



**Muigai & another v Co-operative Tribunal & another; Mwanzia (Interested Party) (Constitutional Petition E424 of 2021) [2022] KEHC 14557 (KLR) (Constitutional and Human Rights) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14557 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E424 OF 2021**

**M THANDE, J**

**OCTOBER 31, 2022**

**BETWEEN**

**SAMUEL MUIGAI ..... 1<sup>ST</sup> PETITIONER**

**ROYAL HOUSING CO-OPERATIVE SOCIETY LTD ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE CO-OPERATIVE TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MOSES MWANZIA ..... INTERESTED PARTY**

**RULING**

1. The genesis of the matter before Court is a ruling delivered by the 1<sup>st</sup> Respondent delivered on October 4, 2021, in CTC Case No 737 of 2015 *Moses Mwanzi & 4 Others v Royal Housing Co-operative Society Ltd*. In the ruling, the 1<sup>st</sup> Respondent committed the 1<sup>st</sup> Petitioner to civil jail for a period of 15 days pending payment in full, of the decretal sum. Being aggrieved, the 2<sup>nd</sup> Petitioner filed an application dated October 4, 2021 seeking review of the said orders and another dated October 8, 2021 seeking the setting aside of the orders. The applications were premised on the grounds that the proceedings before the 1st Respondent infringed on the 1<sup>st</sup> Petitioner's right to a fair trial, his right not to be condemned unheard and the right to fair administrative action. The applications though filed under certificate of urgency were not certified urgent and the 1<sup>st</sup> Petitioner was apprehended on October 4, 2021 and incarcerated at Industrial Area remand prison.



2. This is what prompted the filing of the Petition herein dated October 15, 2021 in which the Petitioners seek the following reliefs:
  - a. A declaration that the proceedings of October 4, 2021 are a nullity.
  - b. A declaration that the proceedings of September 9, 2021 are a nullity.
  - c. A declaration that the actions of the 1<sup>st</sup> respondent's amount to an infringement of the petitioner's rights to fair trial.
  - d. A declaration that the 1<sup>st</sup> respondent's actions are an infringement of the petitioners' rights to fair administrative action.
  - e. A declaration that the 1<sup>st</sup> respondent has been wrongfully incarcerated having been denied a chance to be heard.
  - f. An order of certiorari do issue to quash and suspend the further execution and enforcement of the warrant of committal to civil jail dated October 4, 2021, issued by the Co-operative tribunal.
  - g. An order of mandamus do issue to the in charge industrial area remand prison for the immediate release of the 1<sup>st</sup> petitioner (Mr Samuel Muigai).
  - h. An order directed to the interested party to serve the 1<sup>st</sup> petitioner with the Notice to show cause Application.
  - i. General damages for prayers c and d above.
  - j. General damages for wrongful incarceration.
  - k. Any other orders it may deem just, fit and expedient to award in the interest of justice.
  - l. Costs of this petition be provided for.
3. The Petitioner also filed an application of even date seeking similar orders in the interim.
4. The Interested Party, who was one of the applicants in the matter before the 1<sup>st</sup> Respondent, opposed the Petition by his Preliminary Objection (PO) dated June 23, 2022. The grounds of the PO are that this Court lacks jurisdiction to entertain this matter as a constitutional petition given the provisions of Section 81 of the *Co-operative Societies Act*.
5. The Respondents supported the preliminary objection and chose not to file any submissions.
6. I have carefully considered that written submissions by the Interested Party and the Petitioners on the PO. The only issue for determination is whether this court has jurisdiction to entertain this Petition, in view of the provisions of Section 81 of the *Co-operative Societies Act* cap 490, Laws of Kenya (the Act).
7. It is the Interested Party's contention that the Petition offends the provisions of Section 81 of the Act and that the same is an appeal in disguise. The Interested Party submitted that the 1<sup>st</sup> Respondent did on November 26, 2020, in the case before it, issue a decree and certificate of costs in his favour. The Interested Party then proceeded to execute the same. Being aggrieved by the decision of the 1<sup>st</sup> Respondent, the Petitioner's ought to have sought recourse within the appellate jurisdiction of this Court as set out in Section 81 of the *Act* and not in a constitutional petition.
8. On their part, the Petitioners refuted the contention by the Interested Party that this is an appeal disguised as a constitutional petition and further that the same does not offend Section 81 of the



- Act. They submitted that what they are challenging is the proceedings in which the committal orders of October 4, 2021 were issued without service upon the 1<sup>st</sup> Petitioner or his advocate on record, as required by Rule 12 of the Co-operative Tribunal (Practice and Procedure) Rules 2009. This led to the 1<sup>st</sup> Petitioner's unlawful arrest and detention without being accorded a fair trial.
9. The Petitioners further submitted that attempts through the applications dated October 4, 2021 and October 8, 2021 for review and to have the said orders lifted, bore no fruit. Consequently, the 1<sup>st</sup> Respondent has not only violated the 1<sup>st</sup> Petitioner's constitutional rights but has further violated the rules of natural justice by failing to follow the process set out in section 4(3) and (4) of the Fair Administrative Action Act. They argued that the only recourse left is to seek redress from this Court for appropriate orders sought in the Petition. Relying on Article 165(6) and (7) of the Constitution of Kenya, 2010, the Petitioners submitted that this Court has jurisdiction to declare the proceedings of the 1<sup>st</sup> Respondent a nullity and further declare the same was done in a manner that resulted in infringement of the 1<sup>st</sup> Petitioner's rights.
  10. It is not disputed that there were proceedings before the 1<sup>st</sup> Respondent, between the Petitioners and the Interested Party, namely CTC Case No 737 of 2015 Moses Mwanzi & 4 Others v Royal Housing Co-operative Society Ltd. It is also not disputed that orders were issued by the 1<sup>st</sup> Respondent committing the 1<sup>st</sup> Petitioner to civil jail for non-payment of the amount in the decree and certificate of costs in favour of the Interested Party. It is further not disputed that the Petitioners applications for review and setting aside of the impugned orders were dismissed. The Petitioners are aggrieved by the orders of the 1<sup>st</sup> Respondent.
  11. Parliament recognized that there will be instances where parties will be dissatisfied with decisions of the 1<sup>st</sup> Respondent and enacted Section 81 of the Act which stipulates the appellate procedure to be followed from a decision of the 1<sup>st</sup> Respondent as follows:
    1. Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court:  
Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.
    2. Upon the hearing of an appeal under this section, the High Court may—
      - a. confirm, set aside or vary the order in question;
      - b. remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
      - c. exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
      - d. make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
    3. The decision of the High Court on any appeal shall be final.
  12. It is quite evidence that a party aggrieved by a decision of the 1<sup>st</sup> Respondent is required to invoke the appellate jurisdiction of this Court for redress by filing an appeal. The section provides that such appeal is to be filed within 30 days of the decision, with a proviso that this Court may for sufficient reason, extend the time. Upon hearing an appeal filed before it, the Court shall make appropriate orders as



set out in Section 81(2). Sub-section (3) provides that the decision of this Court on any appeal, shall be final.

13. 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.
14. 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, CJ 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.



15. 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.

16. And 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.

17. The procedure for redress for a party aggrieved by the decision of the 1<sup>st</sup> Respondent, such as the Petitioners are, is clearly set out in Section 81 of the Act. The Petitioners therefore ought to have invoked the appellate jurisdiction of this Court in seeking recourse.

18. It is noted that the Petitioners contended that they do not seek to appeal the decision of the 1<sup>st</sup> Respondent but challenge the proceedings leading to the order to commit him to civil jail. The wording in Section 81(1) of the *Act* that Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court, does not limit the nature of dissatisfaction a party may have. As such, any party aggrieved by any order of the 1<sup>st</sup> Respondent may appeal to this Court. In light of this, whether a party seeks to challenge the decision itself or the proceedings pursuant to which such decision is made, their recourse lies in the appellate jurisdiction of this Court by dint of Section 81 of the Act. Put differently, regardless of the nature of the dissatisfaction of a party by a decision of the 1<sup>st</sup> Respondent, a clear mechanism for redress has been provided by the act.

19. 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.

20. 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.

2021. I associate with the views expressed by the learned Judge and find that the concerns of the Petitioners could easily have been addressed by the Court exercising its appellate jurisdiction, as provided by the Act.



22. The Petitioners have contended that the Petition was necessitated by the infringement 1<sup>st</sup> Petitioner's constitutional rights were infringed upon by the 1<sup>st</sup> Respondent. The Petitioners further accused the 1<sup>st</sup> Respondent of violating the rules of natural justice by failing to follow the process stipulated in Section 4(30 and (4) of the Fair Administrative Act.
23. It is trite 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 does not equate to violation of the fundamental rights of a losing party.
24. In the case of *Methodist Church In Kenya Trustees Registered & Another v rev. Jeremiah Muku & Another* [2012] eKLR the Court of Appeal spoke 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.

25. It is clear in my mind that by their Petition, the Petitioners seek to achieve what they failed in their 2 applications dated October 4, 2021 and October 8, 2021 before the 1<sup>st</sup> Respondent, to wit, the setting aside of the orders of committing the 1<sup>st</sup> Petitioner to civil jail. It bears repeating that the remedy for the Petitioners lay in invoking the appellate jurisdiction of this Court as clearly provided in Section 81 of the Act.
26. In the end and in view of the foregoing, this Court makes a finding that it lacks jurisdiction to entertain the Petition herein.
27. It is a well settled principle of law that a court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. This was clearly stated in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR by the Supreme Court 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 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.

28. Without jurisdiction, the Court is stripped of the power to take one more step as stated in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where Nyarangi, JA held as follows:

[J]urisdiction 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.



- 29. I now turn to the issue of costs. The Interested Party submitted that costs follow the event and this is not a public interest litigation and he should therefore be awarded costs of the petition. The Petitioners on the other hand urged that the preliminary objection be dismissed entirely and costs borne by the Respondents and Interested Party.
- 30. Rule 26(1) of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, provides that The award of costs is at the discretion of the Court. Given that this is not a public interest litigation, the circumstances herein call for an award of costs to the successful party.
- 31. In the end and in view of the foregoing, I uphold the Preliminary Objection dated 3.6.22 with the result that the Petition dated October 15, 2021 is hereby struck out with costs to the Interested Party.

**DATED AND DELIVERED IN NAIROBI THIS 31ST DAY OF OCTOBER 2022**

**M. THANDE**

**JUDGE**

**In the presence of: -**

- ..... **for the Petitioners**
- ..... **for the Respondents**
- ..... **for the Interested Party**
- ..... **Court Assistant**

