



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONSTITUTIONAL PETITION NO. 1 OF 2019

JARED PETER ODOYO OLUOCH KWAGA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING

This Ruling is on a Preliminary Objection which was raised by the Respondent, **THE DIRECTOR OF PUBLIC PROSECUTION**. The said Respondent was sued by the Petitioner, **JARED PETER ODOYO KWAGA**.

1. The Petitioner told the Court that he resided within the **HOMA BAY COUNTY**.
2. The primary reason why he lodged the Petition was that the Respondent had instituted criminal proceedings against the Petitioner, (together with other persons), at the Chief Magistrate's Court, Milimani Nairobi.
3. The Petitioner perceives as unconstitutional, the decision by the Respondent to institute the criminal proceedings in Nairobi, whereas the cause of action allegedly arose at Migori.
4. The Petitioner pointed out that most of the witnesses in that criminal case, as well as the physical evidence such as landed properties are within Migori County. The Petitioner also said most of the 16 accused persons reside within Migori County.
5. In the circumstances, the Petitioner reasoned that it would defy logic, to have the accused persons spend huge amounts of money to travel to Nairobi for the case, and also their subsistence during the period whenever they were required to be in Nairobi for purposes of the criminal case.
6. The main relief sought in the Petition is the transfer of the case from the Chief Magistrate's Court at Milimani, Nairobi to any other Court within Migori County or at a Court which was located nearest to the place where the alleged offences were committed.
7. In the face of the said Petition, the Respondent put forward a Preliminary Objection in the following terms;

"1. THAT this Honourable Court lacks jurisdiction to hear/entertain/determine the Notice of Motion and Petition No. E001 of 2020 dated 23rd October 2020 filed in the High Court, Kisumu.

2. THAT there is established a High Court Anti-Corruption and Economic Crimes Division to specifically hear/entertain/determine Petitions and Judicial Review applications on claims of infringement or the threatening of constitutional rights relating to corruption and/or economic crimes related matters vide Gazette Notice No. 7262 of 26th June 2018.

3. THAT the Petitioners in the Application and Petition No. E001 of 2020 dated 14th October 2020 alleged infringement of constitutional rights relating to Nairobi Milimani Anti-Corruption Case Number MCAC/E18 OF 2020 which falls within the jurisdiction of the Anti-Corruption and Economic Crimes Division of the High Court of Kenya Nairobi, pursuant to the aforementioned practice directions."

8. In answer to the Preliminary Objection, the Petitioner challenged the authority of the Chief Justice to set up the Anti-Corruption and Economic Crimes Division. In his considered view, the Gazette Notice **No. 7262** of 26th June 2018 constituted a breach of his constitutional rights to a fair trial.

9. The said submission is premised on the reasoning that the impugned Gazette Notice had the effect of amending **Section 71** of the **Criminal Procedure Code**, which stipulates the place where an accused person should undergo trial.

10. It is common ground that pursuant to **Article 94** of the **Constitution of the Republic of Kenya**, the legislative authority is vested in Parliament.

11. **Article 94 (5)** of the **Constitution** stipulates thus;

“No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.”

12. In this instance, the Petitioner acknowledges that pursuant to **Section 11 (1)** of the **High Court (Organization and Administration) Act 2015**, the mandate and extent of the Chief Justice’s authority to establish Divisions of the High Court.

13. It therefore follows that, in principle, the Chief Justice was conferred with authority to establish Divisions of the High Court.

14. However, the Petitioner emphasized that pursuant to **Article 94 (6)** of the **Constitution** that when an Act of Parliament confers upon a State Officer or any other person, the authority to make provision having the force of law in Kenya, the said legislation;

“..... shall expressly specify the purpose and objectives for which the authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.”

15. It was the understanding of the Petitioner that under **Section 11 (1)** of the **High Court (Organization and Administration) Act 2015**, the mandate and extent of the authority conferred upon the Chief Justice is specified; and it is limited to the establishment of the following Divisions.

“(a) Family and Children Division;

(b) Commercial Division;

(c) Admiralty Division;

(d) Civil Division;

(e) Criminal Division;

(f) Constitutional and Human Rights Division;

(g) Judicial Review Division; and

(h) any other division as the Chief Justice may, on the advice of the Principal Judge determine.”

16. As the said section does not cite the Anti-Corruption and Economic Crimes Division, the Petitioner contends that the Chief Justice did not have the requisite authority to establish it.

17. First, I find that the challenge being mounted against the legality of the Anti-Corruption and Economic Crimes Division is a red-herring.

18. The Petition before me was not a challenge to the constitutionality of the Anti-Corruption and Economic Crimes Division. It is an application seeking the transfer of the criminal case from the Court at Milimani, Nairobi, to either Migori or to a Court near Migori.

19. If indeed the Petitioner wished to challenge the constitutionality of that Court, he would be entitled to bring an action intended specifically for that purpose. In my considered view, if the Court were to hold that the Anti-Corruption and Economic Crimes Division was either unlawful or illegal, (because it had been established without requisite authority), the proceedings which had been instituted before that Court would be incompetent. Such proceedings, in my view, would not be amenable to transfer to another Court.

20. The second point that was raised by the Petitioner was that his rights and fundamental rights had either been breached or threatened to be breached.

21. I find that if this Court were to delve into that question, I would already be addressing the substance of the application and of the Petition. As the Respondent raised a Preliminary Objection, founded upon the contention that this Court lacks jurisdiction to hear/entertain/determine the application, it would be improper for the Court to delve into matters of substance in the application, at this stage.

22. It is well settled that when a party raises an issue about whether or not the Court had jurisdiction to handle a particular matter, the Court must first settle the said question. It is only if the Court were to determine that it had the requisite jurisdiction, that the said Court could then take the step of hearing and determining the substantive issues before it. If the Court lacked jurisdiction, it cannot proceed to hear and determine the substantive issues which had been placed before it.

23. Actions which are taken by a Court which lacked jurisdiction, would be futile.
24. Therefore, until and unless the issue of jurisdiction was determined, it would be wrong to answer the question about whether or not the constitutional rights and fundamental freedoms of the Petitioner had been infringed or were threatened with infringement.
25. The Petitioner has submitted that the Anti-corruption and Economic Crimes Division in Nairobi, whose authority, power and jurisdiction is impugned, cannot be an impartial arbiter on the issue of its authority, power and jurisdiction.
26. There is no doubt that no man is to be a Judge in his own cause.
27. Therefore, the Petitioner submitted that;
- “It shall be a breach of the rules of natural justice to have this matter heard and determined by a High Court Division whose establishment, authority, power and jurisdiction is challenged.”***
28. In my understanding, it is an age-old tradition and practice, that when a party was challenging the jurisdiction of the Court before which he was on trial, he should do so before that Court. The reason for that is that the question of jurisdiction is not subjective.
29. Jurisdiction cannot be conferred by a Court, if the Court does not have it.
30. In **SAMUEL KAMAU MACHARIA & ANOTHER Vs KENYA COMMERCIAL BANK & ANOTHER [2012] eKLR** the Court pronounced itself thus;
- “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.”***
31. In effect, jurisdiction is a question of objective determination. Therefore, when a party persuades me that I lack jurisdiction, I would have no alternative but to down my tools.
32. The Petitioner is inviting one Judge of the High Court to make a determination on the question concerning the jurisdiction of another Court of concurrent jurisdiction. I have no jurisdiction of a supervisory nature or of review over any Court of concurrent jurisdiction.
33. If a party was of the view that a particular Court lacked jurisdiction, the said party should institute an appropriate challenge before that Court; or if the case was before a Magistrate’s Court, the party could move the High Court which has jurisdiction over the said Magistrate’s Court.
34. In this case the Applicant is one of the 16 Accused persons who are facing trial before the Court at Milimani, Nairobi.
35. Therefore, this Petition is intertwined with the **ANTI-CORRUPTION CASE NO. 18 OF 2020**, in which he is the 6th Accused.
36. I hold the considered view that it would be wrong to encourage a person who was facing trial before a Court at Nairobi, to file an application at Kisumu, seeking to have the said case transferred to either Migori or to a Court near Migori.
37. If the Petitioner was permitted to proceed in such manner, the Court would have enabled the Petitioner to shop for a forum of his choice.
38. Parties ought not to be permitted to go around choosing for themselves the Court where they wish to institute proceedings, regardless of the proximity or lack thereof, between the said Court and the place where the cause of action accrued.
39. The convenience of parties or of their advocates is not a factor that can determine whether or not a Court before which the party had been charged had or did not have jurisdiction.
40. In the result I find that this Court lacks jurisdiction to determine the application dated 23rd October 2020. If the Petitioner wishes to challenge the jurisdiction of the trial Court, he ought to consider whether or not to mount such challenge before the trial Court.
41. In effect, the Preliminary Objection is upheld, not only in relation to the application, but also in relation to the Petition. I so hold because the Petition was so intertwined with the proceedings in the criminal case which is still pending, that it would be imprudent to canvass the Petition before a Court that is different from the Court that was handling the criminal case.
42. Accordingly, the Petition and the application dated 23rd October 2020 are struck out, for want of jurisdiction.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER 2021

FRED A. OCHIENG

JUDGE