



Republic v Registrar of Companies & 2 others; Waterfront Outlet Limited (C.147966) (Interested Party); Waterfront Outlets Limited (CPR/2015/214503) (Exparte) (Miscellaneous Application E059 of 2022) [2023] KEHC 227 (KLR) (Judicial Review) (19 January 2023) (Ruling)

Neutral citation: [2023] KEHC 227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E059 OF 2022
AK NDUNG’U, J
JANUARY 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

REGISTRAR OF COMPANIES 1ST RESPONDENT

BUSINESS REGISTRATION SERVICES 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

WATERFRONT OUTLET LIMITED (C.147966) INTERESTED PARTY

AND

WATERFRONT OUTLETS LIMITED (CPR/2015/214503) EXPARTE

RULING

1. Pursuant to leave of court granted on June 2, 2022, the applicant by way of a notice of motion dated June 30, 2022 and brought under articles 2,3,10,22,23,25,27,35,47,48,50,73(1)(a) & 165 of the Constitution of Kenya; sections 832,853,859 and 863 of the Companies Act, section 3,3A of the Civil Procedure Act, order 53 rule 3 (1)(2)(3) and (4), 4(1)(2)(3) 5, 6 and 7 (1) and (2) 1 of the Civil Procedure Rules, 2010, and section of the Law Reform Act cap 26 laws of Kenya sought for the orders:

1. That the honourable court be pleased to grant to the applicant:



- a. An order of *certiorari* to quash the decision by the registrar of companies and the business registration services to (i) issue a directive on the applicant to change its name, viz Waterfront Outlets Limited (CPR /2015/214503) within 30 days from May 6, 2022 and (ii) order the registration of Waterfronts Limited (CPR/2015 / 214503) to be struck off from the register of companies, lest (i) averred above is not complied with.
 - b. An order of *mandamus* to move into this court and compel the registrar of companies and the business registration services to:
 - I. (i) strike off the registration of Waterfront Outlets Limited (C 147966) and (ii) remove from the register of companies the invalid and forged registration, particulars and documentation of Waterfront Outlets Limited (C 147966).
 - II. compel the registrar of companies and the business registration services to produce in court documents in the register of companies related to (i) Waterfronts Outlets (BN 207645), (ii) Waterfront Outlets Limited (2015/214503) and (iii) Waterfront Outlets Limited (C147966) and substantiate on the origin and transactional history of the three entries.
2. That pending the hearing and determination of this motion, the honourable court be pleased to issue an order granting the applicant access to the register of companies for the series 147000 to 148000 alongside the register of stricken off companies.
 3. That the honourable court be pleased to issue a declaration that Gopal Dhanji Patel and Ketan Gopal Dhanji Patel are the only shareholders of Waterfront Outlets Limited (CPR/2015/214503).
 4. That the honourable court be pleased to grant such other or further relief as it may deem fit, necessary and expedient in the circumstances.
 5. That the costs of this application be provided for.
2. The application was supported by the grounds on the face of it, a verifying affidavit and a statutory statement, both dated May 30, 2022 together with an affidavit dated June 30, 2022.
 3. In summary, the applicants case was that a cursory look at the copies of registration documents with the registrar of companies uncovered the revelation that a great fraud had been perpetrated against the applicant wherein the memorandum and articles of association held by the registry's file had been fraudulently substituted. That the effect of the fraudulent substitution introduced and added one Christopher Onuonga Oanda to the company as a shareholder holding 10 shares. Further, that the applicant came to learn of another company appearing on the ecitizen portal under the same name, Waterfront Outlets Limited, associated with Christopher Onuonga Oanda.
 4. That on April 7, 2022, the applicant wrote to the registrar of companies detailing the disclosed fraud and seeking the assistance of the registrar to ensure the rectification of the record and that on May 6, 2022, the registrar of companies replied to the applicant wherein the impugned decision calling for the ex parte applicant to change its name was communicated to them [applicant]. It is urged that the registrar of companies letter dated May 6, 2022 is correspondence in furtherance of the averred fraud and a covert attempt to throw the applicant off the trail of the evident collusion between the 1st respondent and the interested party.



5. The reliefs sought by the applicant are on grounds of contravention of statute, illegality, unconstitutionality; irrationality, unreasonableness, bad faith, improper motive; and violation of legitimate expectation against the applicant, by the 1st and 2nd respondents.
6. In response to the application, the interested party filed its replying affidavit dated July 1, 2022, and written submissions dated July 19, 2022; while the respondents filed a notice of preliminary objection dated July 25, 2022, on the grounds:
 - i. That this court lacks the competent jurisdiction to preside over this matter.
 - ii. That the application is an appeal disguised as a judicial review application seeking a merit review of the impugned decision which jurisdiction this court lacks by dint of the provisions of section 3 of the Companies Act as read together with practice issued by the Chief Justice on the November 18, 1997.
7. Both the respondents and the interested party submitted and beseeched this court to allow the preliminary objection and dismiss the *ex parte* applicant's application for lack of jurisdiction. It is their case that, this court lacks jurisdiction to determine the application. That the instant matter relates to and/or revolves around the provisions of the Companies Act No 17 of 2015, and the practice directions issued by the Chief Justice on the November 18, 1997; and as per the provisions of section 3 of the Companies Act as read together with the practice directions of 1997, the *ex parte* applicant's application complaints against the registrar of companies arising from the duties performed in exercise of his duties would be best resolved at the commercial division of the High Court. However, and notably, the respondents conceded that the judicial review division is a court with the status of the High Court.
8. The *ex parte* applicant posited that the courts have dealt with a similar question on jurisdiction as the present one and the honourable court found that indeed it has the requisite jurisdiction over such matters. That the jurisdiction of the court is not dependent upon the provisions of the Companies Act, nor indeed on the effect of registration or the conclusiveness of a certificate of registration. The judicial review jurisdiction of the court is derived from section 8 and 9 of the Law Reform Act, cap 26 Laws of Kenya, and rules made thereunder and set out under order 53 of the Civil Procedure Rules. Reliance was placed on the case of Republic V Registrar of Companies Ex Parte Trans global Freight Logistics Limited [2008] eKLR.
9. Further, that the judicial review division of the High Court has severally presided over the very issues that it is being moved to determine in this instant matter: certiorari, and mandamus. The *ex parte* applicant relied on the cases of Republic v Registrar of Companies Ex parte Megascope Healthcare (K) Limited & another [2017] eKLR, and Republic v Registrar of Companies & another Ex parte Golden Africa Kenya Limited [2019] eKLR. The *ex parte* applicant, therefore, prayed that the respondents' preliminary objection be dismissed with cost, for lack of merit.
10. After a careful consideration of the material on record, the issue for determination that arises is: whether the preliminary objection is merited in law.
11. It is trite law that a point of law can be raised at any stage of proceedings. The courts have time and again restated this position. In the case of Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited [2015] eKLR (Nairobi Judicial Review Miscellaneous Application No 2 Of 2015) the court found that: -

“...the question of the appropriate time to raise a preliminary objection has been addressed in various decisions in our courts. In the case of Beatrice Cherotich Koskei and Another v



Olunguruone Land Dispute Tribunal and 2 Others Misc Civil Appl 861 of 2007, the court observed as follows:

“If, as respondents’ counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody’s time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at the earliest possible opportunity. I, therefore, hold that respondents’ counsel is entitled to raise his preliminary objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon.”

These sentiments echoed the view of the court in the case of Ali Oshan and Others v Mrs Catherine Kaswii Nyiha and Others Misc Civil Application 525 of 2002 where the court stated as follows:

“It is obvious that the Kenya National Football Federation Constitution does not allow parties whose disputes fall within the definition of article XIX (1) to commence proceedings in a court of law but to refer them to arbitration. ... It is trite law that a preliminary objection can be raised at any time when the action is still active. Hence Mr Gikandi is perfectly right to raise the preliminary point at this stage...”

12. The High court, in discussing preliminary objection, in *Republic v Permanent Secretary, Ministry of Education & 2 others Ex parte Meshack Ochieng'* [2021] eKLR observed that,

“The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, are as follows:

“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.”

10. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of *Oraro v Mbaja*, (2005) 1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The Court of Appeal also stated in *Mukisa Biscuit Company v West End Distributors Ltd* (supra) that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.
13. On the question as to whether jurisdiction is a point of law, the Supreme Court in *Petition No 7 of 2013 Mary Wambui Munene v Peter Gichuki Kingara and Six others*, [2014] eKLR, stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.
14. The issue of jurisdiction is one that goes to the root of a case and as such must be determined before a court can take any further action in the matter. The court in *Republic v Public Procurement*



“Jurisdiction is donated to a court by either constitution or legislation or both. The Supreme Court in *Samuel Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR had this to say on jurisdiction of courts;

68. “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. This court dealt with the question of jurisdiction extensively, in in the matter of the Interim Independent Electoral Commission (applicant), Constitutional Application Number 2 of 2011. 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. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

15. As to what is jurisdiction, the Court of Appeal stated in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (consolidated)) [2022] KECA 15 (KLR), on what constitutes jurisdiction in general as follows: -

“36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, volume 3 at page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to 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 it upon itself to exercise a jurisdiction which it does not possess, its



decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

37. The *locus classicus* on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA relying, *inter alia*, on the above cited treatise by John Beecroft Saunders held as follows:

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

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside *ex debito justitiae*.

39. The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity.

40. In Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). 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 itself jurisdiction exceeding that which is conferred upon it by law.”

16. In judicial review proceedings, the court is mainly focused on the decision making process. The Court of Appeal in *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi Civil Appeal No185 of 2007(2002) eKLR, held that: -

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e. the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into



the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.

17. Whereas the respondents and the interested party maintain that the jurisdiction over company law matters is donated to the High Court and specifically to the commercial division of that court by dint of the Hon Chief Justice’s practice directions, it was the *ex parte* applicant’s position that this instant application was solely triggered by the impugned decision, in the letter dated May 6, 2022, of the registrar of companies and that the impugned decision is illegal, *ultra-vires*, violates the *Fair Administrative Action Act*, is irrational, unreasonable, and, a violation of the applicant’s fundamental rights and freedoms guaranteed in the *Constitution*; due process was not followed; and that the impugned decisions were made in an opaque manner and without any explanation of the criteria used.
18. Having applied my mind to the rival positions taken by the parties, the facts and the applicable law, it is clear that the preliminary objection raised herein meets the legal criteria of a preliminary objection as defined in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696.
19. Suffice to note that even with the expanded scope of judicial review under the new constitutional dispensation, judicial review still remains a special jurisdiction that is majorly restricted to examination of whether an administrative decision conforms to the requirements of legality, rationality and procedural propriety. It is opportune to add that the judicial review process cannot be a substitute to statutorily provided for jurisdiction of other courts or bodies and the judicial review court cannot and should not assume jurisdiction where statute clearly places jurisdiction at the door of another court or body. To echo the words of the Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others* (supra), ‘ 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 itself jurisdiction exceeding that which is conferred upon it by law.
20. It is common ground that the 1st respondent’s powers to take the impugned action are derived from the *Companies Act* (the Act). Section 3 of the act defines the court in which disputes arising from the operations of the act fall as “the court” means (unless some other court is specified) the High court. In practice directions dated November 18, 1997, the Hon the Chief Justice set out matters that shall be deemed to be commercial matters suitable for trial at the commercial division of the High Court and such matters include “all company matters and applications including winding-up, excluding cases in which a company is suing or being sued as an entity.
21. I agree with the respondents’ submission that parliament in its wisdom provided for the definition of the court to address complaints against the registrar of companies in the exercise of his functions under the Act. Am fortified in this finding by the holding of this court (Professor Ngugi J, as he then was) in *Republic v Resident Magistrate’s Court at Kiambu ex parte Geoffrey Kariuki Njuguna and 19 Others* [2017] eKLR where he held;

“It is common among all the parties that only the High Court has jurisdiction to hear and determine any disputes touching on company law matters by virtue of section 3 of the Companies Act, 2015. That position is so self-evident that no further analysis and comment is required.

28. It must mean, therefore, if the dispute between the *ex parte* applicants and the interested parties (including Dr Warwathe and Ms Kamamia) relates to a company law matter ie KNCCI, the appropriate forum for its ventilation would be the High Court and not the Magistrates Court”.



22. Further, it flows from the facts of the case that the application naturally invites the court to venture into a merit review of the decision of the registrar of companies. The exercise would of necessity involve an analysis of whether the registrar complied with the provisions of the Companies Act. The judicial review court, as earlier noted, is restricted in so far as merit review is concerned and the court with the necessary wherewithal under the Act and the Hon Chief Justice' practice directions is the commercial division of the High Court.
23. It is trite law that jurisdiction is the authority of the court to decide matters that are litigated before it. Such authority is conferred by the constitution or statute. In our instant suit section 3 of the Act confers jurisdiction to the High Court and the practice directions state the commercial division of that court to be the appropriate court to handle disputes under the Act. In determining the dispute, and in view of the expanded space in the new constitutional dispensation, the commercial division, in addition to resolving issues under the Act would, if it finds any element amenable to judicial review in the matter, have the necessary power and jurisdiction to grant an order of judicial review under article 22, 23 and 47 of the Constitution.
24. With the result that the preliminary objection raised herein has merit and is allowed. The suit herein is dismissed for want of jurisdiction. Each party is to bear its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 19TH JANUARY, 2023.

A. K. NDUNGU

JUDGE

