



**Jobita & 3 others v Kisumu Water and Sanitation Co Limited & another;
County Government of Kisumu (Interested Party) (Constitutional Petition
E004 of 2022) [2022] KEHC 16539 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E004 OF 2022**

RE ABURILI, J

DECEMBER 19, 2022

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF THE ARTICLES 2(1), 3(1), 10(1), (2) A, B & C, 43 & 232 OF
THE CONSTITUTION**

AND

**IN THE MATTER OF THE ARTICLE 20(1), (2), (3) A & B, (4) A & B, ARTICLES
21(1), 22(1), (2), & 23(1) & (3) A, B, C, D & E OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED
UNDER ARTICLE 43 AND 232 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF THE WATER ACT, 2016

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF THE WATER (SERVICES REGULATORY) RULES, 2012

AND



IN THE MATTER OF THE OF THE TARRIFF GUIDELINES
AND
IN THE MATTER OF THE KIWASCO'S PRO-POOR POLICY, 2021

BETWEEN

LABAN JOBITA 1ST PETITIONER
CALEB NYAMITAH 2ND PETITIONER
FATUMA SWALEH 3RD PETITIONER
ALICE O JOBITA 4TH PETITIONER

AND

KISUMU WATER AND SANITATION CO LIMITED 1ST RESPONDENT
WATER SERVICES REGULATORY BOARD 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF KISUMU INTERESTED PARTY

RULING

1. The petition herein was filed on January 31, 2022, simultaneous with an application seeking for conservatory orders.
2. The court (OchiengJ) as he then was gave directions for the parties' counsel to file and exchange written submissions and replying, further and supplementary affidavits on February 8, 2022.
3. On March 22, 2022 Mr Munuang'o counsel for the 1st respondent notified the court verbally that there was another similar matter in the nature of a judicial review filed before Environment and Land Court.
4. Mr Okoth counsel for the petitioners denied knowledge of such matter and pointed out that in any event, no such issue had been raised in the filed replying affidavit.
5. Mr Munuang'o further informed the court that the judicial review matter had been filed by the firm of Nyamori & Company Advocates.
6. Mr Okoth then alerted the court that he had just spoken to Mr Nyamori Advocate and that they had agreed to consult the client. The judicial review matter was said to be No 13 of 2022.
7. On May 31, 2022 when the matter came up for further directions, Mr Okoth Advocate informed the court that he had talked to Mr Nyamori counsel appearing in judicial review No 13/2022 and that the issue of the court's jurisdiction was pending ruling. The ruling was reported to be pending to be delivered on notice.
8. The court again set this matter for mention for further directions on October 19, 2022 and that it how I found myself seized of this file, following my partial deployment to this court from September 15, 2022.



9. On the latter date, Ms Chidzao advocate notified the court that ruling in ELC 13/2022 was delivered on September 30, 2022 dismissing the judicial review application. She submitted that in the judicial review matter, the applicants had challenged the upward review of the water tariffs for the 1st respondent herein as the same had already been implemented. Further, that the present petition also challenges the upward review of the water tariffs undertaken by the 1st respondent herein, Kisumu Water and Sanitation Co Ltd.
10. Mr Okoth informed the court that he had not perused the court ruling in ELC 13/2022. He sought time to peruse the ruling and move this court in this petition.
11. Ms Chidzao offered to share the ruling with the court and the petitioner's counsel.
12. As at November 14, 2022 when the matter came up before me, the Ruling in question had not been filed in court although the petitioner's counsel maintained that as there was no merit determination, he had instructions to proceed with this petition. Ms Chidzao on the other hand urged this court to peruse the ruling first before advising the parties on the best way forward.
13. It was not until December 13, 2022 that this court was served with the ruling in ELC judicial review E013 of 2022 between Victor Juma Owiti v Kisumu Water & Sanitation Co Ltd, Water Services Regulatory Board as respondents and County Government of Kisumu as the interested party.
14. I have perused the petition herein and especially the prayers sought and the JR ELC E013/2022. In the Judicial review matter before the Environment and Land Court, the *ex parte* applicant therein sought for leave of court to institute judicial review proceedings to apply for the judicial review orders of prohibition to prevent or stop the 1st and 2nd respondents, in person or through their agents from demanding and or collecting any water bills on the basis of the impugned tariff structure for the period 2021/2022 to 2024/2025 as published by the 1st respondent *vide* public notice dated and issued on December 14, 2021; and the 2nd respondent *vide* Kenya gazette notice No 13561 in gazette issue vol cxxiii-No 252 dated December 10, 2021; *certiorari* to remove and bring before this honourable court, the Kenya gazette notice No 13561 in gazette issue vol cxxiii-No 253 dated December 10, 2021 in which the 2nd respondent published the illegal tariff structure for the period 2021/2022 to 2024/2025; *certiorari* to remove and bring before this honourable court, the public notice dated and issue on December 14, 2021 issued and published by the 1st respondent and referenced "Regular Review Of Tariff" and notifying "all esteemed customers and the general public" of the implementation of the illegal Tariff Structure for the period 2021/2022 to 2024/2025 as published by the 2nd respondent in the Kenya gazette notice No 13561 in gazette issue Vo cxxiii - No 253 dated December 2021.
15. The other prayer was that the leave in 2(a), (b) and (c) operates as stay of the continued implementation and or enforcement of the impugned tariff structure for the period 2021/2022 to 2024/2025 as published by the 2nd respondent *vide* Kenya gazette notice No 13561 in gazette issue Vol cxxiii No 253 dated December 10, 2021.
16. The grounds upon which the judicial review application was predicated are on the face of the application and supported by an affidavit sworn by Victor Juma Owiti the *ex parte* applicant and a statutory statement.
17. One of the issues that arose in that application for leave to apply for judicial review orders was the question of jurisdiction of the ELC court to hear and determine the application and thereby to bypass the requirement of exhaustion of remedies, on account that the dispute was within the jurisdiction of the Water Tribunal established under the *Water Act*. The other issue was whether there was public



- participation conducted as required under section 139 of the Water Act and articles 10(2) & 232(1) of the Constitution, before increasing the water tariffs.
18. The Environment and Land Court nonetheless did not determine the question of jurisdiction. It only found that there was public participation and that the new water tariff structure had already been implemented and proceeded to dismiss the application for leave and stay.
 19. Back to this petition and the prayers sought in the petition and notice of motion dated January 31, 2022, and beginning with prayer (iii) of the notice of motion, the petitioner sought the following orders:
...
 - (iii) That pending the hearing and determination of this petition, interim conservatory orders do issue restraining the 1st respondent, whether by themselves, their agents, servants, employees and or officers from implementing, charging or levying or in any way continuing to implement, charge or levy the new water tariffs as approved in the gazette notice No 13561 dated November 26, 2021.
 20. This is the same gazette notice which the *ex parte* applicant in Kisumu ELC judicial review No E013/2022 was challenging in the application for leave and stay of implementation of the water tariffs structure and which the ELC judge found not merited and dismissed it even before it could reach the substantive stage. That application was filed in February 2022 while this petition was filed on January 31, 2022.
 21. In the prayers in the petition, the petitioners herein challenge the constitutionality of the 2nd respondent's approval of the review of tariffs for water services for the periods 2021/2022 to 2024/2025 on application by the 1st respondent as contained in the gazette notice No 13561.
 22. Among the constitutional provisions cited to be contravened are articles 10(2), 43(1)(d), 232(1)(d), 187 and section 4, 63, 70(1) and 139 of the Water Act, section 120 of the County Government Act and rules 34 & 36 of the Water (Services Regulatory) Rules.
 23. The petitioners further claim, that the new water tariffs adjustments circulated by the 1st respondent on the basis of the approval by the 2nd respondent in the gazette notice No 13561 is unconstitutional, illegal and contravenes the provisions cited above and hence they seek for declarations to that effect. They also seek for another declaration that their right to and access to clean and safe water in adequate quantities as guaranteed by article 43(1) (d) of the Constitution has been violated by the actions of the respondents to exorbitantly adjust upwards the water tariffs.
 24. The petitioners finally seek for an order of *certiorari* to be issued to remove to this court and quash the gazette notice No 13561 dated November 26, 2021 and published in gazette Vol cxxiii No 253 on December 10, 2021 and the new water tariffs adjustments circulated by the 1st respondent.
 25. Among the grounds upon which the petition was predicated, and which grounds are similar to the grounds in Kisumu ELC judicial review E013/2022 are that the Water Services Regulatory Board had arrogated upon itself the functions of the county government; that there was no public participation or consultation done by the 1st respondent to get views of the residents/consumers of water before a decision was reached to enhance the water tariffs hence denying them the right to be heard.
 26. From the above scenario, I have no doubt in my mind that the issues being raised in the petition herein were subject of the Kisumu ELC judicial review E013/2022, which was dismissed on merit basis and



not struck out. More so, that the decision being challenged had already been implemented and that there was adequate public participation before such implementation of the new water tariffs took place.

27. That is all that this court can say on the similarity between this petition and ELC judicial review E013/2022.
28. However, there is another key issue that must be addressed by this court and that is the issue of jurisdiction. The ELC already assumed jurisdiction to hear and determine the dispute which I have found is similar to this petition in all material particulars. That being the case, the question is whether this court has jurisdiction to hear and determine the same dispute and for avoidance of doubt, I shall not delve into whether or not this petition is *res judicata* ELC judicial review E013/2022.
29. I shall deal with substantive jurisdiction vested in this court and in the ELC.
30. The Supreme Court in the case of *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR had this to say in matters jurisdiction of the court, citing what the Court of Appeal and High Court had pronounced themselves on:

“(9) In setting out the issues for determination, the Court of Appeal highlighted the issue of jurisdiction of the ELC vis-a-vis the National Environmental Tribunal or the National Environmental Complaints Committee to hear and determine the dispute between the parties. In rendering his decision on the issue, Asike-Makhandia JA stated that:

“In the instant matter, the learned judge citing the case of *Ken Kasinga v Daniel Kiplangat Kirui & 5 others* [2015] eKLR, and other decisions from courts of coordinate jurisdiction, held that where a claim in a petition or suit is multifaceted, a court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of the law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting pleadings – that all that a litigant need to do is draft pleadings that such claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping.” [page 50][emphasis added]

[10] The learned judge further held that:

“To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the payers in the petition were outside the jurisdiction of the Tribunal or the National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction only means the jurisdiction to hear specifically constitutional or legislatively delineated



disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of a particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

[...] A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode of conferment of jurisdiction to any court or statutory body.” [pages 51 - 52].

31. In *R v Karisa Chengo* [2017] eKLR, the Supreme Court determined that:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or 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 cognizance 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.”

32. Further, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the apex 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 upon it by law.”

33. This principle has been replicated in a plethora of determinations by the Supreme Court as binding on all other courts below the Supreme Court, of common cause being that, a court, even the Supreme Court itself cannot arrogate itself jurisdiction through crafts of interpretation (see *Interim Independent Electoral Commission Constitutional* (advisory opinion) application No 2 of 2011) and that a court ought to exercise its powers strictly within the jurisdictional limits. See *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* [2012] eKLR.

34. In *Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* [1989] KLR 1, the *locus classicus* on matters jurisdiction, it was stated as follows:

“Jurisdiction is everything and 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.”



35. Dealing with this issue of jurisdiction on this court's own motion, I am guided by the fact that a jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others ex parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 stated thus:
36. Thus, it is not mandatory that an issue of jurisdiction must be raised by the parties. The court on its own motion can take up the issue and make a determination thereon without the same being pleaded.
37. Before delving deep into this question of jurisdiction, I must first and foremost lay a basis for it in this case. Article 260 of the *Constitution* defines natural resources to mean the physical non-human factors and components, whether renewable or non-renewable, including:
- a. Sunlight;
 - b. Surface and ground water;
 - c. Forests, biodiversity and genetic resources; and
 - d. Rocks, minerals, fossil fuels and other sources of energy.
38. Part 2 of the *Constitution* is on Environment and Natural Resources. Article 69 provides for obligations in respect of the environment; article 70 provides for enforcement of environmental rights while article 71 provides for agreements relating to natural resources.
39. Section 13(3) of the *Environment and Land Court Act* stipulate that 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 freedoms relating to a clean and healthy environment under article 42, 69 and 70 of the *Constitution*.
40. Under Section 7(13) of the *Environment & Land Court Act*, the court in the exercise of its jurisdiction under the Act shall have power to make any order and grant any relief as it deems fit and just including: injunctions; prerogative/judicial review orders; award of damages; compensation; specific performance; restitution; declaration or costs.
41. The *Water Act*, 2016 defines what a water right, water resource management, water services and water services provider means. Water services means any services of or incidental to the supply or storage of water and includes the provision of sewerage services. The Act also defines a water user and goes ahead to define what an Environment and Land Court is.
42. The Water Authority at section 6 is established under section 11 and is the agent of the National Government to regulate the management and use of water resources. Of great significance as far as the jurisdictional issue is concerned is part vi of the *Water Act* on dispute resolution. The Act establishes the Water Tribunal under section 119(1) and the powers of the tribunal are at section 121(1) and (2) of the Act.
43. The tribunal has powers to hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Water Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and the Regulatory Board.



44. In addition, the tribunal has power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.
45. In determining the appeal, section 123 empowers the tribunal to affirm, quash or vary the decision or order.
46. Under section 124 of the [Water Act](#), a person aggrieved by a decision of the tribunal may, within twenty-one days from the date of that decision, appeal to the Land and Environment Court, established under article 162(2) of the [Constitution](#) on an issue of law.
47. Under section 125 of the [Water Act](#), a decision of a water basin organization, the authority, the regulatory board or the tribunal against which no appeal has been preferred within 30 days from the date on which the decision was made, shall be binding on all parties.
48. Under section 3 of the Act, the purposes of the Act is to provide for the regulation, management and development of water resources and water and sewerage services in line with the [Constitution](#).
49. The [Water Act](#) at section 4 also mandates the Cabinet Secretary, the Authority, the Regulatory Board, County Governments and any person administering or applying the Act to be guided by the principles and values set out in articles 10, 43, 60 and 232 of the [Constitution](#).
50. The [Water Act](#) provides mechanisms for resolution of disputes. A Water Tribunal is established to be the first port of call and any person aggrieved by the decision of the Tribunal is to file an appeal before the Environment and Land Court within 21 days of the decision.
51. I have ventured into the salient provisions of the [Water Act](#) to establish a nexus between the dispute that is before this court and the judicial review matter as determined before the Environment and Land Court *vide* ELC JR E013 of 2022.
52. What I gather from the above provisions of the law is that disputes arising under the Act, and whether they involve alleged violation of rights or fundamental freedoms, are governed by the legal regime that is implemented or enforced by the Environment and Land Court. In addition, that the disputes that fall within the jurisdiction of the Water Tribunal are appealable to the Environment and Land Court and not to the High Court.
53. Under article 162(2)(b) of the [Constitution](#), disputes relating to land and environment (environment and use and occupation of and title to land) are to be litigated before the Environment and Land Court.
54. In addition, article 165(5)(b) of the [Constitution](#) expressly bars the High Court from hearing and determining disputes that are reserved for the Supreme Court and the courts contemplated / established under article 162(2)(a) & (b) namely- the Employment and Labour Relations Court and the Environment and Land Court.
55. This court has already established, through perusal of the various provisions of the [Water Act](#), including the provision for settlement of disputes under the said Act, that ultimately, such disputes whether filed before the Water tribunal or not, would end up before the Environment and Land Court and not the High Court. And as earlier stated, the Environment and Land Court *vide* judicial review E013/2022 had already assumed jurisdiction to hear and determine the same dispute as the one before me *vide* this petition.
56. That being the case, I find and hold that this court is devoid of jurisdiction to hear and determine the dispute as filed.



57. Jurisdiction is everything without it, a court of law acts in vain. More so, jurisdiction is vested by the *Constitution* and statutes not by parties to a dispute or by the court arrogating itself jurisdiction that it does not have.
58. Having found that this court lacks jurisdiction to hear and determine the dispute manifested in the petition herein, which dispute is vested both in the Water Tribunal and the Environment and Land Court, I must do the honorable thing of downing my tools and do no more.
59. Accordingly, I down my tools and strike out this petition with an order that each party shall bear their own costs of the petition whose merits have not been considered by this court.
60. This file is accordingly closed.

DATED, SIGNED AND DELIVERED AT KISUMU, THIS 19TH DAY OF DECEMBER, 2022

R.E. ABURILI

JUDGE

