



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

CONSTITUTIONAL PETITION NO. 3 OF 2019

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 27, 42, 43, 69,
70, 162, 174, 183, 186 & 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 6, 9, 11 63, 70(1), 72(1), 79, 82(1), 139(1),
158 & 159 OF THE WATER ACT 2016, CAP 372, LAWS OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10,
42, 43, 69, 174, 183 AND 186 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE EMBU COUNTY GOVERNMENT INTERFERING AND
MEDDLING WITH THE MANAGEMENT OF KYEWACO (KYENI
WATER AND SANITATION COMPANY)**

BETWEEN

JULIUS NJERU NJOKA.....1ST PETITIONER

KENNETH NJERU MIKINYANGO.....2ND PETITIONER

JOHN NYAGA NJOKA.....3RD PETITIONER

FELIX WANDUKIRE NYAGA.....4TH PETITIONER

DONATO MURIUKI IRERI.....5TH PETITIONER

PATRICK GICHOVI NJAGI.....6TH PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT

THE EMBU COUNTY EXECUTIVE COMMITTEE MEMBER –

WATER IRRIGATION, ENVIRONMENT AND

NATURAL RESOURCES.....2NDRESPONDENT

RULING

1. By a petition dated 7th March 2019 the Petitioners sought the following reliefs in relation to alleged contravention of their constitutional rights by the Respondents, that is to say:

a. A declaration that the Board of Directors duly elected by the AGM on 4th April, 2017 were properly and duly elected as KYEWASCO (Kyen Water and Sewerage Company) Board of Directors and appointment letters be issued accordingly.

b. A declaration that the decision by the 1st and 2nd Respondents to issue appointment letters to the interim committee to run the affairs of Kyewasco for two months and the renewal thereto for a further six months without following due process, the 2nd Respondent acted ultra vires the Constitution.

c. A declaration that the decision by the 1st Respondent for payment of a monthly flat rate charges of 200/- and purport to implement it in defiance of the laid out legal guidelines in total disregard of the Constitutional provisions on the executive not to involved in the management of water service providers ultra vires.(sic)

d. A declaration that the decision by the 1st and 2nd Respondents to impose decisions on appointment of interim committee without public participation, interfere with management of Kyewasco (Kyen Water and Sewerage Company Limited) at the expense of critical service delivery to the members of public does not meet the immediate needs of the petitioners and the people of Embu County at large, is irresponsible and imprudent use of power, discriminatory on the Petitioners, unlawful and unconstitutional thus it is null and void ab initio.(sic)

e. A permanent injunction order restraining the 1st and 2nd Respondents and any of its officers from interfere in any way with management of Kyewasco (Kyen Water and Sewerage Company Limited) at the expense of critical service delivery to the Petitioners, members of public and all consumers.(sic)

f. Any other order or relief this honourable court may deem fit and just to issue to ensure that law, order, good governance and constitutionality is observed.

g. The costs of the proceedings herein borne by the Respondents herein.

2. Simultaneously with the filing of the petition the Petitioners also filed a notice of motion under certificate of urgency dated 7th March 2019 in which they sought interim orders pending the hearing and determination of both the application and the petition.

3. The 2nd Respondent filed an affidavit sworn on 24th March 2019 on his own behalf and on behalf of the 1st Respondent denying the Petitioners' claim in its entirety. The Respondents also filed a notice of preliminary objection to the said petition and application setting out the following grounds:

a. This court lacks jurisdiction to entertain this matter in as far as the Petitioners have admitted in the petition that they represent stakeholders and directors of Kyeni Water Services Company Limited (Kyewasco), they are bound by article 132 of the Memorandum and Articles of Association of Kyewasco that provides for an Arbitration concerning running of the affairs of the company.(sic)

b. In as far as the Petitioners are seeking to have purported elections of third parties to a third party company, not a party to this suit, affirmed by the Environment and Land Court and resolution of issues of tariffs, the same do not fall under the purview of the Environment and Land Court Act, No. 19 of 2011 and specifically section 13 thereto and the court lacks jurisdiction to entertain this matter.(sic)

c. All the prayers sought in the petition do not fall under the purview of issues to be dealt with under section 13 of the Environment and Land Court Act, No. 19 of 2011 and therefore this honourable court has no jurisdiction to entertain the purported petition.

d. Petitioners have not set out with a reasonable degree of precision the provisions of the Constitution alleged to have been violated and the manner in which they have been infringed and in view of existence of a clear remedy under the Kyewasco Constitution which has an underpinning under relevant statute, this court should allow that procedure to be followed by the parties.

e. The issues raised by the Petitioners have not met the threshold to be brought to this honourable as a Constitutional Petition.

f. That the petition and the notice of motion both of 7th March 2019 are not merited and must be struck out with costs to the Respondents.

4. When the matter was listed for *inter partes* hearing of the notice motion dated 7th March 2019 it was directed that the preliminary objection by the Respondent be determined in the first instance through written submissions. The Respondents were granted 21 days to file

and serve their submissions whereas the Petitioners were granted 21 days to file their submissions upon service by the Respondents. The record indicates that the Respondents filed their submissions on 9th April 2019 but there is no indication of the Petitioners having filed theirs.

5. The material on record indicates that there are leadership and corporate governance challenges at Kyeni Water & Sewerage Company Ltd (KYEWASCO) which is a water service provider licensed under the Water Act 2016. The material on record reveals that there is an existing dispute on the management of KYEWASCO pitting the Petitioners against the Respondents hence the reliefs sought in the petition and interlocutory application.

6. The material on record further indicates that KYEWASCO is a company incorporated under the Companies Act and that it is a water service provider regulated by Tana Water Services Board. The Respondents have been accused of improperly interfering with the leadership, management and operations of the said company to the detriment of the public and concerned water consumers in Kyeni and Runyenjes within Embu County.

7. Although the Respondents have raised several objections in their notice of preliminary objection the court shall only deal with the issue of jurisdiction. The 2nd and 3rd grounds of objection are to the effect that this court has no jurisdiction under section 13 of the **Environment and Land Court Act No. 19 of 2011** to entertain dispute as framed in the petition.

8. The question of the jurisdiction of a court or tribunal to entertain a cause or dispute was considered in the case of the **Owners of Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Ltd [1989] KLR 1** where the court observed as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." (Emphasis added).

9. In the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 Others [2012] eKLR** the Supreme Court of Kenya explained the source of a court's jurisdiction as follows:

"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...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."

10. So, where does the Environment and Land Court derive its jurisdiction from? The relevant provisions are to be found in **Article 162 (2) (b) of the Constitution of Kenya 2010** and the **Environment and Land Court Act, 2011**. There are, of course, various other statutes e.g the **Land Act 2012, Land Registration Act, Environmental Management and Coordination Act**, etc which confer jurisdiction upon the Environment and Land Court.

11. For purposes of these proceedings, the material provisions on jurisdiction are to be found in **section 13 of the Environment and Land Court Act** which provides as follows;

"13 (1) The court 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 this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes-

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or thereat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

(5) Deleted by Act No. 12 of 2012, Sch

(6) Deleted by Act No 12 of 2012, Sch

(7) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including –

- a) interim or permanent preservation orders including injunctions;**
- b) prerogative orders;**
- c) award of damages;**
- d) compensation;**
- e) specific performance;**
- f) restitution;**
- g) declaration; or**
- h) costs.**

12. The court has considered the nature of the dispute amongst the litigants and the nature of the reliefs sought in the petition. The dispute does not concern any claim with regard to land or the environment. The dispute relates to the management and operations of a limited company incorporated under the provisions of the **Companies Act**. The mere fact KYEWASCO is a water service provider does not turn the leadership dispute into one relating to land and the environment within the meaning of **Section 13 of the Environment and Land Act**. The court is thus of the view that it has no jurisdiction to entertain the instant petition and the accompanying application for interim orders.

13. In view of the foregoing, the court does not find it necessary to consider the other objections relating to arbitration and the constitutional threshold which were raised by the Respondents. The court is obligated to down its tools the moment it holds the view that it has no jurisdiction to entertain the matter.

14. The upshot of the foregoing is that the court finds merit in the 2nd and 3rd grounds of the preliminary objection dated 24th March 2019. Accordingly, the said preliminary objection on jurisdiction is upheld and the petition dated 7th March 2019 as well as the notice of motion dated 7th March 2019 are hereby struck out with costs to the Respondents.

15. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 19TH DAY of SEPTEMBER, 2019.

In the presence of Ms. Kiai holding brief for Mr. Kigen for the 1st & 2nd Respondents and in the absence of the Petitioners.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

19.09.19