



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 21 OF 2010

IN THE MATTER OF: ARTICLES 2, 19, 20, 21, 23, 25 ©, 31, 35, 40, 50(1), 165(3), 262 AND SECTION 7 OF PART 1 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 75 OF THE CONSTITUTION OF KENYA, 1969 AND ARTICLES 10, 21, 29, 31, 40 AND 50(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: PLOT NOS. KWALE/DIANI BEACH/BLOCK 856, 551, 552, 553, 554, 556, 557, 558 AND 559

AND

IN THE MATTER OF: THE REGISTERED LAND ACT

AND

IN THE MATTER OF: THE GOVERNMENT LANDS ACT

AND

IN THE MATTER OF: MOMBASA HIGH COURT CIVIL SUIT NUMBERS: HCCC 140/2003 AND 108 OTHERS AND KWALE SRMCC 171/2010

AND

IN THE MATTER OF: TITLE NOS. KWALE/DIANI COMPLEX/056 AND 488 OTHERS

BETWEEN

LEISURE LODGES LTD.....PETITIONER

VERSUS

THE COMMISSIONER OF LANDS AND 767 OTHERS.....RESPONDENTS

RULING

Introduction:

1. The Petition herein was filed on 8th December, 2010 and was until 14th July, 2011 dealt with by Hon. Mohamed Ibrahim J. (as he then was, now Judge of the Supreme Court of Kenya). It was subsequently dealt with by Hon. Maureen Odero J, until 5th August, 2011, Okwengu J (as she then was) on 18th October, 2011 and Hon. Muriithi who delivered Ruling on 28th September, 2012, and directed counsel for the various parties to attend court on 15th October, 2012 for taking of directions -

“as to any necessary consolidation of suits, stay of suits and the hearing of the interlocutory application together with, or separately from the Petition herein.”

2. Thereafter the matter was listed in court on 15th October, 2012, 3rd December, 2012 and lay in limbo until 5th September, 2014, when it was listed before Hon. Maureen Odero J, but no Advocate appeared for either the Petitioner or any of the many Respondents. In the meantime an application had been made to the Hon. Chief Justice, to constitute a Bench of three Judges, as the matter had been certified as raising important issues of law, and therefore deserving determination by three Judges and not one Judge.

3. When our colleague Hon. Emukule J first examined the case file on 26th January, 2015, he directed that the Deputy Registrar send Notices to Counsel for the Petitioner, the Respondents and the Interested Parties to attend court on 17th February, 2015 for directions on how to proceed with the hearing of the Petition. The court directed with consent of counsel that the case be heard on 31st March, 2015, with a mention dated of 6th March, 2015 to confirm that parties were ready for the hearing of the Petition.

4. On 6th March, 2015, by consent of counsel for all the parties, the hearing date was changed to 21st and 22nd April, 2015 from 10.00 a.m., and counsel confirmed that the matter be determined by way of Affidavit evidence, with leave granted to counsel to file and exchange final affidavits in respect of their respective clients. Unfortunately this court was not sitting on 21st April, 2015, and the matter was fixed for further mention on 27th April, 2015, but counsel would not agree on the hearing dates, and once again directed a further mention on 29th April, 2015 to confirm availability of all counsel on 13th and 14th July, 2015 for hearing of the Petition.

5. On 29th April, 2015, those dates, 13th and 14th July, 2015 were accepted by counsel, with an undertaking by counsel for the Petitioners to serve unrepresented Respondents through substituted service through the daily papers of wide circulation, and counsel undertook to file their respective Lists of Authorities to be relied on well before the hearing dates and counsel confirmed the hearing for 13th – 14th July, 2015.

6. Again as fate would have it, the matter could not proceed on either the 13th or 14th July, 2015 as one of the three Judges was away on duty elsewhere, but counsel graciously agreed to have the case heard on 27th July, 2015 when all the three Judges, (Emukule, Kasango and Muriithi JJ) would be available and ready to hear the Petition. Due to objections by counsel for the Respondents that they had not had enough time to digest the submissions by counsel for the Petitioners, the matter was again taken out to proceed with the hearing of the Petition on 27th July, 2015.

7. However, on 27th July, 2015, out of the blues, counsel for the Respondents surprised counsel for the Petitioners that the Respondents would be raising question of inadequate notice as the hearing date was taken ex parte, and that they had no time to digest and respond to the Petitioner’s counsel’s submissions. Only counsel from the Office of the Attorney-General was ready to proceed. Some counsel were said to

be unwell. Other counsel raised issues of jurisdiction by this court, which needed to be addressed.

8. Once again the hearing of the Petition was thwarted, and in a formal Ruling of 27th July, 2015, counsel bound themselves to have the Petition heard on 17th – 18th August, 2015, that is immediately after the August, 2015 Vacation, and the beginning of the Third Term for Superior Courts operating within the Coast Region.

9. As it appeared later the application for adjournment of the hearing on 27th – 28th July, 2015, to 17th – 18th August, 2015 was a **ruse** to enable the Respondents Advocates to file Preliminary Objections. There are four Preliminary Objections filed. There is **firstly** the **Preliminary Objection** dated 5th August, 2015, by Mogaka Omwenga & Mabeya Advocates, for the 379th Respondent, **secondly**, there is the Preliminary Objection dated 9th August, 2015 by George M. Kabebe, Advocate for the 9th Respondent, **thirdly**, there is the Notice of Preliminary Objection dated 17th August, 2015 by Gikandi & Company Advocates and **fourthly** there is the Preliminary Objection dated 10th August, 2015 by Asige Keverenge & Anyanzwa, counsel for the 116 Respondents.

10. All the Preliminary Objections are based upon one single ground, and perhaps the more comprehensive one is by Asige Keverenge, counsel for the 116 Respondents, and we shall use it for the purposes of determining the entire Preliminary Objection to jurisdiction raised by counsel for those Respondents.

11. On his Notice of Preliminary Objection, (dated 10th August, 2015), counsel for the 116 Respondents raised objection in **limine** to the Amended Petition dated 11th August, 2011 and to the orders sought therein and/or granted on the following grounds that –

- (1) this court has no jurisdiction to entertain or hear or determine the Petition;
- (2) Article 165 of the Constitution of Kenya expressly forbids this court from entertaining or hearing or in any way determining the Petition;
- (3) this Petition violates, and is an abuse of the process of this court and the due process of law, it is scandalous;
- (4) the Petitioner has not specified in any way or sufficiently in detail which right or fundamental freedom or freedoms or rights each of the 116 Respondents named therein have violated, infringed or denied or threatened to deny, violate or infringe;
- (5) the Petitioner has not in any way or at all specified with precision the manner in which the alleged denial, violation, infringement or threat to denial, violation or infringement of those rights and of fundamental freedoms have been committed by each of the 116 Respondents and/or Respondents or at all;
- (6) the Petition does not raise any material that discloses denial, violation, infringement of a right or fundamental freedom as envisaged in the Bill of Rights. The Petition is merely trivializing the constitutional jurisdiction of this court;
- (7) the reliefs and remedies sought in the Petition are obtainable and statutorily fall and are grantable under civil law actions which are in this constitutional “Petition” is in substance and effect;
- (8) the denial, violation, infringement and contravention of rights and fundamental freedoms or a threat thereof are only enforceable against the Government and cannot be enforced against individual Respondents as sought in the Petition;

(9) the alleged contravention, denial, violation/or and contravention of rights and/or fundamental freedom is in respect of titles of land that do not exist and are not held by the Petitioner meaning that the court cannot embark on adjudicating of a right or fundamental freedom in respect of a non entity;

(10) the Petition is a disguised Appeal against pending and/or determined suits filed by the Petitioner and/or same Respondents in the High Court and invites this court to usurp or confer upon itself jurisdiction which is neither donated to it by the Constitution or Statute.

12. Apart from reiterating objection on grounds of jurisdiction, Mr. Kabebe, counsel for the 9th Respondent raises the following other grounds –

(1) that the issues raised in this Petition are either sub-judice, or **res judicata**;

(2) that the omissions and/or commissions of the 9th Respondent as complained by the Petitioner, if any, which is denied, are commissions or omissions of an agent on instructions and authority to act on behalf of a “Principal” who is known to the Petitioner hence the Petitioner has no cause of action against the 9th Respondent;

13. For the 9th, (again), 26th, 34th and 215 Respondents, Gikandi & Company Advocates raised Preliminary Objection on the grounds that –

1. the High Court has no jurisdiction to hear and determine the Petition herein as it is only the Environment and Land Court that has appropriate jurisdiction to hear and determine disputes touching on use of land or ownership thereof;
2. the present Petition is an abuse of the court process for being vexatious, frivolous, sub-judice and/or res judicata.

14. For their part, Munyiya, Mutugi, Umara & Muzaa & Company Advocates for the 145th ad 303rd Respondents objected to the Petition on the grounds that –

1. the Petition does not disclose any cause of action against the 145th Respondent and 303rd Respondent;
2. that the 145th Respondent does not own any property within the subject parcels of land;
3. the 145th Respondent is therefore a stranger to the allegations in the Petition;
4. in the premises the Petition against the 145th Respondent should be dismissed with costs.
5. the 303rd Respondent is a bona fide purchaser for value without notice, and that in the premises the Petition against the 303rd Respondent should be dismissed.

15. For the 298th Respondent, Gikandi & Company Advocates, in addition to reiterating the common objection of lack of jurisdiction also add that –

1. the Petition is incompetent and scandalous, and does not disclose any denial, violation, or infringement or threatened infringement of any right or fundamental freedom as against the 298th Respondent; and
2. the Petition is an abuse of the process of the court.

16. In addition to the objection on jurisdiction, the firm of Mogaka, Omwenga and Mabeya Advocates for the 379th Respondent, on their part added the following objection to the Petition namely -

1. that the Petition is an abuse of the court process for being vexatious, frivolous, sub-judice, and *resjudicata*;
2. that the 379th Respondent is an innocent purchaser for valuable consideration without notice;
3. that there is a breach of the rules of natural justice on the ground that no hearing notices are being

served upon the parties personally and/or appropriately through the daily newspapers with a national circulation.

17. The objection on behalf of the Attorney-General is contained in the Grounds of Opposition dated 11th August, 2015, and is grounded on the question of lack of jurisdiction of this court, as envisaged under Article 162(2) and 165(5) of the Constitution and section 13 of the Environment and Land Court Act 2011 (No. 19 of 2011), and stated that it would raise objection based upon the decision of the Court of Appeal in the case of **THE OWNERS FO MOTOR VESSEL “LILIAN “S” VS. CALTEX OIL (KENYA) [1989] KLR I.**

THE SUBMISSIONS

18. We do not propose to set out the arguments by each counsel who raised preliminary objection to jurisdiction. Only one counsel M/S Umara, for the 145th and 303rd Respondents submitted that she would leave the question of jurisdiction to the court. To say that Mr. Ochieng Oduol lead counsel for the Petitioner was utterly surprised and shocked at the turn of events is to put it very mildly. He had all along travelled to and from Nairobi ready to have the Petition heard and determined. To raise objection at this hour was according to him utter abuse of the process of the court, and in as much counsel for the Respondents had called the Petition scandalous and vexatious, conduct of counsel for the Respondents was equally vexatious and scandalous in raising the Preliminary Objections five years down the line from when the Petition had been filed, and in particular when the three Judge Bench was ready and willing to hear and determine the Petition.

19. However, as it is trite law to say that a Preliminary Objection on a point of law may be raised at any time in the course of proceedings, the court is bound in law to determine the preliminary point, more so, if that preliminary objection relates to jurisdiction.

20. All counsel who raised the preliminary objections to the court’s jurisdiction relied upon 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 ELC Act). The said counsel also relied upon the cases of “**Owners of the Motor Vessel “Lillian S: v. Caltex Oil (Kenya) Limited”** (supra), and the decision in **KENINDIA ASSURANCE COMPANY LIMITED VERSUS OTIENDE [1991] KLR 38.**

21. In the **Kenindia case vs. Otiende case**, the court held that the admission by the Applicants in their defence, and their invitation to the Judge to decide the agreed issues cannot confer jurisdiction on the court when none exists.

22. Similarly in **KENYA PORTS AUTHORITY VS. EUSTON KENYA LIMITED** (Civil Appeal No. 315 of 2005), the court held that an illegality cannot be waived.

23. Until the decision of the Court of Appeal in **CHARO VS. REPUBLIC [2015] eKLR** that Judges appointed to serve in the courts of “**Equal Status**” to the High Court, that is to say, the Employment and Labour Relations Court, and the Environment and Land Court, had no jurisdiction whether original or appellate in criminal matters, the **locus classicus** case in Kenya on the question of jurisdiction generally, is the **Owners of the Motor Vessel “Lillian “S” vs. Caltex Oil (Kenya) Limited** (supra) where the classic exhortation of Nyarangi JA, appears at page 14 lines 18 – 20 –

“...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...”

24. Other authorities, such as **ALPHONSE MWANGEMI MUNGA & 10 OTHERS VS. AFRICAN SAFARI CLUB LIMITED [2008] eKLR** and **SPEAKER OF THE NATIONAL ASSEMBLY VS.**

JAMES NJENGA KARUME [1992] eKLR on whether or not the Petition raises a constitutional issue would be a question of merit and have no relevance on the decision on the issue of jurisdiction, and we accordingly make no comment on those cases.

25. But what is jurisdiction and how is it conferred? Again we gain insight in the decision of Nyarangi, in the “Lillian S” case –

“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.” See words and phrases legally defined Vol. 3:I-N page 113

26. 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.”

27. The issue of jurisdiction herein is not a factual matter. It is constitutional and therefore a legal matter. It is constitutional because it requires the interpretation of Articles 162(2) and 165(5) of the Constitution of Kenya 2010, (the Constitution), and section 13(2) of the Environment and Land Act, 2011. We will commence with the provisions of the Constitution.

28. 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 (2). 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.

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

30. 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 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.

31. However, section 13(2) of the Act clarified the general jurisdiction in section 13(1) to avoid ambiguity as to what a matter touching on land and environment was. Section 13(3) emphatically stated that nothing was 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.

32. 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 some 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 with in the jurisdiction of the Industrial Court even where they are filed as constitutional Petitions.

33. In contrast, in the case of **IFDID OLE TAUTA & OTHERS VS. ATTORNEY-GENERAL [2015] eKLR** the Petitioners had **inter alia** sought a declaration that they, (the Petitioners) together with the Maasai Community of Ngong Hills were entitled to the suit land measuring approximately 577 Hectares or thereabouts and sought an order directing the Government to immediately survey the land and issue title deeds to them, and other bona fide Maasai residents of Ngong Hills. Among the several issues raised were the question whether the suit ought to have been brought before the Land and Environment Court.

34. After discussing the question at depth, the Judge Bench (P. Nyamweya, R. Ougo and J. Mutungi JJ) held **inter alia** –

“1. Article 162(2) (b) of the Constitution made provisions for the establishment by Parliament of a court with the status of the High Court to hear and determine disputes relating to environment, use and occupation of, and title to land. The Environment and Land Act No. 19 of 2011 was enacted to give effect to Article 162 (2) (b) of the Constitution...It is not disputed that the instant Petition was filed before the enactment of the Environment and Land Court Act which established the Environment and Land Court. The Petitioners could not therefore be faulted for having filed their suit in the constitutional and Judicial Review Division of the High Court;

2. Whereas the jurisdiction to determine whether there had been a violation of any of the rights under the Bill of Rights was vested in the High Court under Article 165(3) (b), the said jurisdiction was subject to clause (5) which prohibited the High Court from exercising jurisdiction over matters that fell within the province of the courts established under Article 162(2).”

35. And while acknowledging that courts have been faced with applications raising objections on their jurisdiction to entertain suits on matters that fell within the jurisdiction of the courts established under Article 162(2), that court stated that whilst the practice had not been to dismiss the suits, but to transfer them for hearing at the right forum, and concluded that –

“...having regard to the constitutional provision under Article 165(3) (b) and section 13(3) of the Environment and Land Court Act, in Constitutional matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and a party could bring such matters either before the High Court and/or before the Environment and Land Court...[and therefore the Environment and Land Court had the jurisdiction to deal with the Petition]

36. In the Petition between **PATRICK MUSIMBA VS. NATIONAL LAND COMMISSION & 4 OTHERS [2015] eKLR**, the Petitioner challenged **firstly** the manner in which compulsory acquisition of land had been conducted in Kibwezi Constituency and **secondly**, the process of the Environmental Impact Assessment (EIA) for the construction of the Standard Gauge Railway (SGR). A preliminary objection was raised by the Respondents challenging the jurisdiction of the court on the ground that the court empowered to hear and determine such matters was the Environment and Land Court (ELC) established under the Environment and Land Act (Cap 12A of the Laws of Kenya, (ELC Act) as read with Article 162 of the Constitution. It was submitted that both Articles 162 and 165 of the Constitution limited the jurisdiction of the High Court. It was argued that the presiding Judges empanelled by the Chief Justice were not qualified to handle the Petition as they had not been appointed as ELC Judges. It was further argued that the jurisdiction of the court could only flow from the appointment of the Judge. According to counsel for the Respondents the Bench as constituted was not in compliance with the Constitution.

37. The following issues among others were framed –

(1) whether the High Court had the requisite jurisdiction to entertain and determine the Petition;

(2) whether the court was properly and validly constituted;

(3) whether ELC Judges and Employment and Labour Relations Court (ELRC) Judges could sit where High Court Judge sit and vice-versa;

[or rather ELC and ELRC Judges can preside over cases over which the High Court Judges exercise jurisdiction]

(4) whether the High Court had concurrent and/or coordinate jurisdiction with ELC on matters touching the Constitution;

(5) whether the restrictive effect of the Court of Appeal’s decision that a Judge appointed to any of the two specialized courts (ELC & ELRC) did not have jurisdiction to sit in courts (other than the one he/she was specifically appointed to) affected the Petition and the Preliminary Objection before the court [Jefferson Kaluma Kenga’s case]

38. After a wide-ranging analysis and consideration of the applicable provisions of the Constitution and in particular, Articles 165(3), 162(2) and (3) of the Environment and Land Act, and the amendments thereto the five Judge Bench held as follows –

“1. In its strict sense the “jurisdiction” of a court refers to the matters the court as an organ not an individual was competent to deal with and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the court.

2. The jurisdiction of the High Court was unlimited save only as provided by the

Constitution. The High Court had express jurisdiction to deal with and determine matters of a constitutional nature under article 165(3) of the Constitution. Indeed, while the constitutional claw back was found under article 165(5), article 165(3) (e) of the Constitution further confirmed that the High Court's jurisdiction could be extended further pursuant to any statutory provision. For example the Judicature Act which conferred the specialized admiralty jurisdiction. The Constitution however did not provide for any other written law to limit the jurisdiction of the High Court.

3. While the High Court's jurisdiction was founded under article 165 of the Constitution, it was certainly not erroneous to argue that the jurisdictions of the courts established pursuant to article 162(2) were mainly statutory. Likewise, the courts contemplated by article 162(2) unlike the High Court were statutory creatures even though their status was equivalent to that of the High Court which was itself a creature of the Constitution. The courts established under article 162(2) by Parliament were the ELRC pursuant to the Industrial Court Act (Cap 234B) and the ELC pursuant to section 4 of the ELC Act (Cap 12A) Laws of Kenya. The jurisdiction of the two courts, as directed by article 162(3) of the Constitution was to be determined by Parliament. Indeed, as regards the ELC, which was the court of relevance to the instant petition, the jurisdiction was set out under section 13 of the ELC Act.

4. By the amendments of 2012, Parliament took away the supervisory jurisdiction of the ELC over subordinate, judicial and quasi-judicial tribunals under article 165(6) and also the jurisdiction to determine matters of a constitutional nature involving environment and land generally. Parliament clothed the ELC with jurisdiction to deal with constitutional matters touching on a clean and healthy environment only but not other constitutional matters, including matters touching on other fundamental rights. However the jurisdiction of the ELC was founded not just under section 13 of the ELC Act but also under article 162(2) of the Constitution and section 150 of the Land Act No. 6 of 2012 which vested exclusive jurisdiction upon the ELC Court to hear and determine disputes, actions and proceedings concerning land under the Land Act. The ELC's jurisdiction was certainly not donated through article 165.

5. The ELC court was a superior court of record, Under both section 4(2) of the ELC Act and article 162(2) of the Constitution it had the same status as both the ELRC and the High Court. They were one indivisible whole save for their respective jurisdictions. While the jurisdiction of the High Court was clear and unlimited under both the Constitution, the jurisdiction of the ELC as well as the ELRC as apparently limited by both establishing statutes and the Constitution, had been the subject of dispute.

6. The novelty of the two courts in the judicial system as well as the fact that their jurisdictions were conferred by statute in specific areas of the law must have contributed to or led to the discourse. With regard to matters Constitution it was settled that the ELRC and, *fortiori*, the ELC could adjudicate and determine matters Constitution.

7. The Court of Appeal's dicta in *Mugendi* was pronounced after the 2012 legislative amendments to the ELC Act, which seemed to limit the jurisdiction of the ELC as far as constitutional matters or questions were concerned to only those relating to a clean and healthy environment rather than to the environment and land generally. The Court of Appeal in *Mugendi* did not address itself to that particular amendment. Neither the High Court nor the Court of Appeal in the preceding decisions held that the High Court could not deal with any *constitutional disputes* touching on land or land rights if the same arose as the High Court was dealing with matters within its jurisdiction under article 165 of the Constitution and especially the special jurisdiction conferred upon the High Court under article 165(3) of the Constitution.

8. In view of the 2012 amendments to the ELC Act one would be tempted to conclude that on a true construction of section 13(3) of the ELC Act the jurisdiction of the ELC in so far as enforcement of constitutional rights was concerned, was limited and restricted by Parliament to matters relating to a clean and healthy environment under articles 42, 69 and 70 and not environment and land generally under article 40 of the Constitution. The Court of Appeal's decision in *Mugendi* as read together with section 13 of the ELC Act however lead to the plausible conclusion that the ELC had jurisdiction to determine matters of a constitutional nature as well. It would be ridiculous and fundamentally wrong for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court was properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction was raised.

9. Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limited the High Court's jurisdiction in that respect while a closer reading of the ELC Act revealed that the ELC Court's jurisdiction was in 2012 Act, limited by Parliament in so far as constitutional issues touching on land and environment were concerned but the Court of Appeal in *Mugendi* expressed the view that the ELC when dealing with disputes concerning the environment and land could also deal with claims of breaches of fundamental rights touching on the subject at hand. In matters Constitution the ELC had jurisdiction not just when it involved clean and healthy environment but also land.

10. A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents.

11. Although the jurisdiction in constitutional matters conferred by section 13(3) of the ELC Act upon the ELC 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 ELC 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.

12. The court was bound by the Court of Appeal's decision in *Jefferson Kalama Kengha* pursuant to the well-known curial hierarchical principle of precedent, even if it were to hold the view that the Court of Appeal's decision was erroneous. However, the facts of *Jefferson Kalama Kengha* were distinguishable from those of the present case. First, in *Jefferson Kalama Kengha*, the jurisdiction in question involved the exercise of Criminal jurisdiction which was exclusive to the High Court and not the exercise of constitutional jurisdiction which was coordinate and or concurrent amongst the three courts namely the ELC, the ELRC and the High Court. Secondly, *Jefferson Kalama Kengha* involved constitution of a bench under section 359 of the Criminal Procedure Code; while at the present case it was an empanelment of a bench under article 165(4) of the Constitution.

13. The powers donated to the Chief Justice under article 165(4) were not merely

administrative. The Chief Justice had to be quasi-judicious in approaching and exercising his powers under article 165(4) of the Constitution. He had to consider, in line with the Constitution and especially articles 159 and 259 thereof, what in any given circumstances, was appropriate. He then decides whether to have three, five or seven judges. The weight of the case, the jurisdiction of the court as well as the circumstances of the case were all relevant factors. he could assign any judge, appointed under the Constitution, to hear the matter.

14. For purposes of article 165(4) judges appointed under the Constitution were those appointed to the High Court and courts of even status. That article of the Constitution did not distinguish between judges. Indeed, article 161(1) of the Constitution made a case for the collectivity of judges of the superior court. Flowing from the reasoning in *Jefferson Kalama Kengha's* case that judges as recruited were specialized in various fields, the Chief Justice could be constrained to consider a judge's special field before assigning him or her to the special bench so certified to consider a substantial question of law.

15. Article 165(4) of the Constitution created two circumstances. First is the certification by the Court that the matter raises a substantial question of law under clause 3(b) or (d) of the Constitution. Thereafter the matter moves to the next level where the Chief Justice assigned the hearing of the matter to an uneven number of Judges. The clause did not state that the judges were restricted to High Court Judges. The Constitution clearly empowered the Chief Justice to assign Judges to hear the matter not to assign the Court to hear the matter and he was at liberty to assign any Judge, as he found appropriate, that duty.

16. the ELC and the High Court had a concurrent and or coordinate jurisdiction on the matters raised in the Petition. The Chief Justice could thus have appointed either ELC Judges or High Court Judges or a mixture of both. He could have appointed three or seven. He settled for five all from the High Court. Nothing indeed stopped the Chief Justice from creating a triangular jurisdictional relationship in constitutional matters when he acted under article 165(4).

17. The High Court had jurisdiction in the instant matter. Where there were two courts or tribunals with concurrent or coordinate jurisdiction, the court then seized with the dispute and with jurisdiction could decline to exercise jurisdiction if the alternative tribunal was more appropriate for deciding the dispute in question. Besides the High Court the ELC with only ELC Judges was also competent to determine the Petition.

18. Due to the need to have the Petition expeditiously disposed of it would be more appropriate to determine the Petition before the court. The public interest that the SGR project had generated would dictate a more expeditious determination. It would not be a small price to pay if the Petitioner who already yearned for justice to wait any longer as the court was being reconstituted to consist of only ELC Judges, noting that the ELC Judges were already stretched to the limit. There should always exist in the court a sense of undesirability to adjourn or delay constitutional matters.

39. An open-minded and close examination of the dispute in this Petition is not merely about the use and occupation of, and title to land. The Amended Petition 21 of 2010 is said to be premised upon the provisions of Articles 2, 19, 20, 21, 22, 23, 25(c), 31, 35, 40, 50(1), 165(3), 262 and section 7 of Part I of the 6th Schedule of the Constitution 2010, AND section 75 of the Constitution of Kenya, 1969 and Articles 10, 21, 29, 40 and 50(1) of the Constitution of Kenya 2010. We are of the considered view that a Ruling on a Preliminary Objection is neither the time nor the theme upon which to engage in an analytical consideration of what the sections of the former and repealed Kenya Constitution 1969, and the Constitution of Kenya 2010 entail. It is also not the place to inquire into the pleadings in response

thereto, that it is frivolous, scandalous, or that it is vexatious.

40. The sole question to be answered here is whether this court comprising entirely of Judges appointed and sworn as Judges of the High Court, have the jurisdictional mandate to hear and determine the Petition herein, in light of the provisions of Article 162(2) and 165(5) of the Constitution of Kenya 2010.

41. We think that this territory and question has been adequately and exhaustively traversed in the decision of the court in **Patrick Musimba vs. National Land Commission** (supra), and we associate ourselves with the reasoning therein, and agree with the conclusions and determination therein in relation to the issue of jurisdiction of the High Court, and courts of the status of the High Court, in determination of issues Constitution, and the right of the Chief Justice to empanel Judge or Judges under Article 165(4), and we endorse the determination thereof.

42. Finally, whereas we recognize the duality or concurrent and coordinate jurisdiction of the High Court and Environment and Land Court, we are also keenly aware of the need to have the Petition expeditiously disposed of, and it would be more appropriate to determine the Petition before this court. The public interest as expressed in Article 159 of the Constitution demands that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.

43. This Petition was filed in 2010, and amended in 2011. Besides the Petitioner, there are over 670 Respondents; it would be in their interest and indeed that of the Petitioner that the Petition be determined expeditiously.

44. For those reasons, we find and hold that this court has the jurisdiction to hear and determine the Petition. The Preliminary Objections taken by the 9th Respondent, 145th, 303rd, the 379th Respondent, 116 Respondents, and 1st – 7th Respondents, and others who did not file objections, but supported them, fail.

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

Dated, Delivered and Signed in Mombasa this 29th day of February, 2016.

M.J. ANYARA EMUKULE (MBS)

JUDGE

MARY KASANGO

JUDGE

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mrs. Kibe for Petitioners

Ms. Lutta for 1st – 7th Respondent

Ms. Umara for 145th – 303rd Respondent

Mr. Mutiso holding brief for Asige for various Respondents

Mr. Kaunda Court Assistant