REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 11 OF 2020

JOEL ASIACHI KUSIMBA.....1ST PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION

COMMISSION.....1ST INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND INTERESTED PARTY

RULING

1. By a Motion on Notice dated 28th September, 2020, the 1st Interested Party herein, **Ethics and Anti-Corruption Commission** (hereinafter referred to as "the Commission"), seeks the following orders:

> **(a) THAT this Honourable Court be pleased to transfer this Petition to the Anti-Corruption and Economic Crimes Division of the High Court of Kenya for hearing and determination.**
>
> **(b) THAT the cost of this application be in the cause.**

2. The application is based on the following grounds:

> **a) THAT on 8th December, 2015, the Chief Justice, in the interest of effective case management and in order that similar disputes are effectively and efficiently adjudicated before specialized divisions of the High Court, established the Anti-Corruption and Economic Crimes Division of the High Court.**
>
> **b) THAT on 09/12/2016 the Chief Justice made Practice Directions pursuant to section 5 of the Judicial Service Act No. 1 of 2011 and section 16 of the High Court (Organization and Administration) Act, No. 27 of 2015 and directed *inter alia* that all petitions and judicial review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes shall be heard by the Anti-Corruption and Economic Crimes Division of the High Court.**
>
> **c) THAT this petition which claims that section 45(2)(b) of the Anti-Corruption and Economic Crimes Act infringes on constitutional rights of public officers is the proper subject matter of the Anti-Corruption and Economic Crimes Division of the High Court.**
>
> **d) THAT in the premises, it is just and expedient to grant the orders sought.**

3. The application is supported by an affidavit sworn by **Ben Murei**, he 1st Interested Party's advocate on 28th September, 2020 in which he has reiterated the aforesaid grounds and added that no prejudice will be suffered by the Petitioner as his place of address is Nairobi which is also the Principal place of address for the Respondent and the Interested Parties.

4. In his view, in terms of section 15 of the ***Civil Procedure Act***, this petition ought to have been instituted in Nairobi.

5. The application was supported by the 2nd interested party based on the same grounds.

6. The application was opposed by the petitioner who filed grounds of opposition to the effect that the said application is misconceived and premised on a misapprehension of the law; that the petition challenges the constitutionality of a provision of the law which falls within the jurisdiction of this court pursuant to Article 165(3)(d) of the Constitution; that Anti-corruption and Economic Crimes Court is established as a specialised division of the High Court to consider matters relating to economic crimes, corruption and has no exclusive jurisdiction to determine matters relating to legality of the provisions of the law as purported hence the application is unmerited and should be dismissed with costs.

7. On behalf of the 1st Interested Party, it was submitted that there is no rational explanation why this petition was filed in the High Court at Machakos. As per the pleadings filed, the Petitioner's address as well as that of his advocate is in Nairobi. I was contended that it is a matter of judicial notice that the principal address for the Respondent and Interested Parties is in Nairobi. In terms of the provisions of section 15 of the ***Civil Procedure Act***, the Petition should have been filed in Nairobi.

8. The Commission relied on the establishment of the Anti-Corruption and Economic Crimes Division of the High Court on 8th December, 2015 by the Chief Justice, which according to it is in the interest of effective case management and in order that similar disputes are effectively and efficiently adjudicated before specialized divisions of the High Court, established the Anti-Corruption and Economic Crimes Division of the High Court. It also relied on the Practice Directions made by the Chief Justice on 9th December, 2016, pursuant to section 5 of the ***Judicial Service Act*** No. 1 of 2011 and section 16 of the ***High Court (Organization and Administration) Act, No. 27 of 2015*** directing *inter alia* that all petitions and judicial review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes shall be heard by the Anti-Corruption and Economic Crimes Division of the High Court (hereinafter, 'ACEC Division').

9. In this case, it is submitted, where it is claimed that section 45(2)(b) of the ***Anti-Corruption and Economic Crimes Act*** infringes on constitutional rights of public officers and is therefore unconstitutional, is the proper subject matter of the ACEC Division of the High Court. According to the Commission, as can be discerned from the wording of both the gazette notice creating the ACEC Division and practice directions, the rationale is consistency in decision making and specialization which dual objectives are not unique to the ACEC Division and underlies the creation of every division that has been established in the High Court.

10. In its view, consistency brings about stability in jurisprudence and predictability in decision making which in turn enhance public confidence in the justice system and therefore advances public interest. Specialization on the other hand enhances knowledge in the specific field on the part of the judicial officers manning them. It also positions the judicial officer to understand emerging challenges that arise in enforcement of the specific laws relevant to the division and to respond accordingly. If therefore section 46(2)(b) of ***Anti-Corruption and Economic Crimes Act*** is unconstitutional law as it infringes on constitutional rights of persons as contended in this case, the Judges in the ACEC Division who enforce the law on a daily basis are better placed to make that determination.

11. It was submitted that the Gazette Notice and Practice Directions are in line with the provisions of section 1A and 1B of the ***Civil Procedure Act*** on overriding objective and that granting the orders sought would give effect to the said objective given the place of residence of the Respondent and Interested Parties and the public interest benefits that consistency and specialization bring to the just determination of disputes.

12. In support of the submissions, he Commission relied on ***Homa Bay Constitutional Petition No. 6 of 2017; Bob Kephas Otieno and another vs the DPP and another*** where **Omondi, J** held at pages 7 to 9 that;

> **"Practice Directions issued by the Chief Justice are normally administrative decisions that usually aid in making the operation of the High Court smooth and effective and cannot override the express provisions of the Constitution. I am persuaded that the Constitutional provision regarding the jurisdiction of the High Court must be given a purposive interpretation and be read as a whole with Article 159(2)(b) as contemplated by Article 268 of the Constitution. It is only in adopting a purposive approach that the values and principles of the Constitution can be realized.''**

13. It was appreciated that the orders sought by the Petitioner are significant and the ramifications, if successful, to ongoing cases and those under investigations would be enormous. It is against this background that it is vitally important that the Petition should be dealt with in compliance with administrative directions applicable to the case.

14. The Court was therefore urged to grant the orders sought herein.

15. On behalf of the Petitioner, while it was appreciated that there is a specialised division of the High Court dealing with corruption and economic crimes, it was contended that this petition does not relate to any specific corruption case that would fall within the jurisdiction of the Anti-Corruption Court but relates to the unconstitutionality of a section of the law, an issue that falls within the jurisdiction of this Court pursuant to Article 165(3)(d) of the Constitution. In the petitioner's view, the Interested Parties have either misapprehended the law relating to this Court's jurisdiction vis-à-vis that of the Anti-corruption and Economic Crimes Division or are just out to delay the determination of this petition through mischievous and vexatious applications. It was submitted that if this Court were to countenance the arguments made by the Interested Parties herein, it would mean that any challenge to the constitutionality of a provision of law relating to matters in which there exist a specialised court can only be determined by that specialised court and not the High Court, an interpretation that would unlawfully take away the unequivocal constitutional jurisdiction of the High Court. In support of this submission, the petitioner relied on **Juma Nyamawi Ndungo & 5 Others vs. Attorney General [2019] eKLR**.

16. As regards the territorial jurisdiction, it was submitted that the petitioner has deposed that he is a resident of Machakos County and no

evidence has been tendered by the Interested Parties to dispute this fact. According to the Petitioner, the mere fact that he has instructed a firm of advocates based in Nairobi does not disentitle him from seeking redress from this Court. The Court was further urged to take judicial notice of the fact that the Interested Parties have offices in Machakos.

Determinations

17. I have considered the issues raised before me by the parties herein.

18. The application is premised on two grounds. Firstly, it is contended that the parties herein reside or have principal addresses in Nairobi hence the invocation of section 15 of the ***Civil Procedure Act***. That section deals with territorial jurisdiction of the Court. However, the preamble to the ***Civil Procedure Act***, however provides that it is:

An Act of Parliament to make provision for procedure in civil courts.

19. The petition before me seek the application and interpretation of the Constitution. It cannot therefore be deemed to be *"civil proceedings"* as contemplated under the ***Civil Procedure Act*** so as to invoke Sections 12 to 15 thereof with a view to defeating the petition. In my view, the provisions of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution in so far as the jurisdiction of the High Court is concerned.

20. Even if I were to agree that section 15 of the ***Civil Procedure Act*** is applicable to this petition, I have perused the affidavit in support of the petition where it is clearly stated that the petition is a resident of Machakos County. The Interested Parties have not disputed this fact. It follows that section 15 of the ***Civil Procedure Act*** is inapplicable since the Interested Parties in compliance with the constitutional imperatives are enjoined to establish offices throughout the country.

21. As regards the Anti-Corruption Division of the High Court, Article 165(3)(a),(b) of the Constitution provides that:

> ***(3) subject to clause (5), the High Court shall have-***
>
> ***"(a) unlimited 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.***

22. Rule 8 of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013,*** provides that:

> ***Every case shall be instituted in the high court of Kenya within whose jurisdiction the alleged violations took place.***

23. As was appreciated **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**:

> **"The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal…It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court."**

24. Therefore, any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act.

25. In matters of jurisdiction of superior courts, it is my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,** where it was held that

> **"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."**.

26. Although that rule applies the word "shall" it is my view, that the provision cannot be successfully invoked in order to dismiss a constitutional petition particularly in light of the clear constitutional provisions regarding the jurisdiction of the High Court. It is my view the mere fact that the said Rules applies the word "shall" rather than "may" does not necessarily connote that the requirement is mandatory. The intention of the rule making authority has to be examined before a determination is made as to whether the provision is mandatory or merely

directory. In **Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438** it was held:

> **"Such expressions as "may", "shall be empowered", "may be exercised", in certain circumstances are to be construed as having a compulsory or imperative force. The test is whether there is anything that makes it the duty on whom the power is conferred to exercise that power. Where a statute confers an authority to do a judicial act, in a certain sense there would be such a right in the public as to make it the duty of the justices to exercise that power: to put it another way where the exercise of an authority is duly applied for by a party interested and having a right to make the application, the exercise depends upon proof of the particular case out of which the power arises."**

27. In my view the said provision is merely directory and directs the parties on where to institute their proceedings and therefore in appropriate cases the court where the proceedings are instituted may direct that the same be heard and determined in a particular place. That, however, is a different thing from saying that the court has no jurisdiction in the matter. Where the court before which a petition is filed is of the view that the matter ought to have been instituted elsewhere, the court is perfectly entitled to direct that the same be heard by the High Court sitting at a particular place but the Court cannot by invocation of the said rule strike out or dismiss the petition. In other words, the place of institution of a petition is not necessarily the same thing as jurisdiction of the High Court.

28. It is true that the ***High Court (Organisation and Administration) Act*** (the Act) in sections 11 and 12 provides for establishment of Divisions and the distribution of the Stations of the High Court. Section 11 provides that the said Divisions are to be established for purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance and the Chief Justice is empowered to create the same where the workload and the number of judges in a station permit. That provision does not provide that it can be invoked to restrict the High Court's jurisdiction as conferred under Article 165 of the Constitution. The section is meant for the purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance. As I have stated above, any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication. In my view, the ***High Court (Organisation and Administration) Act*** (the Act) which is the parent Act, in sections 11 and 12 only provides for establishment of Divisions and the distribution of the Stations of the High Court. It does not purport to limit the jurisdiction of the High Court as provided in the Constitution. In other words, where Divisions are existing in a particular High Court station, the distribution of the matters to be handled by a particular Division may be prescribed. However, where no such Divisions exist, the Act cannot oust the Constitutional provisions dealing with the jurisdiction of the High Court.

29. In Gazette Notice No. 9123 of 2015 (***Notification of Practice Directions on the Division of the High Court of Kenya***), dated 8th December, 2015, the Chief Justice acting pursuant to the said provision established the High Court Division on Anti-corruption and Economic Crimes Division in Nairobi and Admiralty Division in Mombasa and it was provided that **in Nairobi** all disputes relating to Anticorruption and economic crimes matters shall be lodged and heard before the said Division which was to have its own registry and was to determine the categorisation of the matters that may be lodged and heard in the Division. That Gazette Notice also established the Admiralty Division in Mombasa and also provided for applications for international adoptions.

30. However, this Gazette Notice was subsequently superseded by Gazette Notice No. 153 of 9th December, 2016, the ***Practice Directions for the Anti-Corruption and Economic Crimes Division of the High Court*** which was dated 9th December, 2016. By that Gazette Notice, all new cases relating to corruption and economic crimes were required to be filed in the Principal Registry of the Anti-corruption Division at Nairobi for hearing and determination. The said instrument however expressly stated that the Division would at all stages of any hearing facilitate accessible adjudication of all disputes related to corruption and economic crimes. It also set out the matters to be heard in that Division and provided that all pending matters of that nature filed in other stations or Divisions whose hearing had not commenced would be transferred to that Division.

31. The said Practice Directions were subsequently amended vide Kenya Gazette Notice No. 7262 of 2018 and direction 3 thereof provides:

> ***The Chief Justice may establish additional Sub-registries outside Nairobi.***

32. It cannot be overemphasised that the power to establish High Court Divisions is donated under section 11 of the ***High Court (Organisation and Administration) Act***. That Act expressly provides that it was enacted pursuant to Article 165(1)(a) and (b) of the Constitution which provide as follows:

> ***(1) There is established the High Court, which—***
>
> ***(a) shall consist of the number of judges prescribed by an Act of Parliament; and***
>
> ***(b) shall be organised and administered in the manner prescribed by an Act of Parliament.***

33. It is trite law that Acts of Parliament must comply with the letter and spirit of the Constitution. Similarly, secondary legislation and practice directions must comply with the parent legislation and by extension the Constitution. In our case, Article 48 of the Constitution provides that:

> ***The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.***

34. Apart from that Article 6(6) of the Constitution provides that:

> ***A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.***

35. Therefore, in enacting Legislation whether primary or secondary and in promulgating practice directions, it is necessary that the right to access to justice as well as reasonable access to judicial services in all parts of the Republic must always be kept in mind. That is my understanding of section 12 of the ***High Court (Administration and Organization) Act*** which provides that:

> ***The Chief Justice shall, in consultation with the Principal Judge, facilitate reasonable and equitable access of the services of the Court and establish at least one station of the Court in every county.***

36. Though the Gazette Notice No. 9123 was superseded by Gazette Notice No. 153 of 2016, I take it that the latter did not revoke the former since the Anti-corruption and Economic Crimes Division was in fact established by the former and the former clearly stated that the said Division was created in the interest of effective case management.

37. In my view, where a strict adherence to the practice directions would result into a negation of the letter and spirit of Article 48 aforesaid, the Court must take an action that upholds the letter and the spirit of the Constitution. Mine is not a voice shouting in the wilderness. I am not breaking any jurisprudential ground by the said view. **Ogola, J** dealt with the same issue in **Hadija Mlao Mlingo vs. Director of Public Prosecutions & 3 others; Wilberforce Malanga Wambulwa & 5 Others (Interested Parties) [2020] eKLR** in which, while referring to **Shakeel Ahmed Khan & Another vs. Republic & 4 Others [2019] eKLR** and **Ethics and Anti-Corruption Commission & Another vs. William Baraka Mtengo & 4 Others [2017] eKLR**, expressed himself as hereunder:

> **"In the case of Ethics and Anti-Corruption Commission & another vs. William Baraka Mtengo & 4 others [2017] eKLR the court had the occasion to consider the argument that the Practice Directions have taken away the jurisdiction of the High Court and observed as follows:**
>
> **'The Respondent contends that the said Practice Directions have taken away the jurisdiction of this Court and that the Chief Justice has no power to take away jurisdiction from the High Court. I entirely agree with the Respondent that the Chief Justice has no authority whatsoever to take away jurisdiction from any court or to confer jurisdiction to any court.'**

38. The learned Judge proceeded to hold that:

> **"21. I totally agree. However, I will appraise Direction 4 of the Practice Directions. It lays down the overriding objective of the Practice Directions which is the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. This leads to the conclusion that the Practice Directions, were among other things, intended to aid the efficient and timely disposal of the matters identified therein. To that extend, I agree with the Respondent/Petitioner that the overriding objective of the Practice Directions of the Anti-Corruption and Economic Crimes Division of the High Court and the Constitution of Kenya, 2010 is to have expeditious and accessible dispensation of justice to all parties.**
>
> **22. Whereas the Constitution at Article 48 requires that justice be accessible, the same Constitution at Article 159(2)(b) demands that justice shall not be delayed. Time and again this court has held the preposition that the right to access justice ought to be balanced with the need to ensure that justice should not be delayed. As earlier noted, the subject of the Petition herein is the continued prosecution of the Petitioner in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011. To now direct that the matter be transferred to the Anti-Corruption and Economic Crimes Division in Nairobi would in my view delay the hearing of the same. Likewise, the intention of the Practice Directions to facilitate the efficient and timely disposal of the matter would be defeated. If the sub registries or divisions are not established outside Nairobi, the Practice directions will not only fly in the face of the Constitutional imperative that Justice shall not be delayed, but will also increase the cost of justice.**
>
> **23. For the reasons stated in this Ruling, allowing this application will militate against the overriding objective of the very practice directions of the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. The upshot of the foregoing is that I disallow the 2nd Respondent/Applicant's Application dated 10/06/2019. Parties shall fix a hearing date for the petition at registry on priority basis."**

39. In **Shakeel Ahmed Khan & Another vs. Republic & 4 Others [2019] eKLR, Thande, J** expressed herself as hereunder:

> **"Access to justice and the right to a fair trial are fundamental rights enshrined in Articles 48, 49 and 50 the Constitution of Kenya 2010. Indeed Article 25 clearly stipulates that the right to a fair trial is one of the rights which shall not be limited. The question this Court has to consider is whether the transfer of the Main Application to the ACEC Division in Nairobi will hinder the Applicants' right to access to justice or limit their right to a fair trial or indeed delay the hearing and determination of the Main Application. Direction 6 of the Practice Directions lists the matters that shall be heard by the ACEC Division…Direction 2 of the Practice Directions requires that all cases such as the present one involving corruption and economic crimes shall be filed in Nairobi…The 2018 Practice Directions amended the 2016 Practice Directions...Article 165(3) of the Constitution of Kenya 2010 confers upon this Court unlimited original jurisdiction in criminal and civil matters. Does Direction 2 have the effect of taking away the jurisdiction of this Court?...The Chief Justice as head of the Judiciary has power under Section 16 of the High Court (Organization and Administration) Act to establish sub-registries of the ACEC Division and indeed full ACEC divisions outside Nairobi. The failure to do so has in my view the net effect of stripping the High Court in stations outside Nairobi of the jurisdiction conferred upon it by the Constitution…Direction 4 of the Practice Directions lays down the overriding objective of the Practice Directions which is the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. The Main Application was filed on 24.4.19 and was on the same date certified urgent and a priority hearing date given. To now direct that the matter be transferred to the ACEC Division in Nairobi would in my view delay the hearing of the same. The intention of the Practice Directions to facilitate the efficient and timely disposal of the matter would be defeated. Corruption and economic crimes**

have become rampant in this country to the extent that there have been calls to declare corruption a national disaster. As long as sub-registries or divisions are not established outside Nairobi, the Practice Directions will not enhance the overriding objective but will do the exact opposite including increasing the costs of justice. The Practice Directions will also fly in the face of the constitutional imperative that justice shall not be delayed…My conclusion is that allowing this application will militate against the overriding objective of the very practice directions relied upon by the 4th Respondent of the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes."

40. I agree with the said holdings and add that where the said Directions clearly manifest a stripping of the High Court's jurisdiction under Article 165 of the Constitution, the Court is well advised not to apply them line, hook and sinker. I shudder to think of for example a person charged with the offence of soliciting for a bribery of say fifty shillings committed somewhere in Kapedo being required to travel all the way to Nairobi to challenge the said charges. Such a requirement would defeat the letter and spirit of Articles 48 as read with Article 159 of the Constitution. As noted in the above decisions, there is no evidence that the Chief Justice has established the sub-registries outside Nairobi pursuant to direction 3 of the Kenya Gazette Notice No. 7262 of 2018. In my view, where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Judges of the High Court as the High Priests of the Constitutional Temple of justice ought not to not shirk from their Constitutional mandate to ensure that the letter and spirit of the Constitution including Articles 6(6) and 48, which guarantees the right to access to justice and enjoins national State organs of which the Judiciary is one to ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service, are respected, upheld and promoted. A holistic reading of the two Articles leads me to the conclusion that the spirit of the Constitution is to spread the services of the national State organs as wide as possible and to discourage the centralisation of the same at the national capital.

41. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that there is no gap in the application of the rule of law. Therefore, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice.

42. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that:

"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."

43. However, where the proceedings being challenged are pending within the supervisory jurisdiction of one High Court, for the purposes of efficient administration of justice, challenge to the same ought to be made at the High Court where the trial Court is situate pursuant to rule 8 of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.*** That is however a purely administrative matter rather than a jurisdictional matter. That must be so because as was appreciated by the Court of Appeal in **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 Others [2017] eKLR:**

"We must reiterate that the High Court of Kenya remains one and the same court, only that it sits at different locations in the country, such as Malindi and Nairobi. The location where it sits cannot therefore affect its jurisdiction. The practice and requirements that suits be filed in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits. That is not in any way to suggest that such requirements or practice is unreasonable or unnecessary; it is intended to reduce costs of transporting witnesses from one corner of the country to another for hearing of cases and to expedite hearing and determination of suits, thus giving meaning to the overriding objective and the constitutional value in Article 159 which emphasize the need to reduce costs and delay in the hearing and determination of suits."

44. It was argued by the Commission that the rationale for the establishment of the said ACEC Division is consistency in decision making and specialization and underlies the creation of every division that has been established in the High Court. According to the Commission, consistency brings about stability in jurisprudence and predictability in decision making which in turn enhance public confidence in the justice system and therefore advances public interest while specialization enhances knowledge in the specific field on the part of the judicial officers manning them. It also positions the judicial officer to understand emerging challenges that arise in enforcement of the specific laws relevant to the division and to respond accordingly. It was therefore contended that if section 46(2)(b) of ACECA is unconstitutional law as it infringes on constitutional rights of persons as contended in this case, the Judges in the ACEC Division who enforce the law on a daily basis are better placed to make that determination.

45. With due respect to Learned Counsel for the Commission, these are not the stated objectives of the creation of Divisions. Section 11 of the ***High Court (Organisation and Administration) Act*** provides that the said Divisions are to be established for purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance and the Chief Justice is empowered to create the same where the workload and the number of judges in a station permit. That provision does not provide that it can be invoked to restrict

the High Court's jurisdiction as conferred under Article 165 of the Constitution under the guise of consistency and specialisation. It must be remembered that the judiciary transfer policy sets out the mode of transfer of judges. Specialisation would fly in the face of the said policy. I wish to cite the decision of the Court of Appeal in **M M Butt vs. Rent Restriction Tribunal & Others Civil Application No. Nai. 6 of 1979 [1982] KLR 417** that:

> **"A Judge is a Judge whether recently qualified or foggy. The former has the benefit of his latter learning, the later the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of justice spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both are free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torchbearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator."**

46. In other words, once appointed, a Judge is, as mandated in Article 160(1) of the Constitution, only subject to the Constitution and the law and not to the control or direction of any person or authority. The matter before me is seeking a determination of the constitutionality of a statute. I agree with the Petitioner that the adoption of the position taken by the Interested Parties herein would unlawfully take away the unequivocal constitutional jurisdiction of the High Court. That would amount to a jurisprudential coup against the High Court.

47. In the premises, I find the application dated 11th August, 2020 without merit and dismiss the same with costs.

Read, signed and delivered in open Court at Machakos this 24th day of February, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kashindi for Mr Murei for the Interested Party

Mr Ochieng for the Petitioner

CA Geoffrey