REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CONSTITUTIONAL & HUMAN RIGHTS DIVISION)

NO. 375 OF 2017

(CONSOLIDATEDWITH JR NO. 421 OF 2017)

IN THE MATTER OF ARTICLES 22 AND 165(3)(d)(i) & (ii) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 24, 40, 47 AND 69(1) (d) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 129 (1) (2) AND 153 (a) of THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 86(2) OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT

AND

IN THE MATTER OF SECTION 5, 6, 7, 8(1), 11(1) AND (2) OF THE STATUTORY INSTRUMENTS ACT 2013

AND

IN THE MATTER OF SECTION 4,5 AND 6 OF THE FAIR ADMINSTRATIVE ACTION ACT NO. 4 OF 2015 OF THE LAWS OF KENYA

BETWEEN

KENYA ASSOCATION OF MANUFACTURERS…..1ST PETITIONER

FREDRICK GICHUHI NJENGA

& STEPHEN MWANGI…….2ND PETITONER

-VERSUS-

THE CABINET SECRETARY, MINISTRY OF ENVIRONMENT

AND NATURAL RESOURCES……1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY…… 3RD RESPONDENT

MULTYTOUCH INTERNATIONAL…….....…… 4TH RESPONDENT

RULING

1. In this ruling what falls for determination is whether pending the hearing and determination of the consolidated causes, this Court ought to grant a conservatory order staying the implementation of Gazette Notices Nos. 2334 and 2356 both dated 28th February, 2017 published in the Kenya Gazette of 14th March, 2017.

2. In these consolidated causes, the petitioners contend that Plastic are is an extremely cost-effective, versatile and durable synthetic product made from oil by-product, which is used across diverse sectors including packaging, construction, transportation, healthcare and electronics. To the petitioners, it is particularly versatile packaging and as reported by the World Economic Forum, *"plastics are especially inexpensive, lightweight and high performing. Plastic packaging can also benefit the environment: its low weight reduces fuel consumption in transportation, and its barrier properties keep food fresh longer, reducing food waste*".

3. It was further averred that plastic for domestic use (and other uses as well) is recyclable and that several countries have successfully introduced and/or in the process of introducing such recycling schemes. According to the petitioners, due to gaps in the regulatory framework as well as weak enforcement mechanisms, the management of the use and disposal of plastic is sub-optimal. As part of the efforts to address the disposal of plastic bags, since early 2000s, the 1st Petitioner, the Government of Kenya (GoK) through NEMA and in collaboration other stakeholders, United Nations Environmental Programme ("UNEP"), United Nations Development Programme ("UNDP"), City Council of Nairobi ("CCN") and Nairobi Central Business District ("NCBDA") have been collaborating in an effort to develop the appropriate policy for the management of plastic wastes. Consequently, a study was developed to consolidate the approach that would be taken on plastic waste management. In addition, several studies have been conducted by agencies of the Government of Kenya (GOK) which confirmed the need for plastic waste management strategies developed in partnerships with the private sector. It was averred that Significant milestones in the development of a policy on plastic waste management include the fact that the 1st Petitioner, has entered into a Memorandum of Understanding with NEMA and the Kenya Bureau of Standards ("KEBS") with an aim of developing sustainable management of plastic waste. This was a joint effort that culminated in the signing of the Joint Implementation Plan for the sustainable Management of Plastic Waste in Kenya on 29th June 2007.

4. It was averred that The Joint Implementation plan focussed on the parties committing to key deliverables as follows:

a) KEBS: Ensure the quality of the plastic bag is determined in the country by setting the minimum thickness gauge to 30 microns. The roles of the parties to ensure implementation of the plan were as follows;

b) Manufacturers were to contribute funds through a levy to address plastic waste management. The

Fund would be utilised as a green levy to address plastic waste.

c) NEMA was to monitor the implementation of plastic waste management in the country as an advisor to the 1st Respondent.

5. The 2nd Respondent further issued press release dated 21st February 2008 recognized that excise duty was a way of mitigating the growing plastic waste problem and set out the proposal of a green levy that would generate revenues to be used to facilitate the management of plastic waste.

6. It was averred that The 2nd Respondent, KEBS and Local Authorities were given the mandate of developing (where required) and implementing the legislation and other measures for purposes of ensuring the responsible production, consumption and disposal of plastics in the country. According to the petitioners, all plastic bag manufacturers, who are registered members of the 1st Petitioner, have been faithfully remitting the Excise duty levies on the understanding that the said amount would be channelled towards augmenting Government funds to specifically address plastic waste management as agreed in the Joint Implementation Plan. While both the 1st Petitioner and KEBS have fully carried out their respective roles and fully fulfilled their obligations under the Joint Implementation Plan, neither the 1st and 2ndRespondents have taken any steps to carry out their commitments. The effect is that the funds that have been raised and accumulated by way of Excise Duty Levy on plastic bags have not been channelled towards developing a waste management program as envisaged. In the meantime, the manufacturers are blamed as public perception have arisen that they are the source and cause of this menace that is plastic waste.

7. It was contended that the refusal or failure of the 1st and 2nd Respondent to uphold the terms of the Memorandum of Understanding above has resulted in a regulatory and policy vacuum hence the required national strategies and policies to be put in place with consultations from stakeholders holders such as the Petitioner and other regulatory bodies for sustainable plastic waste management have therefore not been effective.

8. It was averred that towards developing and implementing an efficacious waste management programme, as part its national Budget proposals for 2016, the Petitioner recommended the replacement of the Excise Duty Levy with a Green Levy which would be imposed on all plastic bag manufacturers, importers of raw materials and finished plastic products as well as retailers. It was further proposed that such a programme would be done under the aegis of a public private partnership between all the private sector contributors and the 1st and 2nd Respondents. Revenues collected from the Green Levy would be used for sensitisation of the public, collection, segregation, transportation, recycling, waste disposal, waste minimisation and control. In Kenya, a similar levy such as the Green Levy has actually been effected. The ***Fisheries Management and Development Act 2016*** established the Fisheries Research and Development Fund as well as a Fish Levy Trust Fund whose contribution emanated from the private investors in the fishing industry.

9. The Petitioner's proposals for a public private partnership for purposes of plastic waste management, it was contended, is not a new phenomenon, other jurisdictions in Africa and Europe have entered into similar arrangements, and they have been successful. It was disclosed that the 1st Petitioner had a meeting with the 1st Respondent on 28th February 2017 during which it elaborated its proposal for the green levy and the public private partnership for plastic waste management. The 1st respondent seemed enthusiastic about the proposal and even recommended that discussions be held with the 2nd Respondent on the same for adoption. Unknown to the Petitioner, it is on this same date that the 1st Respondent issued Gazette Notices Numbers 2334 and 2356 both dated 28th February 2017 (published in the Kenya Gazette of 14th March,2016), effectively banning the use, manufacture or importation of plastic bags. Both Gazette Notices provided that :-

'…In Exercise of the powers conferred under Section 3 and 86 of the Environmental Management and Co-ordination Act, it is notified to the public that the Cabinet Secretary for Environment and

Natural Resources has with effect from 6 months from the date of this notice banned the use, manufacture and importation of all plastic bags for commercial and household packaging defined as follows:

(a) Carrier bags-Bag constructed with handles, and with or without gussets;

(b) Flat bags-Bag constructed with or without handles, and with or without gussets…'

10. It was averred that subsequent to the said Gazette Notice, the 1st Petitioner actively engaged both the 1st and 2nd Respondents in an effort to come up with an amicable solution to the plastic bag waste problem. To the 1st petitioner's its main concerns were:

a) The ban would definitely cause economic and job losses should the ban be implemented since it not only affected the manufacturers and importers of carrier and flat bags but it spread its tentacles to the following:-

i) Manufacturers of other products who use plastic bags for packaging including the food industry, pharmaceuticals, horticulture, fisheries among others.

ii) Manufacturers who import flat bags for purposes of packaging their products for export.

These can be summarised in the table below:

b) That the ban completely deviated from the discussions that had been ongoing (between the Petitioner, the 1st and 2nd Respondents and regulatory institutions,), the Memorandum of Understanding that had been entered into and recommendations from studies carried out by international organisations. All these were focused on plastic waste management and not a complete ban on the manufacture of plastic bags.

c) In addition, the Petitioner sought to get clarifications and justification from 1st and 2nd Respondent on why their proposed plastic waste management proposals for a public private partnership involving a wider stakeholder of plastic actors in the country to contribute funds, were not considered over the ban which had adverse effects to the Petitioners members.

d) That the sudden, unexpected and drastic policy change in addressing plastic waste was causing disarray within the manufacturing sector and which was likely to affect investor confidence.

11. It was contended that the wording of the ban was ambiguous and was a total ban of all plastic carrier bags and flat bags since no legal clarifications or guidelines were developed until to date. That a total ban was catastrophic to the country due to the use of plastic bags for processes such as food packaging, medical purposes among others. It was disclosed that despite prodding by the Petitioner and numerous meetings with the 1st and 2nd Respondents present, these concerns have simply not been addressed.

12. It was the petitioners' case that the ambiguous nature of the Gazette Notice caused uncertainty and confusion within almost all sectors in the manufacturing industry and that despite assurances from the 1st and 2nd Respondents that binding legal clarifications would issued, none has been forthcoming. To be sure that the 2nd Respondent, FAQ's for which appear to suggest that ban is not as extensive as feared but it has also made it clear that those FAQs have no force of law and are non-binding. In the meantime, other agencies have already started implementing the ban to full effect. For instance, one of the Regulators, KEBS has been declining approvals to manufacturers under the Pre-Export Verification of Conformity (PVOC) programme with regards to pre-ordered raw materials, yet the ban was not in effect.

13. It was disclosed that on 29th March, 2017, **Hon. John Olago Aluoch**, Member of Parliament (MP) of Kisumu West Constituency, presented a public petition to the National Assembly on the ban on the use,

manufacture and importation of plastic bags requesting the National Assembly through the Departmental Committee on Environment and Natural Resources:-

> *a) Recommends suspension of the implementation of the Gazette Notice since the notice given was too short.*
>
> *b) Recommends amendment to ensure that the Environment Management and Coordination Act No. 8 of 1999 to ensure inclusion of fiscal incentives such as Green Levy Fund , Tax Incentives on capital goods and tax rebates to industries promoting management; and imposition of fines for littering in unlawful places among others; and*
>
> *c) Recommends establishment of a waste management levy to be charged on all plastic at source (point of entry) at one per cent of the value equivalent to the product's cost insurance and freight. The funds should be collected by the Treasury through the Kenya Revenue Authority and allocated to the Ministry of Environment and NEMA.*

14. According to the petitioners, the petition was heard in a series of sessions of the Departmental Committee on Environment and Natural Resources held on 6th April, 11th May, 16th May and 25th May 2017. On these different dates, the Committee made observations and/or findings and on 25th May 2017, the Committee held its last session, adopting the Report on the Petition on the ban on use, manufacture and importation of plastic bags as a true reflection of the Committee's deliberation-MIN.NO.DC/ENR/099/2017. However, the National Assembly's implementation Committee and Delegated Committee could not enforce the above stated recommendations because the National Assembly calendar had been closed. In light of this the Petitioner by letter dated 9th June 2017, requested the 3rd Respondent to implement the Parliamentary recommendations. Further, the 1st Petitioner has continued to seek the 1st and 2nd Respondent's intervention and audience in an effort to address its concerns but unfortunately the Respondents failed/ignored/refused to honour the same, prompting the Petitioners to seek the intervention of the Cabinet Secretary of Industry, Trade and Cooperatives who convened a meeting between the Petitioner and Respondents. During the meeting, the Respondents 'clarified' that the ban did not affect industrial bags used in packaging manufactured products and exports. However, the Petitioners pointed out that the wording of the impugned Gazette Notice was that it amounted to a total ban total ban affecting all kinds of plastic bags whether flat or carrier bags. It was agreed that the Respondents will provide a legal clarification on the actual scope of the ban as opposed to the 2nd Respondent's Frequently Asked Questions (FAQs) on its website. It was also agreed that flat bags used for industrial use and exports were to be excluded and the date of effect of the ban would be extended for a further six months. However, the Respondents have failed/ignored/refused to honour and implement the outcomes of the meetings to date, despite the Petitioners consistent follow up through letters dated.

15. It was the petitioners' case that at no particular time did the 1st Respondent inform the Petitioner that there will be a complete ban on the manufacture and importation of carrier and flat bags. To the contrary, the discussions that had been ongoing between the parties were focused on plastic waste and more specifically they were geared towards developing a plastic waste management mechanisms and policies. This not only contravened the provisions of Section 5 of the ***Statutory Instruments Act, No 23 of 2013*** which requires every regulation making authority to make appropriate consultations with persons who are likely to be affected by the proposed instrument; before making the statutory instrument but also the provisions of Articles 10 and 69(1) (d) of the Constitution of Kenya. In this case, it was contended that the 1st respondent did not produce evidence of any Regulatory Impact Assessment carried out prior to the issuance of the impugned Gazette Notice contrary to section 6 of the ***Statutory Instruments Act, No 23 of 2013*** which makes it mandatory for a regulatory authority to conduct a Regulatory Impact Assessment in instances where the statutory instrument will impose significant costs on the community.

16. The Petitioners insisted that a complete ban on the manufacture and importation of carrier and flat plastic bags will not only result in the loss of revenues to the respective companies and loss of jobs. It will also affect other trading activities which require plastic packaging as part of its standardisation policy for

instance in exports.

17. It was averred that while issuing the Gazette Notice, the Respondents relied on section 86(2) of the ***Environmental Management & Coordination Act*** which provides specifically for the management of waste. The Petitioner avers that the Respondents cannot rely on this section to ban the manufacture and importation of plastic carrier and flat bags in contravention of the powers provided to it under the said law.

18. According to the petitioners, the Respondents were party to discussions and a memorandum of understanding that was aimed at creating plastic waste management mechanisms including the imposition of a green levy which the Petitioner's members were willing to pay to help achieve the same. Despite having these somewhat reasonable alternatives which would achieve the same goal, the Respondents instead chose a more drastic and disproportionate way of mitigating plastic waste in the form of a complete ban on the manufacture of plastic bags. The Petitioner contends that there are other viable and reasonable alternatives that would not adversely impact the economy and livelihoods of many people while creating more economic opportunities. Therefore, by failing/ ignoring and/or refusing to grant the Petitioner an opportunity to present its case on the impact of the Gazette Notice No 2356, the Respondents have contravened the Petitioners' right to fair administrative action under Article 47 of the Constitution and Sections 5 and 6 of the ***Fair Administrative action Act***.

19. According to the petitioners, every person, including the Respondents, has a duty to uphold the Constitution as envisaged under Article 3 of the Constitution and a right to enforce their rights as provided under Article 258 (1) of the Constitution.

20. The petitioners other grounds were that the timelines of six (6) months given in the notice for the applicants to comply is too short as the applicants will require ample time to clear all stocks and fulfil their contractual obligations; there was no adequate stakeholder consultation and or any public participation as provided under section 3(5)(a) of the ***Environmental Management and Co-ordination Act***; that the 2nd Respondent acted ultra vires by issuing a legal notice under the provisions of section 3 of the Environmental Management and Co-ordination Act, Cap 387; that the subject legal notice is unconstitutional because it is not in keeping with the principles of good governance enshrined in Article 10 of the Constitution of Kenya which include accountability, public participation and transparency; that the 2nd Respondent did not apply the provisions of Article 69(1)(d), 192(2) and 153(4)(b) of the Constitution; that the legal notice lacks clarity and intelligibility to the anticipated users which is a mandatory requirement under the ***Statutory Instruments Act***.

21. It was the petitioners' case that they have stock worth millions of shillings which shall go to waste should the notice herein be effected. Further the plastic industry employs millions of people and the ban shall adversely affect them and the government shall lose income.

22. It was the petitioners' case that if the impugned regulations come into force before the petition is heard and determined, the deleterious adverse consequences which this petition seeks to avoid i.e. virtual collapse of the sectors affected by the ban, a devastating and unquantified irreparable loss. Further unless the prayer sought are granted, the petitioners and its members would be adversely affected by the 1st and 2nd Respondents' decision.

23. It was therefore the petitioners' case that in order to preserve the efficacy of whatever orders this Court may ultimately make, it is necessary that the implementation of the impugned gazette notices be stayed pending the inquiry by this Court into their legal propriety.

24. The petitioners submitted that taking into consideration the diary of the ELC, taking this matter to the said Court would have the effect of implementing the impugned Gazette Notice yet the jurisdiction of this Court is not contested. To the petitioners the issue raised is purely a litigation strategy as opposed to a jurisdictional one. It was their case that based on the constitutional provisions this Court has the jurisdiction to entertain this matter. It was their contention that both the High Court and the ELC have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do

touch on the environment and land.

1st and 2nd Respondents' Case

25. In response the 1st and 2nd Respondents the Notice that the petitioners seek to quash is issued under sections 3 and 86 the ***Environmental Management and Co-ordination Act***, Cap 387 Laws of Kenya (hereinafter referred to as "EMCA"), an act enacted to provide for a legal framework governing matters environment.

26. It was therefore contended that the said notice was issued pursuant to the administrative powers vested in the 1st Respondent, the CS. The said respondents relied on section 3 of the EMCA and contended that the Act envisages that the appropriate court is the Environment and Land Court (the ELC). According to them Article 16(5) of the Constitution precludes this Court from exercising jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution under which the ELC falls. They also relied on section 13 of the ELC Act and contended that this petition falls within the exclusive jurisdiction of the ELC as the subject matter of the petition is an administrative decision made in respect of management of the environment and is therefore a matter relating to the environment.

27. In support of their case the said respondents relied on the Supreme Court decision in Constitutional Application No. 2 of 2011 – **In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR**, Nairobi JR Misc. Appl. No. 298 of 2013 – **Republic vs. Cabinet Secretary Ministry of Mining & AG, Ex Parte Cortec Mining Kenya Limited**.

28. With respect to the conservatory orders the said respondents relied on **Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another [2016] KLR**, Privy Council Case of **Attorney General vs. Sumair Bansraj [1985] 38 WLR 286**, the decision of the High Court of Trinidad and Tobago in **Steve Furgoson & Another vs. the Ag Claim No. CV 2008 – 00639**, **Petition No. 16 of 2011, Nairobi –Centre for Rights Education and Awareness (CREAW) & 7 Others**, **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] KLR**, **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others SC Application No. 5 of 2014**, **Kemrajh Harrikissoon vs. Attorney General of Trinidad and Tobago [1979] 3 WLR 63** and submitted that the principles enunciated in the above cases should be applied to the instant case and the conservatory orders ought to be declined on the ground of public interest taking into account the effects of the plastic materials on the environment.

3rd Respondent's Case

29. The 3rd Respondent, **National Environmental Management Authority** (NEMA) appreciated that the application for judicial review raises significant issues that require judicial determination but contested the fact that the High Court has jurisdiction to hear and determine this judicial review. According to NEMA, the substratum of the judicial review are matters that can only be determined by the specialized Environment and Land Court (ELC) established by Article 162(2)(b) of the Constitution as well as the Environment and Land Court Act. Most importantly, the ELC is equally vested with the powers to issue prerogative orders such as the ones sought by the *ex parte* applicants herein.

30. It was contended that would be defeatist of the law to allow a judicial review court to commit a fallacy or travesty of procedure when it is the very court vested with the function of checking the decisions of administrative bodies (courts included). These proceedings ought to be struck out *in toto*.

31. Based on section 13 of the ELC Act, it was contended that whenever the substratum of a matter is environment and land, then any dispute emanating therefrom and that falls within the ambit of section 13 of the ELC, must be filed at the ELC. If the dispute is addressing rights of a constitutional nature, the ELC can issue declarations, if the dispute is seeking civil remedies, the ELC can issue injunctions,

compensation, specific performance, restitution, damages and costs and if the dispute seeks prerogative orders like certiorari and prohibition, then the ELC can so issue Section 13(7) of the ELC Act. According to NEMA, The prayers sought in these proceedings point towards a dispute related to the environment *to wit* management of plastic waste and should be determined by the ELC and not the High Court.

32. NEMA also relied on the ***Munya Case*** (supra) and submitted that public interest weights against the Petitioners herein as members of the public are in support of the ban on plastic carrier bags which have caused devastating impact on the environment and human health owing to their non-degradable nature.

33. In NEMA's view the issuance of the conservatory orders will only prolong the existing challenges and environmental menace related to the use of plastic carrier bags. The Court was urged to exercise judicial restraint in granting conservatory orders in the implementation of environmental matters geared towards the protection and conservation of the environment.

The 4th Respondent's Case

34. According to the 4th Respondent, since the subject matter herein falls within the jurisdiction of the ELC and since the remedies sought herein are capable of being granted by the said Court, this Court has no jurisdiction to entertain the matter and grant the orders sought herein. Accordingly the Court was urged to down its tools.

35. With respect to conservatory orders the 4th Respondent relied on the ***Munya Case*** and submitted that the public interest in the ban far outweighs the petitioners' private economic interests. The Court was urged to apply the precautionary principle that '*in dubio pro natura'* which means that "if in doubt, matters should be resolved in a way most likely to favour the protection and conservation of the environment."

Determination

36. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with *in limine*.

37. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** **Nyarangi, JA** expressed himself as follows:

> **"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of 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 facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

38. Similarly in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on 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 the 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. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

39. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

40. It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings.

41. In this case it is contended that these proceedings ought to have been instituted in the ELC. The respondents' issue on jurisdiction as I understand it is twofold. The first ground for questioning the jurisdiction of this Court is the existence the ELC. Article 165(3) of the Constitution provides as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

……

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

42. Article 165(5)(6) and (7) thereof on the other hand provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

43. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

44. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

45. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

46. However, the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

47. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to "*determine the jurisdiction and functions of the courts contemplated in clause (2)*", Parliament did enact ***The Environment and Land Court Act, 2011*** which Act commenced on 30th August 2011. Section 13 of the said Act provides as follows:

(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.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(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;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

48. The petitioners appreciate that these proceedings could have been instituted before the ELC since it is contended that this Court has concurrent and co-ordinate jurisdiction with the ELC. However the 1st petitioner laments that the diary of the ELC as of April/May, this year was in October/November, 2018. It is however my view that nothing bars the ELC from entertaining urgent matters or granting appropriate conservatory reliefs in the meantime. I agree with **Koome, J** (as she then was) in **Ali Abdi Sheikh vs. Edward Nderitu Wainaina & 3 Others Nairobi (Milimani) HCCC No. 90 of 556** that a party is not supposed to file a suit in a court according to his own convenience but according to the provisions of the law.

49. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. However where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others**:

> **"…it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationalistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised."**

50. 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**:

> **"A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of**

appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court".

51. In this case, it is clear that the dispute falls squarely within the provisions of section 13(3) of the ELC Act. The 2nd Respondent's impugned decision was purportedly made in furtherance of the need to facilitate a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. In that process the petitioners contend that there has been a violation or infringement of, or threat to, their rights or fundamental freedom such as the right to fair administrative action.

52. In my view this matter substantially falls within the jurisdiction of the ELC. I agree with the position adopted by **Majanja, J** in **United States International University (USIU) v Attorney General Nairobi Petition 170 of 2012 [2012] eKLR**, in which he expressed himself *inter alia* as follows:

"[41] Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Such a situation would lead precisely to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current court …….

[43] The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibit the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters of their competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).

[44] …… The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it."

53. Although the Court was dealing with an employment dispute, in my view the principles are basically the same.

54. In this case, I am satisfied that this 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:

"**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 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".

55. In the premises the order which commends itself to me and which I hereby make is that these proceedings be heard and determined by the ELC since the said Court is a Court of equal status as the High Court.

56. I direct that considering the urgency of this matter, and as the application for conservatory orders remains undetermined, the Deputy Registrar facilitates this matter to be placed before the duty Judge in the Environment and Land Court during this vacation for further orders.

57. The costs of the preliminary objection will be in the cause.

58. Orders Accordingly.

Dated at Nairobi this 11th day of August, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Amoko for the 1st petitioner and holds brief for Mr Ogesa for the 2nd petitioner

Mr Anyoka for the 4th Respondent

Mr Munene for the 1st and 2nd Respondents

Mr Wabwoto for the 3rd Respondent

CA Mwangi