. Article 165(5)(b) provides:-

“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).”

The courts contemplated under article 162(2) are the courts established by the parliament 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. (emphasis supplied).

Under section 13 of the Environment and Land Court Act, the Environment and Land Court, established pursuant to Article 162(2)(b)-

“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 the Act or any other written law relating to environment and land.”

Section of 30 of the Act provides:-

“30. (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.”

In accordance with the provisions of section 30 aforementioned, the Chief Justice has so far issued three practice directions. The latest being the practice direction contained in Gazette notice No. 16268 dated 9th November, 2012. That practice direction, inter alia, provides as follows:-

“All new cases relating to the environment and use and occupation of, and title to land not falling under paragraph 7 (paragraph 7 thereof deals with jurisdiction of magistrate court's to hear and determine cases relating to the environment and use and occupation of, and title to land) shall be filed in the nearest Environment and Land Court for hearing and determination by the said court.”

It is not in dispute that the issues raised in the petition herein relate to environment, the same touching on use and management of forest resources.

From the foregoing provisions of the law, it is clear that the dispute herein having been filed in the High Court when the Environment and Land Court contemplated under Article 162(2)(b) of the Constitution and established under Section 4 of the Environment and Land Court Act, No. 19 of 2011, had been established, this court lacks jurisdiction to hear and determine the dispute herein.

As pointed out herein above, this court has been urged to transfer the dispute to the court with jurisdiction, should it find that it lacks jurisdiction. In this regard, the court was referred to the decision in **the Cabinet Secretary, Ministry of Mining & another v. National Environment Management Authority & 3 others** (*supra*) where G.V Odunga J. transferred the suit which had been filed to the Environment and Land Court for hearing and determination.

In considering the question of transfer of this suit to the Environment and Land Court and/or the body with the jurisdiction to hear and determine the same, I begin by pointing out that the circumstances that my brother G.V Odunga was faced with were totally different from the circumstances obtaining in the this case. In that case, when the suit was filed, the High Court had jurisdiction to hear and determine the dispute. It is the change in circumstances that prompted the judge to transfer the suit.

Despite the fact that this suit was filed in the High Court when the law denying the High Court jurisdiction was in force, this court has inherent jurisdiction under Article 159 of the Constitution to do substantive justice and the same will be served if the petition is transferred to the Environment and Land Court instead of dismissing it and considering that urgency has been demonstrated.

Related to the above issue, it is clear that from the parties and pleadings that the petitioners, 2nd and 4th respondents are all from Kericho County. There is a High Court in Kericho County and there is no good reason why this petition was filed at this court. The petition should be transferred to Kericho High Court for hearing and disposal. Apart from transferring this petition to the Environmental and Land Court, it should be transferred to Kericho High Court. It is so ordered. Costs be in the cause.

DATED and DELIVERED this 2nd day of July, 2014.

R.P.V. WENDOHO

JUDGE

PRESENT:

Ms Kilach for the petitioners

Mr. Macharia for the respondents

Kennedy – Court Assistant