



**Coast Progressive Team v Cabinet Secretary, Ministry of Energy and Petroleum & 3 others
(Constitutional Petition E012 of 2023) [2023] KEHC 2570 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2570 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E012 OF 2023
OA SEWE, J
MARCH 30, 2023
IN THE MATTER OF ARTICLES 10, 22, AND 23 OF THE CONSTITUTION
OF KENYA, 2010
AND
IN THE MATTER OF ARTICLES 46, 47, 201 AND 227 OF THE
CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT
AND
IN THE MATTER OF THE MINISTRY OF ENERGY AND PETROLEUM
AND
IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT
AND
IN THE MATTER OF THE MINISTRY OF ENERGY AND PETROLEUM
AND
IN THE MATTER OF THE MINISTRY OF TREASURY & PLANNING
BETWEEN
COAST PROGRESSIVE TEAM PETITIONER
AND
THE CABINET SECRETARY, MINISTRY OF ENERGY AND
PETROLEUM 1ST RESPONDENT



**THE CABINET SECRETARY, MINISTRY OF TREASURY &
PLANNING 2ND RESPONDENT**
ENERGY & PETROLEUM REGULATORY AUTHORITY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Before the court for determination is the notice of motion dated March 13, 2023. It was filed on behalf of the 1st and 3rd respondents by the law firm of M/s Garane & Somane Advocates under articles 22(1) and (4) and 23(1) of the *Constitution* of Kenya, 2010. The respondents also relied on rule 8(1) and (2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (otherwise known as “the Mutunga Rules”). They prayed for orders that:
 - (a) Spent
 - (b) This petition be transferred to the constitutional and human rights division of the High Court at Nairobi for further directions;
 - (c) The court be pleased to direct that the court file be placed before the presiding judge at the constitutional and human rights division of the High Court at Nairobi for further directions;
 - (d) The costs of the application be provided for.
2. The application was premised on the grounds that this court is bereft of the territorial jurisdiction to hear the matter pursuant to rule 8 of the Mutunga Rules, which requires that every case be filed in the High Court within whose jurisdiction the alleged violation took place. The respondents asserted that the petition alleges violations of human rights in connection with tender processes which occurred in Nairobi. In addition, the petitioners pointed out that there are other matters which have already been filed at or referred to the Constitutional and Human Rights Division, Nairobi in connection with the same subject procurement. They cited constitutional petition No E001 of 2023: *Duncan Agesa & 3 others v Cabinet Secretary of Energy and Petroleum & 3 others*, which was filed at Kerugoya High Court, and which was transferred to the Constitutional & Human Rights Division at Nairobi on March 10, 2023 by Hon Mwongo, J. and directions given that the file be placed before the presiding judge on March 14, 2023 for hearing and determination.
3. It was further the contention of the respondents that it is undesirable for multiple suits over the same subject matter to be considered by different courts of concurrent jurisdiction, as the practice presents the possibility of conflicting decisions being made. They also pointed out that it would be wasteful to deploy resources of the judiciary to deliberate on the same or similar issues and against the grain of article 159 of the *Constitution* which require the dispute resolution process to be fair, expeditious and cost effective, with proportionate use of judicial resources.
4. The application was supported by the affidavit of Abdullahi Yusuf, an Advocate of the High Court of Kenya, in which he expounded on the grounds aforementioned. He annexed a copy of the ruling delivered by Hon Mwongo, J. dated March 10, 2023 and urged that the application be allowed.
5. The application was opposed by the petitioner *vide* the grounds of opposition dated March 15, 2023. The petitioner thereby contended that:



- (a) This court has jurisdiction to hear and determine this matter as provided under article 165(3) (a), (b) and (d) of the Constitution;
 - (b) The 1st and 3rd respondents' application seeks to inhibit, impede and obstruct the court from exercising its constitutional mandate as provided for under article 165(3)(a), (b) and (d) of the Constitution;
 - (c) Rule 8 of the Mutunga Rules are subordinate to article 165(3)(a), (b) and (d) of the Constitution;
 - (d) The wording of rule 8 of the Mutunga Rules is of a discretionary nature and therefore the court is not bound by it;
 - (e) Practice Rules, Guidelines and Directions cannot take precedence over constitutional provisions;
 - (f) This court is not bound by the ruling in Kirinyaga constitutional petition No E001 of 2023 as it was issued by a court of similar jurisdiction;
 - (g) That, in the light of the foregoing, the 1st and 3rd respondent's application has no basis and amounts to gross abuse of the court process.
6. The application was canvassed by way of written submissions as well as brief oral highlights, pursuant to the directions given herein on March 15, 2023. On behalf of the 1st and 3rd respondents, Mr Abdullahi proposed a single issue for determination in his written submissions dated March 16, 2023, namely, whether the court has power to transfer this matter to another court of competent jurisdiction. He relied on Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 as well as the High Court (Organization and Administration) Act, No 27 of 2015 as to the territorial jurisdiction of this court to support his argument that the court can only exercise its jurisdiction in accordance with the law and the rules of procedure laid down thereunder. He therefore submitted that, in view of rule 8 of the Mutunga Rules, this court ought to transfer this petition as prayed to facilitate the just, expeditious, proportionate and cost effective resolution of the subject dispute, in compliance with article 159(2)(d) and (e) of the Constitution.
7. Ms Lang'at, learned counsel for the 2nd and 4th respondents supported the application; and on behalf of the petitioner, Mr Bunde relied on his written submissions filed on March 21, 2023. He relied on his grounds of opposition and urged the court to not allow its constitutional powers under article 165 of the Constitution to be whittled away as proposed by the 1st and 3rd respondents. He reiterated his stance that the Mutunga Rules are subordinate to the Constitution and that the decision in Kerugoya High Court Petition No E001 of 2023 is not binding on the court, having been made by a court of concurrent jurisdiction.
8. The centrality of the issue of jurisdiction cannot be overemphasized. The point was made in Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd [1989] KLR 1 the Court of Appeal that:
- "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." (Per Nyarangi, JA)



9. Thus, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court held that:

“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 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. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on 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.”

10. The jurisdiction of the High Court is provided for under article 165(3)(a) of the Constitution which stipulates, in part, that:

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

- a) Unlimited original jurisdiction in criminal and civil matters;

11. Article 165(5) of the Constitution on the other hand, provides that:

(5) The High Court shall not have jurisdiction in respect of matters: -

- a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
b) Falling within the jurisdiction of the courts contemplated in article 162(2).

12. The foregoing notwithstanding the High Court (Organization and Administration) Act provides thus in section 25:

The court shall exercise its jurisdiction in accordance with the rules of practice and procedure prescribed by written law.

13. It is to be recalled that the purpose of the Act, as set out in the preamble, is to:

“...give effect to article 165 (1)(a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes.”

14. Accordingly, there cannot be a whittling away of powers of the High Court when the Mutunga Rules stipulate, in rule 8 thereof, that:

“(1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.”

15. There appears to be no dispute that the procurement agreement complained of was entered into in Nairobi going by the averments set out in paragraphs 2, 3, 4 of the petition as read with paragraphs 7 to 16 thereof. Hence, the petition ought to have been filed at the Constitutional and Human Rights Division of the High Court in Nairobi. And while I agree that the Kerugoya ruling is only of persuasive



value, it is significant that it concerns the same tender, and that an order has already been made that the matter be handled at the Constitutional and Human Rights Division of the High Court in Nairobi. I therefore agree entirely with the view taken by Hon Mwangi, J. that:

“...there can be no doubt that this court has original civil jurisdiction to entertain the petition. However, the HCOAA having created divisions and stations of the court for efficiency and effectiveness of the administration of justice, demands that exercise of jurisdiction by the court be in accordance with written rules of practice and procedure.”

16. In the result, find merit in the application dated March 13, 2023. The same is hereby allowed and orders granted as hereunder:
- (b) This petition be and is hereby transferred to the Constitutional and Human Rights Division of the High Court at Nairobi for further directions;
 - (c) In view of the urgency of this matter, let the court file be placed before the duty judge at the constitutional and human rights division of the High Court on April 5, 2023 at Nairobi for further directions;
 - (d) The costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH MARCH 2023

OLGA SEWE

JUDGE

