Mbebe & 105 others v Attorney General & 7 others (Constitutional Petition 69 of 2015) [2021] KEHC 146 (KLR) (26 October 2021) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION 69 OF 2015

JM MATIVO, J

OCTOBER 26, 2021

BETWEEN

ANTONY KATUMI MBEBE & 105 OTHERS ..... PETITIONER

AND

ATTORNEY GENERAL & 7 OTHERS ..... RESPONDENT

JUDGMENT

Factual Matrix

1. The Petitioner's case as enumerated in the Amended Petition dated 16th April 2019 is that prior to 1994, plot number 274/1/MN situate within the County of Mombasa measuring approximately 200 acres registered was registered in the names of Mary Kivingi Byrant (deceased). They also aver that Plot No. 423/1/MN was granted to a one Ram Chad was subdivided into 3 blocks each measuring approximately 45 acres, namely; 4186/1/MN, 4187/1MN and 4188/1/MN.

2. The Petitioners aver that from 1995 or thereabouts, the deceased subdivided the said land and either herself or her personal representatives, namely Timothy Isaac Bryant and Leah Nthambi and Wendy Bryant Nyamweya sold the various parcels listed in the Petition to the Petitioners. The Petitioners' contestation is that in 2015 there were several armed invasions into the said parcels of land and on 10th December 2015 armed groups invaded the said property and evicted some of the applicants, their servants and or employees and erected temporary structures. They state that they reported the said incidence at Bamburi Police but the police informed them of the existence of a court order restraining the removal of the 4th to 8thRespondents. Further, the Petitioners state that thereafter, the Police gave them a court order issued on 18th November 2015 in SRMCC No. 2067 of 2015 between 4th to 8th Respondent and Wendy Bryant Nyamweya. Additionally, they state that upon perusing the court file, they noted that the 4th to 8th Respondents were representing a group of 389 others claiming adverse possession of the original land. Also, they complained of threats to evict by the said Leah Nthambi

Bryant, Timothy Isaac Bryant and Wendy Bryant Nyamweya and the trial Magistrate granted them an injunction.

3. The Petitioners aver that the original land was registered under the *Registration of Titles Act*[1](Repealed), so the Magistrate lacked jurisdiction to entertain the matter. They averred that the original land is less than 10 kilometers away from the court, so, the Magistrate is presumed to know the approximate value of the land within his area of jurisdiction, thus, he acted outside his jurisdiction. They contend that Magistrates have no jurisdiction under article 162 (2) (b) of the *Constitution* to handle matters touching on land which has been surveyed and a title deed issued. They state that after intense persuasions, the General Service Unit evicted the 4th to 8th respondents, but they are apprehensive that a further invasion will take place. As a consequence of the foregoing, the petitioners pray for: -

    a. An order of judicial review by way of Certiorari quashing the order by the Hon Karani given on 18th November 2015 and issued on 30th November 2015 in Mombasa SRMCC No. 2067 of 2015.

    b. A judicial review order in the form of an order of Mandamus directed at the 1st Respondent, the 2nd respondent and the 3rd Respondent, to forcefully evict any person, the 4th to the 8th Respondents and their co-Plaintiffs in SRMCC No. 2067 of 2015 or any other squatter found on the said plots.

    c. A permanent prohibitory order and or injunction be issued against the 4th to the 8th Respondents and their co-plaintiffs in SRMCC No. 2067 of 2015 or any other squatter and prevent any further invasion, encroachment, entry, occupation on the said Plots by the 4th to 8th Respondents and their co-plaintiffs in SRMCC No. 2067 of 2015, their agents, servants or otherwise on the plot numbers as the aforesaid schedule.

    d. A declaration that the applicants have a constitutional right to receive automatic police protection provided by the 1st, 2nd and the 3rd Respondents to guard, safeguard and protect their properties as and when the 4th to 8th Respondents, their servants and agents or any other squatter invade the said Plots.

    e. A declaration that the duty to defend the rights to property and security under Article 29 to 40 of the Constitution is the preserve in this case of 1st, 2nd and 3rd Respondents.

    f. A declaration that the 4th to 8th Respondents, their agents and or servants have breached the applicants' rights under Articles 29 and 40 of the Constitution.

    g. A mandatory order directed at the 1st, 2nd and 3rd Respondents to prefer charges of robbery or such other related criminal offences for the actions disclosed within this Petition.

    h. A declaration that this Honourable Karani sitting in SRMCC No. 2067 of 2015 did not have jurisdiction to issue the order dated 18th November 2015.

The 1st to 3rd Respondent's grounds of opposition

4. The Hon. Attorney General on behalf of the 1st and 2nd Respondents[2] filed grounds of opposition dated 24th December 2015 stating that:- the Petition is misconceived and an abuse of court process; the Petition does not raise any constitutional issues for this courts determination; the Petition is unmerited as the relief sought is improper, incapable and untenable; the forum approached is improper and

1 Cap, 281, Laws of Kenya (Repealed)

2 Even though the grounds state that they act for the 3rd Respondent which is incorrect.

jurisdiction is wanting on competing ownership rights; the Petition does not show any violation of rights by the 1st to 3rd Respondents; by the Petitioner's own admission, the Respondents are barred from interfering with occupation or use of the suit property vide a court order issued in SRMCC No. 2067 of 2015; the Petition is improper, far fetched and unconstitutional as against the 1st to 3rd Respondents as there is no proof of violation of any rights by the said Respondents; the said order has not been set aside or varied; the procedure in law for setting aside irregular orders is prescribed under the law and that the Petition is baseless and misconceived against the 1st to 3rd Respondents.

Petitioner's advocates submissions

5. In a nutshell, the Petitioners' counsel relied on *Anarita Karimi Njer v Republic*[3] which held that a party citing violation of constitutional rights must plead with precision the complaints and the provisions of the Constitution alleged to have been violated. In addition, he cited *Kokebe Kevin Odhiambo v Council of Legal Education & 4 others*[4] and argued that the Petitioner has identified and particularized the specific infractions of the Constitution. To further buttress his argument, he cited *Wilson Olal & 5 others v Attorney General*[5] which held that the purpose of public law is to civilize public power. He also cited *The Intervention in Public Law Litigation: The Environmental Paradigm*[6] which defined the meaning of public law litigation. (Also, he cited *C K (A Child) through Ripples International as her Guardian & next friend & 11 others v Commissioner of Police /Inspector General of the National Police Service & 3 others*[7]).

6. Counsel urged the court to note that no response has been filed to controvert the averments in the Petition and relied on *South Nyanza Sugar Company Ltd v Donald Ochieng Mideny*[8]in which the court underscored the need for an opposing party to controvert evidence against him and argued that this Petition is not frivolous. (Citing *Kivanga Estates Limited v National Bank of Kenya Limited*[9]).

7. Additionally, counsel submitted that the Magistrates' court had no pecuniary jurisdiction to entertain the case. Also, counsel implored the court to consider the site visit report which he argued confirms that the 4th to 8th Respondents were not residing on the land. He dismissed the lowers court's decision as a fabrication since no squatters were found on the land and urged the court to grant the orders sought.

The 1st & 2nd Respondent's advocates submissions

8. On behalf of the Hon. Attorney General, it was submitted that the Petition does not disclose any cause of action against the 1st, 2nd and 3rd Respondents, hence the reliefs sought cannot be issued against the said parties. Counsel cited *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others*[10] which explicated the grounds upon which the writ of Mandamus can issue.

The 3rd Respondent's advocates submissions

3 {1979} e KLR.

4 {2016} e KLR.

5 {2017} e KLR.

6 Peter A. Appel, *Washington University Law Review,* 2000.

7 {2013} e KLR.

8 {2018} e KLR.

9 {2017} e KLR.

10 {1997} e KLR.

9. Counsel for the County Government of Mombasa, the 3rd Respondent argued that the Petition does not raise any constitutional issues. He submitted that the purpose of the Constitution is not to resolve disputes between to individuals. He argued that there is nothing to show that the County Government of Mombasa has breached the Constitution. Further, it was submitted that the Petitioners are seeking declarations on uncontested issues.

Determination

10. First, I will address the question of this court's jurisdiction an issue which ought to have addressed at the earliest opportunity possible. Even though the Hon. Attorney General raised this issue in his grounds, it was never addressed, yet, jurisdiction is a fairly dispositive question and decisional law is in agreement that questions relating to court's jurisdiction ought to be determined at the earliest opportunity possible because if a court proceeds without jurisdiction, the proceedings are a nullity. Even interim orders were issued pending trial despite the glaring issue of jurisdiction staring at these proceedings!

11. 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 statute, charter, or commission under which the court is constituted imposes the limit of this authority. The authority may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

12. 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. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist.

13. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.[11] A court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent.[12] The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*[13] where Nyarangi JA stated: -

> "…. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

11 *John Beecroft, Words and Phrases Legally Defined, Volume 3:1-N, at Page 113.*

12 The Supreme Court *in the matter of the Interim Independent Electoral Commission,* Constitutional Application No. 2 of 2011 (unreported).

13 {1989} KLR 1.

14. A court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court[14] elucidated this position as follows:-

> "Jurisdiction is determined on the basis of the pleadings,[15] ... and not the substantive merits of the case... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by... {another court}, the High Court would lack jurisdiction..."

15. A review of the reliefs sought in the Petition show that the Petitioners seeks an eviction order carefully crafted as a writ of mandamus to forcefully evict any person, the 4th to the 8th Respondents and their co-Plaintiffs in SRMCC No. 2067 of 2015 or any other squatter found on the listed plots. In the same vein, the Petitioners seek a prohibitory injunction to prevent "any further invasion, encroachment, entry, occupation on the said Plots by the 4th to 8thRespondents and their co-plaintiffs in SRMCC No. 2067 of 2015, their agents, servants or otherwise on the plot numbers as the aforesaid schedule."

16. The declarations sought is also cautiously couched as follows: - "to guard, safeguard and protect their properties within the Plot numbers as per the aforesaid schedule and as and when the 4th to 8th Respondents, their servants and agents or any other squatter invade the said Plots." The nomenclature deployed notwithstanding, a casual observer will discern that the nub of the relief and the purpose is protection of land rights guised as a constitutional grievance. A similar reasoning is evident in the other reliefs sought. The upshot is that the Petitioners' claim is premised on alleged ownership of land, use and occupation of land which they claim to have purchased. The substance of their claim is that they seek eviction orders against the 4th to 8th Respondents. They also claim that they are legitimate owners. Simply put, it is evident that the substance of the dispute involves use, occupation and alleged ownership to land.

17. Back to the question of jurisdiction, it is trite that a court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[16] Article 165(1) of the Constitution vests vast powers in the High Court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction to hear any question respecting the interpretation of the Constitution. Article 23 (1) provides that the High Court has jurisdiction, 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.

18. The limitation of the vast powers conferred upon the High court under Article 165 is found in Article 165 (5). This provision states in mandatory terms that the high court shall not have jurisdiction

[14] *In* the matter between *Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[15] *Fraser vS ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[16] *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

in respect of matters: - (a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b). Clearly, this court has no jurisdiction to determine matters falling under Article 162 (2) (2) (a) & (b) of the Constitution.

19. The question I should address now is what are these matters which fall outside the constitutionally ordained mandate of this court? The answer is found in the provisions of Section 13 of the Environment and Court Act.[17] The preamble to the said act states that it was enacted to give effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes. Section 13 of the *Environment and Land Court Act*[18] provides: -

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes 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.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

17 Act No. 19 of 2011.

18 Chapter 12A, Laws of Kenya.

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs

20. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2) (b) of the Constitution and Section 13 of the Act. The intention of the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this court has no jurisdiction. On this ground alone, this Petition in its entirety collapses. Even though am not sitting on appeal, there was no basis at all for granting the interim orders which sadly have been in force all since 2015 or thereabouts and there was no attempt to move the court to vacate the orders till now.

21. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters, which fall within the ambit of the Environment and Land Court. This is clearly provided for under Section 13 (3) of the Act. In addition, sub-section 7 (b) above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Petition seeking judicial Review orders. If at all the Petitioners had any justiciable claim, then, the Environment and Land Court was the right forum. The said court is constitutionally and statutorily ordained to entertain the disputes enumerated in section 13 cited above.

22. Useful guidance can be borrowed from *United States International University (USIU) v Attorney General*[19] a case which related to labour issues. The contention was whether the Employment and Labour Relations Court established under Article 162 (2) of the Constitution has the jurisdiction to interpret the Constitution and to grant the remedies provided under Article 23 of the Constitution. It was held: -

> " 45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011."

23. The Court of Appeal in *Daniel N. Mugendi v Kenyatta University & 3 others*[20] set aside an order dismissing a suit on grounds that the Industrial Court was not possessed of jurisdiction to interpret the Constitution and to grant the remedies provided under Article 23 of the Constitution stating :-

> " In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the

19 {2012} e KLR.

20 {2013} e KLR.

Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."

24. In *Republic v National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others*[21] stated: -

> 62. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by Justice Mohammed Ibrahim in Yusuf *Gitau Abdallah vs. Building Centre (K) Ltd & 4 others* [2014] eKLR:
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> 64. Whereas this Court had in the past entertained disputes wherein the core issue was that of jurisdiction of the National Land Commission, since the determination of the Supreme Court in Petition No. 5 of 2015- *Republic vs. Karisa Chengo & 2 Others* it has become clear that such matters ought to be dealt with by the specialized courts, when the Court expressed itself inter alia as hereunder:-
>
> > "it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation...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."
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> 65. In this case, it is clear that even if this Court were to hear this matter the substratum of the dispute would remain unresolved. However, it is my view that the dispute herein falls squarely within the provisions of section 13(2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant's contended right to be heard stem from their yet to be determined interest in the suit land.
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> 66. In this case, I am satisfied that the dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in *Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo,* SC Petition 2 of 2012,[para. 29-30] where it was held:
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> > "The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have

[21] {2018} e KLR.

> the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework".

67. Similar sentiments were expressed in Constitutional Petition Number 359 of 2013 *Diana Kethi Kilonzo vs. IEBC and 2 Others* in which it was held that:

> "We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

25. A High court may not determine matters falling squarely under the jurisdiction of the 'courts of equal' namely the Employment and Labour Relations Court and the Land and Environment Court. Despite this clear-cut jurisdictional demarcation, matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of this case. It falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. I decline the invitation to venture into this forbidden sphere and strike out this Petition.

26. The other ground upon which this Petition flops is the evident inability by the Petitioners to distinguish the clear-cut difference between "supervisory jurisdiction" of this court and the "judicial review jurisdiction." Notably, none of the parties addressed this important distinction. The Petitioners seek to review a ruling rendered by a Magistrate, a court of competent jurisdiction. In particular, the Petitioners seek an order of Certiorari to quash the orders granted on 18th November 2015 in Mombasa SRMCC No. 2067 of 2015. They also pray for a declaration that the learned Magistrate had no jurisdiction to issue the said order.

27. It is critical to identify whether the decision of the Magistrate's Court is an 'administrative action' within the meaning of the definition at section 2 of the *Fair Administrative Action Act*[22] t (The FAA Act), hereby rendering itself amenable to Judicial Review under section 7 of the FAA Act or under the traditional common law grounds for judicial review. The FAA Act defines an "administrative action" to include "powers, functions and duties exercised by authorities or quasi-judicial tribunals" or "any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates." The decisive question is therefore whether a judgment, ruling or orders made by a court of competent jurisdiction or a subordinate court such as the decision under

[22] Act No. 4 of 2015.

challenge in this case can be classified as an administrative action such that it is amenable to judicial review powers of this court.

28. The implication of the above definition is that the decision of a public authority or quasi-judicial tribunal is outright amenable to judicial review while the decision of any other person or body is amenable to judicial review if it affects the legal rights or interests of the concerned party.

29. Judicial bodies are the ordinary courts of law - such as the Supreme Court, High Courts and the subordinate courts. A quasi-judicial body is a non-judicial body which can interpret law. It is an entity such as an arbitrator or tribunal board, generally of a public administrative agency, which has powers and procedures resembling those of a court of law or judge, and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action.

30. But more important is the fact that there is a clear distinction between the "supervisory jurisdiction" and "judicial review jurisdiction." Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs.[23]

31. This power of superintendence conferred by Article 165 (6) of the Constitution, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee*,[24] is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.[25]

32. The grounds cited by the Petitioners clearly show that the Magistrates court rendered the impugned decision clearly within the limits of its jurisdiction. Even if the court had either misinterpreted the evidence or the facts or failed to apply the law correctly, or had regard to inadmissible evidence, it does not mean that it misconceived the nature of the inquiry or its jurisdiction or its duties in connection therewith. It only means that it erred in the performance of its duties within the confines of its jurisdiction. A court 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry or absence of jurisdiction – they may be misconceptions about meaning, the law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry or improper exercise of jurisdiction. Such misstates as cited by the Petitioners are corrected by way of appeal or review.

23 *Gallagher v. Gallagher*, 212 So. 2d 281, 283 (La. Ct. App. 1968).

24 AIR 1951 Cal. 193.

25 *See D. N. Banerji v. P. R. Mukherjee 1953 SC 58.*

33. The power given to the Magistrates Court by the law was to interpret the law and the evidence, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.[26] Upon being confronted with the application, again, the law governing grant or refusal to grant injunctions came into play. Any errors of the kind cited by the Petitioners (if they exist) have nothing to do with the court exceeding its powers or jurisdiction; they do not amount to illegality or breach of procedure; they are errors committed within the scope of its mandate. To illustrate, a court has to apply the law but if it errs in its understanding or application of the law the parties have to live with it or invoke the appellate jurisdiction.

34. Instead of preferring an appeal, or applying to be enjoined in the said case to present their grievances, the Petitioners have improperly invoked the judicial review jurisdiction of this court to challenge a judicial pronouncement. Even if they had invoked supervisory jurisdiction, the power under Article 165 (6) is used sparingly only when the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction which is not the case here. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For the court to interfere, there must be a case of flagrant abuse of fundamental principles of law or where the order has resulted in grave injustice. The fact that the Petitioners are aggrieved by the decision does not amount to grave injustice. This is the natural consequence of a losing litigant. What the Petitioners are citing are pure grounds of appeal as opposed to review which are illegality, irrationality, ultra vires and procedural impropriety.

35. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. In the instant case, the impugned decision is a judicial function, arrived at within the confines of the jurisdiction conferred to the Magistrate by the law, which to me is not amenable to judicial review but is appealable to the High Court. In fact, as stated above, the reasons cited by the Petitioners are grounds of appeal as opposed to grounds for judicial review. Simply put, the Petitioners are seeking to use this Petition to overturn a decision rendered by a court of competent jurisdiction instead of invoking appellate jurisdiction which is unacceptable.

36. Even though each of the above two grounds are sufficient to dispose this Petition as thy have, there is a third dimension which the parties never cared to address. The Petitioners seek orders which potentially affect persons who are not parties in these proceedings. First, they seek to review orders issued in Mombasa SRMCC No. 2067 of 2015 yet all the parties in the said case are not sued in these proceedings. As if the said omission is not enough, several prayers as framed are dangerously open ended, imprecise and capable of being misconstrued or abused. Specifically, the seek orders the 1st, 2nd and 3rd Respondents "to forcefully evict any person, the 4th to the 8th Respondents and their co-Plaintiffs in SRMCC No 2067 of 2015 or any other squatter found on the plots ..." Similarly, the prayer for prohibition is equally widely drafted such that it refers to co-plaintiffs in the lower court, yet they are not named or sued in this Petition. For the first time in legal drafting, am confronted with prayers directed to " any squatter on the land or any person" a totally imprecise prayer. Like guided missiles, reliefs sought from a court of law should be specific and properly directed to the defendants, their assigns, agents or person acting in their name.

[26] *Armah v Government of Ghana* [1966] 3 All ER 177 at 187 quoted in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208 (HL) at 223D-F.

37. Equally, imprecisely drafted is the prayer for a declaration that the applicants have a constitutional right to receive automatic police protection provided by the 1st, 2nd and the 3rd Respondents to guard, safeguard and protect their properties within the Plot numbers as per the aforesaid schedule and as and when the 4th to 8th Respondents, their servants and agents or any other squatter invade the said Plots. The last part of this prayer refers to "any squatter" who are not defined, named or sued.

38. By now, it is evident that some of the orders sought in this Petition, (if not all), are not only dangerously imprecise, but also if granted, they will affect persons who are not parties to this case. Such a scenario poses a danger of granting orders affecting other persons without giving them the benefit of a hearing a position decried by the Supreme Court of India in *Prabodh Verma v State of U.P.*[27] and *Tridip Kumar Dingal v State of W.B.*[28] The principle that comes out from the above cases is that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. The principle of audi alteram partem has its own sanctity. That apart, a person or an authority must have a legal right or right in law to defend or assail.

39. The applicability of the principles of natural justice has to be adjudged with regard to the effect and impact of the order and the person who may be affected; and that is where the concept of necessary party become significant. I may profitably cite the Supreme Court of India in *Canara Bank v Debasis Das*[29] which stated: -

> "Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

And again:-

> "Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between

27 {1984} 4 SCC 251.

28 {2009} 1 SCC 768.

29 {2003} 4 SCC 557.

a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."

40. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision-making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals. Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body.

41. Above all, the constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[30] Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[31]

42. To sum it up, no order should be passed behind the back of a person who is to be adversely affected by the order, a position aptly stated by the Supreme Court of India in J.S. *Yadav v State of U.P. & Anr*[32] thus: -

> "No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure,... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to

30 Kioa v West (1985), Mason J

31 See *Onyango v. Attorney General*, ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added:-*"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at." And in Mbaki & others v. Macharia & Another, at page 210, the Court stated as follows:- "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."*

32 {2011} 6 SCC 570

accommodate the petitioner without removing the person who filled up the post manned by the petitioner-plaintiff...More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post..."

43. The above judicial pronouncements are graphically clear that the undisclosed persons contemplated in the prayers sought are necessary parties, so, one of the several defects in this Petition is that of non-joinder of necessary parties.[33] A Court ought not to decide a case without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large. True, Rule 5 (b) of The Constitution of Kenya (Protection on of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[34] provides inter alia that a Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute. However, at this late hour it may be prejudicial to the Respondents to invoke Rule 5 (c) for the court to order addition or substitution of parties. In my event, the Petitioners never addressed this issue.

44. On behalf of the Attorney General, it as argued that this Petition does not raise any constitutional questions. I agree. There are no constitutional issues at all in this Petition. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[35] When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values.[36]

45. Emphatically addressing the question of what constitutes a constitutional question, the court in the South African case of *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others*[37] recalling the Constitutional Court's observations in *S v Boesak*[38] stated :-

> "The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of ...the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine

33 See decision by a three-judge Bench in *Prabodh Verma and Others v. State of Uttar Pradesh and Others* {1984} 4 SCC 251

34 L.N. No. 117 of 28 June 2013.

35 http://www.yourdictionary.com/constitutional-question

36 Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

37 {2002} 23 ILJ 81 (CC)

38 {2001} (1) SA 912 (CC)

constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."[39]

46. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[40] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.

47. The Petitioners are alleging invasion of their land. They claim the 4th to 8th Respondents have been interfering with their land. They are questioning a court order in favour of the 4th to 8th Respondents and others in the lower court injuncting the Respondents in the said case from removing them from the land. Disputes relating to ownership, use, occupation of land are essentially factual issues which can be resolved by interpretation and application of the governing statute without resulting to interpretation of the Constitution. Above all, before this court is a Petition which presents two competing rights between individuals. There are no breaches of the Constitution or constitutional rights but alleged encroachment of land. The upshot is that this Petition does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do no not fall anywhere close to violation to constitutional Rights. The mere recitation of constitutional provisions does not ipso facto translate to constitutional questions. They must be gleaned from the pleadings. I gather none from the instant Petition.

48. This Petition having collapsed on the many grounds discussed above; it will serve no utilitarian value to delve into the merits of the Petition. In view of my analysis of the law, authorities and determination of the issues discussed above, and the conclusions arrived at, I find and hold that this Petition fails in its entirety. Accordingly, I hereby dismiss the Petitioners' Amended Petition dated 16th April 2019 with costs to the Respondents.

SIGNED AND DATED AND DELIVERED AT MOMBASA THIS 26 TH DAY OF OCTOBER 2021

JOHN M. MATIVO

JUDGE

39 2001 (1) SA 912 (CC)

40 Supra note 5 at paragraph 23.