



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT AND LAND COURT

E.L.C. NO.243 OF 2013

COUNTY GOVERNMENT OF NYERI.....PLAINTIFF

VERSUS

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....DEFENDANT

R U L I N G

The County Government of Nyeri (*hereinafter referred to as the applicant*) has commenced this suit by plaint against the National Environment Management Authority (*hereinafter referred to as the respondent*) claiming that on 21/11/2013, the applicant received a letter from the respondent dated 20/11/2013 directing it to close the dump site at Asian Quarters situate in Nyeri Municipality within seven days from the date of the notice failure to which the provisions of Section 143 of the Environmental Management and Co-ordination Act, 1999 which provides for imprisonment for one year or a fine of Kshs.500,000 or both should be invoked among other penalties. The applicant alleged that this order was made without first affording her an opportunity of being heard contrary to the rules of natural justice and section 109 of the National Environment Management & Co-Ordination Act No.8 of 1999 and the right to fair administrative action.

She further avers that this order is against the recommendations of the public Complaints Committee dated 29/8/2012 that the defunct Municipal Council of Nyeri be given five years to acquire an alternative dump site or recommendation which had earlier been made by the respondent.

The applicant contends that this recommendation both by the Public Complaints Committee, which is a committee of the respondent and the respondent's own recommendation aforesaid, continue in force for the benefit of the applicant under Section 58 of the Urban Areas and Cities Act, No.13 of 2011. She further claims that the process of acquiring a new dump site had already started and that she had called for expression of interest by 3/12/2013.

The Municipal Council of Nyeri, now defunct, had already applied for a license for transportation of waste and the same had been approved by the respondent vide its letters dated 27/11/2008 and had by its letter dated 1/12/2011 withdrawn a criminal case it had lodged against the Municipal Council of Nyeri having been satisfied with the levels of compliance as far as waste management and protection of the environment in Nyeri Municipality is concerned.

The applicant contends that if the dump site is closed without another one in place, the thousands of residents of Nyeri Municipality would suffer irreparably for no fault of their own especially when it is

the respondent who allowed the use of the current dump site pending the acquisition of another one, which process is still ongoing.

The applicant's claim according to the plaint is a declaration that its aforesaid order of closure is against the rules of natural justice and not in accordance with the law and therefore null and void and therefore seeks an order of injunction restraining the respondent, its employees, agents and/or anyone of them from enforcing the said closure orders and prays for a declaration that the closure order against of the dump site at Asian Quarters, Nyeri Municipality as contained in the letter dated 20/11/2013 is against the rules of natural justice and therefore null and void. Moreover an order of injunction restraining the respondent from enforcing the closure order in respect of the dump site at Asian Quarters, Nyeri Municipality contained in the defendant's letter dated 20/11/2013 addressed to the plaintiff.

The suit is accompanied with a Notice of Motion for orders that this honorable court be pleased to issue temporary orders of injunction restraining the respondent, its agents, employees or any one acting on its behalf or instruction or any one of them from enforcing the closure orders of the dump site at Asian quarters Nyeri Municipality as contained in the defendants letter dated 20th November 2013 addressed to the plaintiff until full hearing and determination of the suit.

The application is based on grounds that *the respondent has by its letter dated 20/11/2013 received by the applicant on 21/11/2013 ordered it to close the dump-site at Asian Quarters and in default criminal process to be set in motion against. The closure order was made without offering the applicant an opportunity of being heard contrary to the rule of natural justice and against the clear provisions of Section 109 of the Environmental Management and Co-ordination Act, 1999 and the right to fair administrative action as enshrined in the constitution and other provisions of the law.* She laments that the process of acquiring another dump site is ongoing and the closure of the dump site would be disastrous to the thousands of the residents of Nyeri Municipality who would suffer irreparable harm for no fault of their own.

The application is supported by the affidavit of **Wambui Kimathi** who depones that on 21/11/2013, the applicant received a letter dated 20/11/2013 from the respondent directing her to within seven days close the dump site at Asian Quarters within Nyeri Municipality. That this order was made without affording the applicant any hearing and is contrary to the rules of natural justice as the applicant has been condemned unheard. The order is also against the recommendation of the public complaints committee dated 29/8/2012 which recommended that the Municipal council of Nyeri do continue using the dump site and acquire another one within five years.

The applicant has already started acquiring a new dump site and has called for expression of interest by 3/12/2013. The Municipal Council of Nyeri had already applied for a license for transportation of waste and the same had been approved by the respondent who had by a letter dated 1/12/2011 withdrawn its case against the municipal council as the dump site was being properly managed. She believes that if the dump site is closed without another one, the residents of the Nyeri Municipality would suffer for no fault of their own. It is the respondent that allowed the council to use it pending the acquisition of another one a process that is ongoing.

On the 9/12/2013, the respondent filed a Notice of Preliminary Objection stating that the entire application lacks merit, is misconceived and is clear abuse of the court process and ought to be dismissed with costs. Moreover that the court lacks jurisdiction to hear and determine this suit in the first instance in view of the provision of **sections 125 and 129 of the Environment Management and Co-ordination Act No.8 of 1999.**

When the matter came for hearing on 11/12/2013, **Mr. Githinji learned counsel for the respondent** took up the preliminary objection that this court lacks the jurisdiction to hear the matter as the suit is based on a restoration order dated 20/11/2013. **Section 108** of the Environment Management and Co-ordination Act gives power to the defendant to issue environmental improvement orders. **Section 125** of the same Act establishes a Tribunal known as the National Environment Tribunal. **Section 129 (i)e** provides that a person aggrieved shall appeal to the National Environment Tribunal. He

submitted that a person aggrieved with the decision of the Tribunal can approach the Environment and Land Court for a relief. The plaintiffs has breached the law by coming to this court and therefore this suit is an abuse of the process of court. He argues further that this court has appellate jurisdiction over the lower court and tribunals.

Mr. Wahome learned counsel for the applicant on his part submitted that the operational word in **Section 129(1)** is "may" within 60 days appeal to the Tribunal. He strongly submitted that when a statute uses the word "may" it means that the power is discretionary hence not mandatory. The section should be read with the **Constitution of Kenya 2010 especially Article 162(2) b and Section 13 (1) (2) of Environment and Land Court Act No 19 of 2011** which came into force on 27/8/2010 and 30/8/2011 respectively. Moreover, the Environment Management and Co-ordination Act came into force in 1999 whilst the Environment and Land Court Act came into force in 2011 hence the Environment and Land Court, Act takes precedence and provides that the Environment and Land Court has original and appellate jurisdiction. The court has power to hear and determine disputes relating to environmental planning such as the dispute herein which is based on environmental protection and restoration.

Mr. Githinji in reply argues that the use of the word "may" in **Section 129(1)** of Environment Management and Co-ordination Act read together with **Section 130(1) of the said** Act presupposes that an appeal should have been filed by the parties before the Tribunal. If parliament intended to do away with the Tribunal it could have repealed the law and abolished the Tribunals. He concluded by submitting that where it is expressly provided that the tribunal has jurisdiction, then the High Court lacks jurisdiction.

I have read the application, the preliminary objection and have listened to the submissions of both parties and find that the applicant is challenging a restoration order that was issued by the authority.

Article 162 (2)b of the Constitution of Kenya 2010 gives parliament the power to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Parliament exercised this power by enacting the **Environment and Land Court Act no 19 of 2011** that came into force on the 30/8/2011 after being assented to on 27/8/2011.

The Environment and Land Court Act is an Act of parliament to give effect to Article 162 (2)b of the Constitution of Kenya, to establish superior court to hear and determine disputes relating to the environment and the use and occupation of and title to land and to make provision for jurisdiction, function and powers and for connected purposes.

Section 13(1) of the Act gives the court original and appellate jurisdiction to hear and determine disputes in accordance with Article 162 (2)b of the Constitution and with the provision of the Act or any other law applicable in Kenya relating to environment and land.

Section 13 (4) of the Act provides that in addition to the matters referred to in subsections (1) and (2), the court should exercise appellate jurisdiction over decisions of subordinate courts or local tribunals in respect of matters within the jurisdiction of the Court. This section presupposes that the Environment and Land Court has appellate jurisdiction over subordinate courts and tribunals on matters reserved for the later but does not have original jurisdiction over the same.

Section 125 of Environment Management and Co-ordination Act establishes the National Environment Tribunal whilst **Section 129 (e)** gives a person aggrieved by the imposition against him of an environmental restrictions order or environmental improvement order by the Authority under this Act or regulation made thereunder the right to appeal to the tribunal.

Section 130 of the Environment Management and Co-ordination Act (**EMCA**) provides for appeals to the High Court by any person aggrieved by a decision or order of the tribunal. The decision of the High Court is final.

Mr. Wahome has argued that the use of the word “**May**” in **Section 129** presupposes that it is not mandatory for one to appeal to the Tribunal. This Court observes that the word “**may**” has also been used in Section 130 of **EMCA**. I do find that the word “**may**” is used in the two sections to give a person the power to elect whether to appeal or not and not to elect to seek his a remedy in the Tribunal or High Court. There is a clear hierarchy of jurisdiction as set out in the Environment Management and Co-ordination Act thus a person aggrieved by the decision of the Authority appeals to the Tribunal and if dissatisfied appeals to the High Court which is a final arbiter in the said mater. I agree with Mr. Githinji that where it is expressly provided that the Tribunal has jurisdiction, the court lacks original jurisdiction but has appellate jurisdiction.

The Environment and Land Court Act repealed the Land Disputes Tribunal Act hence abolishing the Land Disputes Tribunals but did not likewise repeal sections 125 – 130 of the Environment Management and Co-ordination Act hence it is presumed that the intention of Parliament was to retain the National Environmental Tribunal with it's jurisdiction.

There is a strong presumption that civil courts have jurisdiction to decide all question of civil nature. The exclusion of jurisdiction of civil courts is therefore not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied. This principle by no means cannot be whittled down. Provisions conferring jurisdiction on authorities and tribunals other than civil courts are strictly construed.

The general rule is that civil courts have jurisdiction to decide questions of civil nature and exclusion being an exception. The burden of proof to show that jurisdiction is excluded in any particular case is on the party raising such contention. The rule that the exclusion of jurisdiction of civil courts is not to be readily inferred is based on the theory that civil courts are courts of jurisdiction and the people have a right unless expressly or impliedly debarred, to insist for free access to the courts of general jurisdiction of the state.

This court finds that the Environment Management and Co-ordination Act creates certain rights and liability and gives special remedy for enforcing the same and therefore the ordinary remedy of approaching the High Court is impliedly excluded. Moreover, the fact that the Environment Management and Co-ordination Act provides for a process of appeal from the National Environment Tribunal to the High Court presupposes that the original jurisdiction of the **Environment and Land Court** is excluded whilst the appellate jurisdiction is expressly provided when the Act expressly provides for the appellate jurisdiction of the Environment and Land Court.

This court finds that the suit as commenced is misconceived as the same is not a Judicial Review or a petition. Had the plaintiff filed a judicial review application the issue of jurisdiction could not have arisen as the High Court has exclusive jurisdiction to issue judicial review orders of **Certiorari**, **Prohibition** and **Mandamus** against inferior tribunals and bodies that Act without jurisdiction, without adherence to rules of National Justice , act with irrationality and whose decision is tainted with procedural irregularity. The plaintiff has approached the court not through Judicial Review but a civil suit and therefore **R -VS- NEMA 2006 KLR (E & L) 1 – pg 784** does not apply.

Section 13 of the Environment and Land Court Act presupposes that the Environment and Land Court does not have exclusive original jurisdiction as the Tribunals that deal with Environment and Land Disputes, that were not abolished have jurisdiction to hear and determine disputes in accordance with the Act of parliament that donates the jurisdiction to them while the Environment and Land Court has appellate jurisdiction over them.

This suit is commenced by way of plaint seeks a declaration that the closure order against the plaintiff of the dispute at Asian quarters, Nyeri Municipality as contained in the defendant's letter to the plaintiff dated 20/11/2013 is against the rules of National Justice and therefore null and void. Though the plaintiff seeks declaratory orders on the basis that rules of National justice were breached, this court finds that the plaintiffs claim is based on an environment restoration order issued by the National Environment Management Authority and therefore the dispute falls under the jurisdiction of the Tribunal.

The upshot of the above is that the Preliminary Objection is upheld and the entire suit is struck out.

Dated, signed and delivered at Nyeri this 5th day of November 2014.

A. OMBWAYO

JUDGE