



**Gamii Properties Limited & another v Nairobi City County Government
(Constitutional Petition 35 of 2020) [2022] KEHC 13222 (KLR)
(Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 35 OF 2020**

AC MRIMA, J

SEPTEMBER 30, 2022

BETWEEN

GAMII PROPERTIES LIMITED 1ST PETITIONER

KINGS WEAR LIMITED 2ND PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. The petitioners filed a petition dated February 5, 2020 seeking the following orders: -
 - a. A declaration that the space in front of the petitioners' premises, namely LR No 209/666 along Tom Mboya Street, between Tom Mboya Street junction with Ronald Ngala Street and Tom Mboya Street junction with Aru Lane, open space for pedestrians/customers access into, and from the petitioners' said premises and other neighbouring shops/businesses and should not be converted into a minibus/matatu terminus stage;
 - b. A declaration that the space adjacent to the petitioners' premises namely LR No 209/666 along Tom Mboya Street, between Tom Mboya Street junction with Aru Lane and Tom Mboya Street junction with Luthuli Avenue, is a parking area for customers accessing or shopping at the petitioners' premises and neighbouring shops/businesses, and should not be converted into a minibus/matatu terminus or stage;
 - c. A declaration that the respondent's decision to convert the section along Tom Mboya Street at the junction with Ronald Ngala Street and Tom Mboya Street with the junction with Aru Lane from an open space into a minibus/matatu terminus/stage is unconstitutional and illegal;



- d. A declaration that the respondent's decision to convert the section of Tom Mboya Street between the junction with Aru Lane and the junction with Luthuli Avenue from a parking area into a minibus/matatu terminus/stage is unconstitutional and illegal as it affects the petitioners' right to use of the said space by its customers and for itself as a loading zone;
 - e. A conservatory order do issue forthwith restraining the respondent from converting the area along Tom Mboya Street, between the junction of Tom Mboya Street with Ronald Ngala Street and the junction with Luthuli Avenue, into a minibus/matatu terminus stage and/or allowing minibus/matatu to continue using the said section as a terminus/stage, pending the hearing and determination of this petition or pending further orders of this court:
 - f. An order that costs of this petition be borne by the respondent.
2. The petition is brought by two petitioners.
 3. The 1st petitioner is the registered proprietor of all that parcel of land known as LR No 209/666 situated along Tom Mboya Street between Ronald Ngala Street and Aru Lane, at the front, and Mfangano Lane, at the back, within the Nairobi city county.
 4. The 2nd petitioner is a tenant in the 1st petitioner's premises. It is a sister company to the 1st petitioner and it carries on business in the said premises.
 5. The petitioners' claim rests on the manner in which the respondent decided to use the land at the front and the back of the petitioners' premises.
 6. According to the petitioners, the backyard has all along been the loading zone whereas the front has served both as loading zone as well as the customers' access into the business.
 7. To the petitioners' utter shock and surprise, the respondent without engaging the petitioners in any way whatsoever decided to put the areas at the front and back of the petitioners' business into different uses. The upshot was the adverse effect on the petitioners' business.
 8. Citing infringement of the Constitution and the law, the petitioners approached this honourable seeking the remedies cited above. The petitioners also filed an evenly dated notice of motion seeking some conservatory reliefs.
 9. The respondent did not participate in the matter despite service. Having given the respondent adequate time through counsel to participate, in vain, the court directed the parties to, and the petitioners obliged, file written submissions on both the petition and the notice of motion, hence this judgment.
 10. This court has carefully considered the matters raised by the petitioners alongside the submissions filed.
 11. To this court, there is need to, in the first instance, determine whether it is the High Court or the Environment and Land Court which has the requisite jurisdiction over the matter.
 12. Jurisdiction is defined in Halsbury's Laws of England (4th Ed) Vol 9 as "...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the court's power to entertain, hear and determine a dispute before it.
 13. In Words and Phrases Legally Defined Vol 3, John Beecroft Saunders defines 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 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 like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

14. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

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...

15. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulabi Abdi & another* civil appeal No 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this court in *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

16. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* (2013) eKLR stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.

17. On the source of a court's jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR stated 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 counsels 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 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.

18. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -

(44) a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

19. From the foregoing, it is sufficiently settled that a court's jurisdiction is derived from the *Constitution*, an Act of Parliament or both.

20. Contextualizing the above in this matter, the guiding provisions are articles 165(3) and (6) and 162 of the *Constitution* and section 13 of the *Environment and Land Court Act* respectively. Article 165(3) and (6) elaborately sets out the jurisdiction of the High Court as follows:

- (3) 3) 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.



- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
21. Article 162(2) and (3) provides as follows: -
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
22. The legislation contemplated under article 162(3) is the *Environment and Land Court Act*.
23. Section 13 thereof outlines the Environment and Land Court’s jurisdiction as follows: -
- (1) The court shall have original and appellate jurisdiction to hear and determine all dispute 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 threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the *Constitution*.
(emphasis added)
24. The issue of the jurisdiction of the specialized courts has been determined with finality by the superior courts in the famous *Karisa Chengo & 2 others v Republic* case. The Court of Appeal in *Karisa Chengo & 2 others v Republic* civil appeal Nos 44, 45 & 76 of 2014 [2015] eKLR observed as follows: -
- The Committee of Experts in its final report thus, adverted to three main factors in securing anchorage in the Constitution for the specialized courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC judges were, in addition to the general criteria for appointment as judges of the superior



courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the Constitution of a statement on the status of the specialised courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the industrial court.....

25. The matter was appealed to the Supreme Court in petition No 5 of 2015 *Republic v Karisa Chengo & 2 others* [2017] eKLR. The Supreme Court rendered itself as follows: -

[50] ... article 162(1) categorises the ELC and ELRC among the superior courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of courts. Concurring with this view, the learned judges of the Court of Appeal in the present matter observed that both the specialised courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these courts is subject to supervision or direction from another.

(51)

(52) In addition to the above, we note that pursuant to article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

(79) It follows from the above analysis that, although the High Court and the specialized courts are of the same status, as stated, they are different courts. It also follows that the judges appointed to those courts exercise varying jurisdictions, depending upon the particular courts to which they were appointed. From a reading of the statutes regulating the specialized courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “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).

26. The foregoing is the obtaining legal position.

27. The matter, however, did not end there. A further problem arose. It was on the cases raising ‘cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either courts.



28. Initially there were two schools of thought in the High Court on the matter. One school favoured the ‘pre-dominant purpose test’ whereas the other school rooted for the ‘pre-dominant issue before court test’.
29. The proponents of the former include Ngugi, J who rendered himself in [*Suzanne Achieng Butler & 4 others v Redbill Heights Investments Limited & another*](#) (2016) eKLR as follows: -
23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the courts utilize the pre-dominant purpose test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
24. The court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.
41. Munyao, J was for the other test. In [*Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another*](#) [2018] eKLR the learned judge argued as follows: -
25. On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.
42. The Court of Appeal had an occasion and dealt with the issue. In [*Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others*](#), civil appeal No 83 of 2016 [2017] eKLR, the court dealt with the issue as follows: -
- [30] article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as *cujus est solum, eius est usque ad coelum et ad inferos* (cujus doctrine) which translates to ‘whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to hell’. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well.....
- (31) Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.”
- (35) ...[F]or land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law



therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted.

43. The Court of Appeal, therefore, settled for the ‘pre-dominant purpose test’. Therefore, that is the test I will use in this case.
44. The dispute before court relates to the manner in which the respondent is planning the use of its land or the public land. The respondent is a devolved constitutional entity charged with the duty of providing several services to the residents and people living within the Nairobi city county.
45. Given that the nature of the dispute herein concerns the manner in which the respondent is planning and using the land within the Nairobi city county, and from the guidance of the Court of Appeal in the *Co-operative Bank of Kenya Limited case* (supra) coupled with the above analysis, there is no doubt that the dispute fits into those contemplated within article 162(2)(b) of the *Constitution* and section 13 of the *Environment and Land Court Act*.
46. As a result, the jurisdiction of the High Court is expressly ousted under article 162(5)(b) of the *Constitution*.
47. The foregoing discussion is, therefore, sufficient to dispose of this matter since a court without jurisdiction can only act in vain.
48. Coming to the end of this judgment, I must profusely apologize for its late delivery. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a general election, the said matters had priority over the rest, hence, the delay.
49. This court, hence, chooses to end this discussion here.
50. Consequently, the following orders do hereby issue: -
 - a. The petition and the notice of motion dated February 5, 2020 be and are hereby struck out for want of jurisdiction.
 - b. There shall be no orders as to costs.
51. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Masore Nyang’au, Learned Counsel for the Petitioners.

Mr. Macharia, Learned Counsel for the Respondent.

Kirong/Benard – Court Assistants.

