



**Masore v Law Society of Kenya & 2 others (Constitutional Petition E051 of 2022)
[2023] KEHC 1043 (KLR) (Constitutional and Human Rights) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E051 OF 2022**

M THANDE, J

FEBRUARY 17, 2023

BETWEEN

LEO NYANG'AU MASORE PETITIONER

AND

LAW SOCIETY OF KENYA 1ST RESPONDENT

ADVOCATES DISCIPLINARY TRIBUNAL 2ND RESPONDENT

SULEIMAN K MURUNGA 3RD RESPONDENT

RULING

1. The Petitioner herein filed a Petition dated 4.2.22 seeking the following reliefs:
 - a. A Declaration that the conduct of the 1st and 2nd Respondent against the Petitioner has offended the Rule of Law Principle as set out under Article 10(2) (a) of the Constitution of Kenya, 2010.
 - b. A Declaration that the proceedings before the 2nd Respondent instituted vide complaint by the 3rd Respondent as against the Petitioner amounted to double jeopardy and their continuation after the ruling by Hon. Bor J delivered on 25th February 2019 in Nairobi Environment & Land Court No. 1549 of 2013: *Suleiman Murunga v Nilestar Holdings Limited & others* was res judicata and violate the petitioner's constitutional rights as set out under Article 47, 48 and 50 of the Constitution, are an abuse of administrative power, an abuse of the court process and therefore unlawful, null and void ab initio.
 - c. A declaration that the Respondents herein have infringed the Petitioner's constitutional rights to:



- i. Fair hearing under Article 50 of the *Constitution* of Kenya, 2010.
 - ii. Fair Administrative Action under Article 47 of the *Constitution* of Kenya, 2010.
 - iii. Access to justice under Article 48 of the *Constitution* of Kenya, 2010.
 - iv. Property under Article 40 of the *Constitution* of Kenya, 2010.
- d. An order of mandamus to compel the 1st respondent to grant the petitioner unlimited access to the petitioner's e-portal account hosted by the 1st respondent's website of URL <https://online.lsk.or.ke/subscriptions> to allow the petitioner to apply for his practicing certificates and 1st respondent provide written approval stating that there is no objection to the grant of the certificate
 - e. An order of certiorari to bring before the High Court and quash the entire proceedings commenced by the 3rd respondent before the 2nd respondent vide Advocates' Disciplinary Tribunal in case No. 61 of 2019; in the matter of Leo Masore Nyang'au including the judgement of the Tribunal delivered on 10th May 2021 and all subsequent orders and directions.
 - f. An order of prohibition prohibiting the 1st respondent from impeding in any way the petitioner's application for renewal of practicing certificates and the issuance of the practicing certificates, on account of Advocates' Disciplinary Tribunal in case No. 61 of 2019; In the matter of Leo Masore Nyang'au, subject to petitioner's compliance with the statutory pre-application requirements including;
 - i. Meeting the Continuing Professional Development (CPD) quota of 5 points.
 - ii. Providing proof of subscription to a professional indemnity cover.
 - iii. Providing proof of registration of the law firm under which the petitioner trades under.
 - iv. Providing a duly filled and commissioned Statutory Declaration (In compliance with the *Advocates (Accountant's Certificate) Rules*).
 - v. Providing a duly filled Accountant's Certificate for the year.
 - vi. Not being an adjudged bankrupt.
 - vii. Providing proof of payment of fees prescribed for a practicing certificate and the annual subscriptions payable for the time being to the 1st respondent and to the Advocates Benevolent Association.
 - g. An order of compensation being general damages, exemplary damages and moral damages of the unconstitutional conduct of the respondents and the violation of the petitioner's rights.
 - h. Any further orders, writs, directions as this Honourable Court may deem fit and appropriate.
 - i. Cost of the instant petition.
2. The Petitioner also filed an application of even date seeking interim orders which were granted.
 3. The facts of this matter as set out by the Petitioner in his pleadings are that he is an advocate of this Court. He claims that upon instructions, he filed CMCC No. 1111 of 2018 *Nilestar Holdings Limited and Green Valley Limited v Millenium Plastics (2008) Limited & 3 Others*, for recovery of rent arrears



in respect of premises on LR No. 209/928. The defendants therein who included the 3rd Respondent did not file a response. Accordingly, eviction orders were issued and executed. The 3rd Respondent filed an application seeking the setting aside of those orders, on grounds *inter alia* that there were pending proceedings against the Petitioner's clients in Milimani ELC case No. 1549 of 203: [Suleiman Muringa v Nilestar Holdings Limited, Green Valley Ltd and 2 Others](#) (the ELCCase) and that injunctive orders had been issued, restraining the Petitioner's clients from evicting the 3rd Respondent. All this the Petitioner was unaware of. The 3rd Respondent then proceeded to file an application dated 5.3.18 for contempt against the Petitioner in the ELC case and also lodged a complaint against him on 15.8.19 before the 2nd Respondent (the Tribunal) in Advocates Disciplinary Tribunal Case No. 61 of 2019: In the Matter of Leo Masore Nyang'au on 15.8.18. Vide a ruling on 25.2.19, the application for contempt was dismissed by the ELC Court. The Petitioner complains that in spite of being served with the ruling, the Tribunal proceeded with the hearing of the case before it. The Tribunal delivered its judgment on 10.5.21 and found the Petitioner guilty of unprofessional conduct and held that the Petitioner was aware of the injunctive orders in the ELC case. The Petitioner also claims that the Tribunal found him guilty on a balance of probability yet the standard of proof required in the matter was proof beyond reasonable doubt. As a result of the judgement, the Petitioner has not been issued with practicing certificates for the years 2019-2021.

4. The Petitioner further stated that he filed Civil Appeal No. E270 of 2021 against the Tribunal's judgment and unsuccessfully sought stay of further proceedings at the Tribunal. He stated that after assessing the appellate process, he was convinced that the same would not offer efficacious remedies. He thus withdrew the appeal and filed the Petition herein, claiming that the Tribunal in the conduct of the proceedings before it violated Article 10(2)(a) on national values and principles of governance; Article 27 by denying him equal protection and benefit of the law; Articles 162(2)(b) and 165(6) on the supervisory jurisdiction of the Environment and Land Court; Article 159(2)(b) by prolonging the finalization of the case before it; Article 50 as read with 25(c) on the right to a fair trial and Article 47 on fair administrative action.
5. The Petition is opposed by the 3rd Respondent vide a preliminary objection dated 22.2.21. The objection is that the Petition is premature given that sentencing of the Petitioner has not taken place following his conviction. Further that the supervisory jurisdiction of this Court under Article 165 of the [Constitution](#) cannot be invoked until the proceedings in the Tribunal are concluded. The 3rd Respondent urged that the Application be struck out with costs.
6. The preliminary objection is the subject of this ruling. The only issue for determination is whether this Court has the jurisdiction to entertain the Petition herein.
7. The 3rd Respondent contends that this Court lacks the jurisdiction to entertain the matter herein on the ground that the supervisory jurisdiction does not take away the mandate of the Tribunal to enforce discipline amongst members of the Law Society of Kenya. Further that every advocate is subject to the jurisdiction of the Tribunal under Section 55 of the [Advocates Act](#). It was argued that having submitted to the jurisdiction of the Tribunal, it was wrong for the Petitioner to turn around upon his conviction and pending mitigation and sentence, to allege that his fundamental rights had been violated and hence the proceedings should be stopped. His apprehension, conjecture and speculation that the pending sentence will be severe and harsh is not enough to obtain the orders he now seeks. Further being aggrieved by the decision of the Tribunal, the Petitioner's remedy lay in an appeal.
8. It was further submitted that complaints against advocates may be lodged at the Tribunal, established under Section 57 of the [Advocates Act](#). An advocate aggrieved by the decision of the Tribunal may appeal to the High Court as provided under Section 62(1) of the [Act](#). The 3rd Respondent further



submitted that his preliminary objection is purely on a point of law to wit that the Petitioner is invoking the supervisory jurisdiction of this Court under Article 165(3)(b) and (d) yet the matter is not ripe for adjudication by this Court. This, it was submitted is a matter of law as the jurisdiction of the Court flows from the Constitution or statute.

9. On his part, the Petitioner submitted that this Court has under Article 165(3)(b) of the Constitution, the original and unlimited jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. This being the case, a person can approach the Court at whatever time whenever such person's rights have been denied, violated, infringed or threatened. He contended that the 3rd Respondent is propounding the narrative that the 1st and 2nd Respondents should be allowed to violate the Petitioner's rights until the proceedings before the Tribunal are finalized.
10. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by the Constitution, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

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.

11. This Court derives its jurisdiction principally from Article 165(3) of the Constitution which provides as follows:

Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and



- (e) any other jurisdiction, original or appellate, conferred on it by legislation.
12. The unlimited original jurisdiction of the High Court in civil and criminal matters includes the jurisdiction to hear any question respecting the interpretation of the Constitution, the determination of the question whether any law is inconsistent with or in contravention of this Constitution or whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the Constitution.
 13. The Constitution of Kenya recognizes tribunals. Article 159(1) provides that Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. The 2nd Respondent is a tribunal established under Section 57 of the Advocates Act, for the purpose of governing the conduct of advocates. Under Section 60 of the Act, the Tribunal has jurisdiction to hear any complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, made to the Tribunal by any person. After considering a complaint made against an advocate, Section 60(4) provides that the Tribunal may order that the complaint be dismissed. If however the Tribunal forms the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may make orders for the stipulated sanctions against the advocates as it deems fit.
 14. The Advocates Act makes provision for an advocate aggrieved by the decision of the Tribunal, as the Petitioner is, to appeal to the High Court. Section 62 of the Act provides:
 1. Any advocate aggrieved by order of the Tribunal made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61(2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.
 2. The Court shall set down for hearing any appeal filed under subsection (1) and shall give to the Council of the Society and to the advocate not less than twenty-one days' notice of the date of hearing.
 3. An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order.
 15. The Petitioner invoked these provisions and filed Civil Appeal No. E270 of 2021 against the said judgment of the Tribunal. He however told the Court that after assessing the appellate process, he was convinced that the same would not offer efficacious remedies.
 16. The question before this Court is whether its jurisdiction has been properly invoked in light of the provisions of Section 62 of the Advocates Act and in light of the allegations of violation of the Petitioner's rights by the Tribunal in its conduct of the matter pending before it.
 17. In the case of Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR, the Court of Appeal had this to say on the jurisdiction of the Court vis-à-vis that of other statutory tribunals and bodies:

Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear



abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

18. The Petitioner has argued that if this Court were to decline jurisdiction, then it will permit the 2nd Respondent to supersede or lessen the powers of the ELC, a superior court to try an advocate for allegation of misconduct contrary to Section 56 of the Act. He further contends that there is already a finding on similar facts, of a Court with supervisory powers of the Tribunal, that the Petitioner is faultless. As such, the Tribunal has overruled the ELC on similar facts and if this Court does not intervene, the Tribunal will proceed to sentencing which will result in breach of the constitutional order. Further that the matters herein require to be heard on merit and not through a preliminary objection.
19. The Court notes that in his appeal against the order of the Tribunal, the Petitioner filed an application dated 13.10.21 seeking interim orders of stay of mitigation and sentencing before the Tribunal. He also sought stay of further proceedings or execution of any order of the Tribunal. In his ruling of 1.11.21, Seron, J. was of the view that the Tribunal ought to be allowed to conclude its process after which any aggrieved party would be at liberty to approach the High Court on appeal. He dismissed the application. Following the dismissal of that application, the Petitioner made the assessment that the appellate process would not offer him efficacious relief.
20. In the case of *Republic v Advocates Disciplinary Tribunal & another Ex Parte Asige Japheth Savwa* [2016] eKLR, relied on by the Petitioner, Odunga, J. (as he then was) stated:
 30. It follows that this Court has the powers to interfere with the decision of the Respondent arrived at in the exercise of its statutory mandate where the Respondent's powers are not validly exercised. To make a decision adversely affecting the applicant without affording the applicant an opportunity of being heard is in my view such invalid exercise of power warranting this Court to interfere.
 31. In my view the respondent broke all the procedural rules relating to fairness in its proceedings. It issued prejudicial orders on a mention date; it did not bother to confirm whether its directions were complied with in order to ensure the fairness of the process; and it did not confirm whether the Applicant was duly notified at every stage of the proceedings. Accordingly, its decision cannot be allowed to stand.
21. It is trite that the mandate of this Court is to consider whether the Tribunal violated the rights of the Petitioner in the manner it conducted its proceedings in the case in question. The Petitioner's complaint as I understand it is that the Tribunal disregarded this crucial evidence thereby denying him a fair trial. He complains that the Tribunal ignored the ruling of the ELC exonerating him from any contemptuous conduct. He faults the Tribunal for finding him guilty of professional misconduct yet the ELC had exonerated him from the accusation by the 3rd Respondent, of contempt of court. It is my considered view that the issues raised by the Petitioner are not matters for the constitutional Court. It is in the appellate process that the Court will be able to review the evidence on record and make a finding as to whether all evidence was considered and whether the Tribunal arrived at a just finding. As such the Court exercising its appellate jurisdiction is better placed to offer efficacious remedies as opposed to the Constitutional Court, which cannot go into issues of merit.
22. The Petitioner further argues that what is before the Court is not a pure point of law; that the 3rd Respondent has delved into contested facts contrary to settled law on what constitutes a preliminary



- objection; that he has raised matters of fact which are not jurisdictional issues. He urged the Court to find that the preliminary objection is frivolous and an abuse of the Court process.
23. The law on preliminary objections is well settled. In the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 Law JA rendered himself thus:
- So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. (emphasis mine).
24. A preliminary objection consists of a point of law which has been pleaded. The nature of a preliminary objection is such that when argued, may dispose of the suit. Law, JA gave examples of preliminary objections key amongst them being objection to the jurisdiction of the Court.
25. And in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court reiterated the same and stated:
- (15) Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
- (16) What point of law is being raised in this preliminary objection? It is clear that it is a jurisdictional point, that an application for certification falls to the Appellate Court’s jurisdiction in the first place.
26. In the present case, the 3rd Respondent has challenged the jurisdiction of this Court to entertain the Petition. A jurisdictional point can be raised in a preliminary objection.
27. The locus classicus on jurisdiction is the oft cited case of *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1., where Nyarangi, JA. famously stated:
- 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.
28. It is not in doubt that Article 165(3) of the *Constitution* confers upon the High Court unlimited original jurisdiction in civil and criminal matters, including the jurisdiction to hear any question with respect to the interpretation of the *Constitution*. In particular and relevant to the matter herein, under Article 23 this Court has jurisdiction accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The jurisdiction of this Court may however be limited by the Constitution and statute in certain instances. The Court may thus only exercise that jurisdiction which has been conferred upon it by the Constitution, statute or both.
29. In the case of *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] eKLR, the Court of Appeal considered the question of limitation of the jurisdiction of the High Court and stated as follows:



11. The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. In *Halsbury's Laws of England*, Volume 10 at paragraph 319, the learned authors state:
- “The subject’s right of access to the courts may be taken away or restricted by statute.”
- ...
- Paragraph 723 states:
- “Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court’s jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”
12. In *Narok County Council v Trans-mara County Council* (supra) this Court held that:
- “... though section 60 of the *Constitution* gave the High Court a limited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty.”
13. In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of the Constitution only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court in *The Matter Of The Interim Independent Electoral Commission*[2011] eKLR:
- “[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.”
14. Similarly, in *Suleiman Ibrahim v Awadh Said*[1963] EA 179, Windham, C. J. held that section 33 of the *Rent Restriction Act* of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.
30. Our courts have time and again stated that where a clear procedure for redress has been provided by law, such procedure must be followed to the letter. One such case is *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court of Appeal stated:
- In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.
31. This Court is being asked to overturn the finding of the Tribunal through this constitutional petition. This the Court cannot do so as adequate provision has been made for redress for a party dissatisfied with the decision of the Tribunal.
32. In *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* [2013] eKLR, the Court rendered itself thus:
- Where there exist sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted... Where the Constitution and or statute established a dispute resolution procedure, then that procedure must be used.



33. The procedure for redress for a party aggrieved by the decision of the Tribunal, such as the Petitioner is, has been provided and is clearly set out in Section 62 of the Act. Notably, the Petitioner did invoke the said provision. It is only after failing to get the stay orders sought, that he withdrew the appeal and filed the Petition herein alleging that his rights had been violated.

34. And in the case of *Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others* [2011] eKLR, Asike-Makhandia, J (as he then was) considered a petition, the subject of which had a remedy in statute, and pronounced himself thus:

If we do not have basic rules of engagement, of what use will be Constitutional Petitions or references if they are turned into panaceas for all legal problems that the citizens of this country may have or imagine? I do not think that the Constitution was meant to replace statutes that provide remedies to those concerned.

The learned Judge went on to state:

I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights.

35. I concur with the views expressed by the learned Judge and find that what the Petitioner is complaining about could competently have been addressed by the Court exercising its appellate jurisdiction, as provided for by the Act.

36. It is well settled that a party may only invoke constitutional remedies for serious violation of the Constitution but not, as in the present case, for correction of substantive or procedural errors committed in the course of litigation. A wrong decision by a tribunal of competent jurisdiction does not equate to violation of the fundamental rights of a losing party.

37. In the case of *Methodist Church in Kenya Trustees Registered & Another v rev. Jeremiah Muku & Another* [2012] eKLR the Court of Appeal addressed its mind to this issue and stated:

In *Maharaj v Attorney General of Trinidad and Tobago* (No. 2) [1979] AC 385, the Privy Council said at page 399 – para D.

“In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court.

38. After carefully considering the Petition before me, it is quite clear in my mind that the Petitioner seeks to achieve what he failed in his application for stay of proceedings, in Civil Appeal E270 of 2021. This in my view is an abuse of the Court process.

39. In the end and in view of the foregoing, I make a finding that this Court lacks jurisdiction to entertain the Petition herein. I therefore uphold the Preliminary Objection dated 22.2.22 with the result that the Petition dated 4.2.22, is hereby dismissed with costs.

DATED AND DELIVERED IN NAIROBI THIS 17TH FEBRUARY 2023

M. THANDE



JUDGE

In the presence of: -

..... for the Petitioner

..... for the Respondents

..... Court Assistant

