



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 78 OF 2017

IN THE MATTER OF ARTICLES 47,162 AND 165 OF THE CONSTITUTION OF KENYA

BETWEEN

JITESH SHAH

OSHWAL EDUCATION RELIEF BOARD

OSHWAL UNIVERSITY TRUST.....PETITIONERS/APPLICANTS

-VERSUS-

HON. ATTORNEY GENERAL.....RESPONDENT

AND

KOKI MBULU T/A KOKI MBULU & CO. ADVOCATES....RESPONDENT

RULING

1. Through their petition filed on 10th March 2017, the petitioners herein sought the following orders:
 1. A declaration do issue that a Deputy Registrar of the Environment and Land Court has no jurisdiction to handle the taxation of a Bill of Costs filed in that court after his/her transfer from the said court.
 2. A declaration do issue that a Deputy Registrar of the Environment and Land Court has no jurisdiction to handle the taxation on a Bill of Costs filed in that court without authority in writing of the Honourable The Chief Justice of the Republic of Kenya.
 3. A declaration do issue that the Bill of Costs dated 4th February 2016 was filed in court without jurisdiction and the said Bill should be struck out with costs .
 4. A permanent injunction restraining Honourable S. Mwayuli, Deputy Registrar High Court (Judicial Review Division) from proceeding with the taxation of the Bill of Costs dated 4th February 2016 filed in the Environment and Land Court
 5. A declaration do issue that the petitioners are entitled to be heard and make any

representations they wish to make before the taxation of any Bill of Costs filed against them.

2. Concurrently with the petition, the petitioners also filed a Notice of Motion, under Certificate of Urgency in which they sought conservatory orders to restrain Honourable S. Mwayuli Deputy Registrar of the High Court (Judicial Review Division) from proceeding with the taxation of the interested party's Bill of Costs filed in the Environment and Land Court.(herein after "ELC). The said application was however withdrawn on 27th March 2017, by consent, at the instance of Mr Karongo, advocate for the petitioner.

3. In response to the petition, the interested party herein, on 12th June 2017, filed a notice of preliminary objection to the proceedings on the ground that this court lacks the jurisdiction to hear and determine the petition.

Parties thereafter filed written submissions in respect to the interested party's said preliminary objection which is now the subject of this ruling.

The Interested Party's Submissions

4. Koki Mbulu & Co. advocates for the interested party submitted that even though the petition is centered on the alleged transfer of Hon. S. Mwayuli from the Environment and Land Court to the Judicial Review Division, no gazette notice or other concrete evidence was adduced to prove the alleged transfer and that the alleged transfer was therefore a creation by the petitioners' advocates. Counsel submitted that the petition was filed on 10th January 2017 with the intention of stopping a judicial officer from exercising a lawful mandate since the bill of costs was due for taxation on 15th March 2017.

5. Counsel further argued that this court lacks the jurisdiction to hear and determine the petition as it revolves around matters reserved for the exclusive jurisdiction of the courts contemplated in Article 162 (2) of the Constitution since the subject matter falls within the domain of the Environment and Land Court. It was the interested party's case that as long as the Bill of Costs touches on a land transaction, the provisions of Section 13 (7) of the Environment and Land Court Act 2011 come into play and this court therefore lacks jurisdiction to entertain proceedings reserved for the exclusive jurisdiction of the Environment and Land Court as aptly provided for under Article 165 (5) of the Constitution. It was the interested party's contention that Article 47 of the Constitution on fair administrative action was not applicable in this case as the High Court is not a quasi-judicial body and that similarly Articles 48 and 50 of the Constitution are not applicable in this case in the context of the prayers sought.

6. Counsel further submitted that the High Court does not have the jurisdiction to review and/or supervise the actions of the Deputy Registrar of the Environment and Land Court acting on delegated authority pursuant to paragraph 13 of the Advocates Remuneration Order (ARO). He added that it would be untenable for this court to superintend or superimpose itself as an appellate forum for decisions of the Environment and Land Court.

1st and 3rd Petitioners Submissions

7. M/S Walker Kontos advocates for the 1st and 3rd petitioners submitted that the interested party's preliminary objection lacks merit as the high court has jurisdiction to hear and determine the petition and that the said jurisdiction has not been ousted by Article 165(5) of the Constitution. Counsel submitted that the provisions of Article 165 (5) (b) and (d) clearly stipulate that this court has jurisdiction to hear and determine claims of violation of rights and fundamental freedoms guaranteed under the Constitution as well as to evaluate the constitutionality of anything done or purported to be done under the authority given under the Constitution.

8. The 1st and 3rd petitioners relied on the decision in the case of **Fredricks & Others –vs- Education and Training, Eastern Cape & Others [2002] 23 ILJ 81 (CC)** cited with approval in **Council of**

County Governors vs Lake Basin Development Authority & 6 Others [2017] eKLR where in the issue of what constitutes a constitutional matter was discussed.

9. It was further argued that jurisdiction is determined based on the pleadings and not the merits of the case. For this submission, the petitioners relied on the case of **Vuyile Jackson Geaba v Minister for Safety and Security First and others CCT 64/08 [2009] ZACC 26** which was adopted in the Kenyan case of **Council of County Governors v Lake Basin Development Authority and 6 others [2017] eKLR**. Counsel explained that the petition was premised on the decision made by Honourable S. Mwayuli Deputy Registrar of the High Court (Judicial Review division) when she proceeded to tax the interested party's Bill of Costs despite her transfer from the Environment and Land Court. It was the petitioners' case that upon her transfer to the Judicial Review division, the said Deputy Registrar lacked jurisdiction to tax the interested party's Bill of Costs on a matter touching on land and filed in the Environment and Land Court.

10. The Petitioners maintained that the said taxation was invalid as it contravened the provisions of Article 165 (5) of the Constitution that deprives the High Court (including the Judicial Review Division, to which Honourable Mwayuli was then stationed), the jurisdiction to adjudicate on matters touching on land and environment. It was further argued by the petitioners that the said taxation violated their constitutional right to fair administrative action and the right to access justice because they were not accorded an opportunity to participate in it since they were never notified of the said taxation and only became aware of it when they were served with the notice of delivery of ruling.

11. It was further argued that the petition raises constitutional matters that are within the jurisdiction of this court as it seeks the enforcement of constitutional rights and the exercise of Judicial functions of the Deputy Registrar. The petitioner's case was that this court's jurisdiction to adjudicate upon the petition was not ousted by Article 165 (5) of the Constitution since Section 13 of the Environment and Land Court Act restricts the jurisdiction of Environment and Land Court to disputes relating to land, environment and all allegations of infringement of rights to land and the environment which means that the jurisdiction does not extend to issues raised in the petition relating to the exercise of judicial function in contravention of the right to fair administrative action and access to justice.

12. While placing reliance on the decision of Odunga J. in **Republic V Chief Magistrate Milimani Commercial Court and 2 Others Ex Parte Violet Ndanu Mutinda and 5 Others [2014] eKLR**, the petitioners submitted that the conduct of the Deputy Registrar in taxing the interested party's Bill of Costs, without notice to them, contravened the rules of natural justice.

The 2nd Petitioner's Submissions

13. The 2nd petitioner's counsel, M/s Mucheru-Oyatta Associates, submitted that the preliminary objection is misguided as it fails to appreciate the fact that the jurisdiction of this court is unlimited and that being a constitutional court, it could determine the constitutional issues raised in the petition regarding the petitioners right to access justice and to have a dispute resolved at a fair and public hearing before a court under Articles 48 and 50 of the Constitution respectively.

14. It was the 2nd petitioner's case that he was denied his rights to be heard before the Deputy Registrar when the taxation of the interested party's Bill of Costs proceeded in his absence and without any notice to him.

DETERMINATION

15. Upon considering the rival submissions of the parties on the preliminary objection raised by the interested party, I note that the fundamental issue for determination is whether this court has the jurisdiction to determine the instant petition. The interested party relied on the provisions of Article 162(2) and 165(5) of the Constitution, and section 13(2) of the Environment and Land Court Act 2011 (the Environment and Land Court Act).

16. The oft cited decision in Kenya on the question of jurisdiction generally, is the case of **The Owners of the Motor Vessel “Lillian “S” vs. Caltex Oil (Kenya) Limited (1989) KLR 1** where the classic exhortation of Nyarangi JA, appears at page 14 lines 18 – 20 as follows:

“...I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.... Jurisdiction is everything. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....”

17. In the cases of **Alphonse Mwangemi Munga & 10 Others Vs. African Safari Club Limited [2008] eKLR** and **Speaker Of The National Assembly Vs. James Njenga Karume [1992] eKLR** it was held that the issue of whether or not a Petition raises a constitutional issue is a question of merit to be determined at the hearing of the petition and therefore has no relevance on the decision on the issue of jurisdiction.

18. In the **“Lillian S” case** (supra), the definition of jurisdiction and how it is conferred was discussed as follows: –

“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 (to it) in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both of their 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 as except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court has taken upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be before judgment is given.”

The learned Judge then added:

“It is for that reason that a question of jurisdiction once raised by a party or by a court of its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

19. From the above decision it is clear that the issue of jurisdiction herein is not a factual matter but is a constitutional and therefore a legal matter because it requires the interpretation of Articles 162(2) and 165(5) of the Constitution (the Constitution), and section 13(2) of the Environment and Land Act, 2011.

20. Starting with the provisions of the Constitution, the superior courts of Kenya, established under Article 162(1) are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause The courts to be established by Act of Parliament with the status of the High Court to hear and determine disputes relating to –

- a. Employment and Labour Relations, and
- b. The environment and the use and occupation of, and title to land.

Parliament was also to establish the jurisdiction and functions of the courts contemplated in clause (2).

21. Pursuant to the provisions of Article 162(2) (b) of the Constitution, Parliament enacted the Environment and Land Court Act 2011, (No. 19 of 2011). Section 4 of the said Act established the Environment and Land Court which under Article 162(1), is a superior court of record, with the status of the High Court. The general jurisdiction is set out in section 13(1) of the Environment and Land Act and which emphasizes that the Environment and Land Court has both 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 the Environment and Land Act or any other law applicable in Kenya relating to environment and land.

Section 13(2) of the said Act clarified the general jurisdiction in section 13(1) in order to clarify exactly what constitutes a matter touching on land and environment. Section 13(3) emphatically states that nothing is to preclude the jurisdiction of the Environment and Land Court to hear a denial, violation, or infringement of or threat to, rights and fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

22. In **Eldoret, EL&C Petition No. 2 of 2013, (Mohammed Said vs. County Council of Nandi [2013] eKLR**, the Environment and Land Court considered, in detail the jurisdiction of the Land and Environment Court and Munyao Sila J held **inter alia**:

i. That section 13(3) did not state that nothing was to preclude the jurisdiction of the Environment and Land Court to hear applications for redress of a denial, violation or infringement of, or threat to the rights or fundamental freedom relating to clean and healthy environment under Articles 42, 69 and 70 of the Constitution;

ii. That there was no preclusion to hear any other Petition, grounded on any other article of the Constitution, so long as it fell within the purview of land and environment, and

iii. That the High Court had under Article 165(5) no jurisdiction in respect of matters that fell within the jurisdiction of the Environment and Land Court or those falling within the jurisdiction of the Industrial Court even where they are filed as constitutional Petitions.

23. In the instant case, it was not disputed that the series of events that gave rise to the instant petition took place before the Deputy Registrar when taxing the interested party's Bill of Costs filed before the Environment and Land Court. The petitioners' contention was that the said Bill of Costs was taxed by a Deputy Registrar who lacked jurisdiction as she was at the time attached to the Judicial Review Division of the High Court after being transferred from the Environment and Land Court.

Indeed at paragraph 6 of the petition the petitioner states:-

“On or about 4th February 2016, the interested party filed a Bill of Costs dated 4th February, 2016 in the Environment and Land Court seeking costs against the petitioners for an alleged legal opinion.”

My reading of the above paragraph and the prayers sought in the petition reveals that the genesis of this petition is the Bill of Costs that the interested party filed before the Environment and Land Court. The petitioners' main complaint was that the said Bill of Costs was taxed without any prior notice to them and by a Deputy Registrar who allegedly lacked jurisdiction to handle the taxation having been transferred to another division of the High Court. My finding is that the issue of whether or not the Deputy Registrar who presided over the taxation had been transferred to a different division of the High Court is an issue of fact which cannot be determined at this stage as preliminary objections are confined to pure points of law. See **Owners of Motor Vessel “Lillian” S** case (supra).

24. The petitioners argued that this court has jurisdiction in view of the fact that the issues raised in the petition touch on the right to fair administrative action, fair hearing and access to justice. My finding is that underlying all the rights that the petitioners claim were violated is the undisputed fact that the Bill of Costs, whose taxation gave rise to the instant petition, was filed before the Environment and Land Court

and that the Deputy Registrar, while taxing the said bill was exercising delegated jurisdiction under Section 13 of the Advocates Remuneration Order. In the case of **Patrick Musimba vs. National Land Commission & 4 Others** [2015] eKLR, it was held inter alia that:-

“Although the jurisdiction in constitutional matters conferred by section 13(3) of the Environment and Land Court Act upon the Environment and Land Court appeared limited to questions on and application for redress of a denial violation or infringement or threat to rights or fundamental freedoms relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution, the section did not purport to confer exclusive jurisdiction in such cases upon the Environment and Land Court so as to impinge upon article 165(3)(b) & (d) of the Constitution. It could not have been the intention of the draftsmen of the Constitution that when the court was faced with a mixture of causes of action touching on the Constitution, especially on fundamental rights, a separationistic approach was to be adopted by the court and half the claim dispatched to one court as the other half was retained.”

25. Taking a cue from the above cited case and the statutory and constitutional provisions that I have already referred to in this ruling, I find that considering that the Bill of Costs in contest was filed in the Environment and Land Court and further, that it is a matter that is still live before the said court as is evident in paragraph 13 of the petition, it automatically follows that any contest on whether or not it was taxed in conformity with the law or if any rights were infringed in the process of the taxation are issues that can only be determined by the same Environment and Land Court as to determine otherwise would be tantamount to interfering with matters pending before a court of equal status thus extending the jurisdiction of this court beyond the limits allowed by the Constitution. I find it quite ironical, if not contradictory, that while the petitioners’ complaint is that the Deputy Registrar of the Judicial Review Division lacked jurisdiction to tax a Bill of Costs filed in the Environment and Land Court, they at the same time deem it proper to lodge their petition before this court even after conceding, at paragraph 13 of the petition, that the issue of the taxation of the Bill of costs is still a live matter before the Environment and Land Court.

26. I find that the circumstances of this case are different and distinguishable from the circumstances in the case of **Republic vs. Chief Magistrate Milimani Commercial Court and 2 Others Ex Parte Violet Ndanu Mutinda case** (supra) as in the cited case, the High Court exercised its supervisory jurisdiction over the subordinate court while in the instant case, the matter at hand is still live before a court of equal status to this court.

27. In the end, I find that the preliminary objection raised by the interested party on the jurisdiction of this court to determine the instant petition is merited and I allow it. Having found that the preliminary objection is merited, what orders should this court make in respect to the petition? Courts have held a liberal view, in tandem with Article 159 of the Constitution, when faced with applications raising objections on their jurisdiction to entertain suits on matters that fall within the jurisdiction of the courts established under Article 162(2) of the Constitution and found that it would serve the interest of justice to transfer such cases to the right forum. It is for this reason that I direct that this petition be placed before the Environment and Land Court Division (Milimani Court) for hearing and determination.

The costs of the Preliminary Objection shall abide the orders as to costs as may be made in the Petition.

Dated, delivered and signed in open court at Nairobi this 18th day of June 2018.

W.A. OKWANY

JUDGE

In the presence of

Mureithi holding brief for Mucheru for the 2nd petitioner

Manyara holding brief for Mbalu for interested party

C.A. Kombo