



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

PETITION CASE NO. 4 OF 2015

TIMOTHY OTUYA AFUBWA.....1ST PETITIONER

FRED MARUTI MURUNGA.....2ND PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF TRANS-NZOIA.....1ST RESPONDENT

RATILAL GOSAR DODHIA.....2ND RESPONDENT

VIPUL RATILAL.....3RD RESPONDENT

AVIR KANTI SHAH.....4TH RESPONDENT

R U L I N G

1. The two petitioners **Timothy Otuya Afubwa** and **Fred Maruti Murunga** filed a constitutional petition in which they named the **County Government of Trans-Nzoia** and three other individuals as respondents. They contemporaneously filed a notice of motion seeking certain conservatory orders. When the notice of motion came up for hearing, the respondent's counsel raised preliminary objections on behalf of the respondents on the ground that the notice of motion as well as the petition were incompetent for having been brought under wrong provisions of the law. They also contended that the court lacked jurisdiction to entertain the matter.

2. The County Government of Trans-Nzoia had purchased **L.R. No. Kitale Municipality Block 7/20** from the second, third and fourth respondents. The petitioners are contending that they are registered voters of Kwanza and Saboti constituencies respectively and that the purchase of the property by the County Government of Trans-Nzoia was a waste of public funds and further that there was no public participation. The petitioners also contend that the property was bought at exorbitant price and that they suspect that public money was embezzled in the process. They further contend that the County Government of Trans-Nzoia has failed to equip the existing hospitals in the County and that the purchase of the property which the County Government intends to use as a hospital was unnecessary.

3. The petitioners have cited Articles **19, 20, 22, 23, 35, 40, 42, 43, 47, 64, 65, 66, 69, 70, 159, 227 and 258 (2) (c)** of the Constitution. Article 20 provides for application of the Bill of Rights. Article 22 is on the enforcement of the Bill of Rights. Article 23 deals with authority of court to uphold and enforce the Bills of Rights. Article 35 is on access to information. Article 40 is on protection of right of property. Article 42 is on environment. Article 43 is on economic and social rights. Article 47 is on fair administrative action. Article 64 is on private land. Article 65 is on land holding by non citizens. Article

69 relates to obligations in respect of the environment. Article 75 is on enforcement of environmental rights. Article 159 is on judicial authority. Article 227 is on procurement of public goods and services and Article 258 is on enforcement of the constitution.

4. The counsel for the respondents argued that this court has no jurisdiction to entertain the application or the petition itself. This was one among other points raised by the counsel for the respondents in their preliminary objections. In any proceedings, jurisdiction is very fundamental and if the court is of the opinion that it has no jurisdiction, then there is no point of making any further step in the proceedings. In the case of *The owners of motor vessel "Lillians" -vs- Caltex Oil Kenya Limited 1989 KLR the Court of Appeal* held as follows:-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court hasno jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

5. Mr. Samba for the petitioners argued that the rules made pursuant to Article 22(3) define the High Court to include Courts established under Article 162(2) of the Constitution and that therefore this court has jurisdiction to entertain the petition. He however submitted that should the court find that it has no jurisdiction, it should refer the matter to a court with jurisdiction. Mr. Wanyama for the second, third and fourth respondents in response argued that the reference to High Court including the Courts established under Article 162 (2) of the Constitution was only in reference to Article 42, 69 and 70 of the Constitution.

6. The Environment and Land Court was established under Article 162(2) of the Constitution. The Constitution then gave Parliament mandate to determine the jurisdiction and functions of the court contemplated in clause (2) of Article 162. As mandated by the Constitution, Parliament enacted The Environment and Land Court Act No. 19 of 2011 which came into force on 30/8/2011. section 13 of the Act is the one which confers jurisdiction.

Section 13 (1) provides as follows:-

“ 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 provisions of this Act or any other law applicable in Kenya relating to Environment and Land”.

Section 13(2)

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

- (a) -----
- (b) -----
- (c) -----
- (d) -----
- (e) -----”.

Section 13(3)

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

7. Article 165(3)(b) of the Constitution gives the High Court jurisdiction to determine any question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The Bill of Rights is contained in Chapter Four of the Constitution. It runs from Article 19 to 59. Section 13 of the Environment and Land Court Act clearly shows that the legislature was alive to the fact that the right to clean and healthy environment fell under the Bill of Rights which was within the jurisdiction of the High Court but that notwithstanding, they removed Article 42 and gave the Environment and Land Court jurisdiction to hear and determine an application for redress of a denial, violation or infringement of or threat to the right to clean and healthy environment.

8. In the instant case none of the petitioners is claiming that his right to a clean and healthy environment under Article 42 of the Constitution has been denied, violated, infringed or threatened. The rules which the Chief Justice made pursuant to Article 22 (3) were meant to provide the manner in which proceedings for enforcement of the Bill of Rights were to be brought before court. I do not think that the definition in those rules that the High Court also includes Courts established under Article 162 (2) of the Constitution was meant to give those Courts jurisdiction to entertain applications for redress arising from violation of the Bill of Rights. The Constitution had already designated the High Court as the only court to address questions on violation of the Bill of Rights. Parliament in its mandate also deemed it fit that the only right under the Bill of Rights which the Environment and Land Court could hear is the right to clean and healthy environment and gave that jurisdiction to the Court. The petitioners complaints are clearly out of the jurisdiction of this court.

9. I find that this Court has no jurisdiction to entertain the petitioners' petition. The petitioners should direct their petition to the right court with jurisdiction.

It is so ordered.

Dated, signed and delivered at Kitale on this **18th** day of **June, 2015**.

E. OBAGA

JUDGE

In the presence of Professor Sifuna for 1st Respondent, M/s.Arunga for Mr. Samba for Petitioners and Mr. Wanyama for 2nd, 3rd and 4th Respondents.

Court clerk – Isabellah.

E. OBAGA

JUDGE

18/6/2015