



REPUBLIC OF KENYA



KENYA LAW
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**Moseti v Municipal Manager & another (Environment & Land Petition
6 of 2021) [2022] KEELC 2752 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2752 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND PETITION 6 OF 2021

JM ONYANGO, J

MAY 11, 2022

**IN THE MATTER OF ARTICLES 1, 2, 10(2), 19(1), 20(1), 21(1) & (2), 23,
25, 27(1) & (2), 40, 47, 48, 50(1), 159 (2), 162(2) AND 258 OF THE
CONSTITUTION, 2010.**

AND

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE
FUNDAMENTAL RIGHTS OF THE PETITIONERS**

AND

**IN THE MATTER OF THREAT TO DEMOLISH KIOSKS AND MAKESHIFT
STALLS WITHIN KISII MUNICIPALITY**

AND

IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK III/177

AND

**IN THE MATTER OF SECTION 111 OF THE COUNTY GOVERNMENT ACT,
2012**

AND

**IN THE MATTER OF SECTION 56 OF THE PLANNING AND LAND USE
PLANNING ACT, 2019**

AND

**IN THE MATTER OF SECTION 20 OF THE URBAN AREAS AND CITIES ACT,
2011**

AND

ELC PETITION NO 6 OF 2021 - RULINGPAGE 1



**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE
RULES, 2013**

BETWEEN

ALOYS MATAYA MOSETI PETITIONER

AND

MUNICIPAL MANAGER 1ST RESPONDENT

MUNICIPAL BOARD-KISII MUNICIPALITY 2ND RESPONDENT

RULING

Introduction

1. The Petitioner herein filed a Petition dated 27th April, 2021 against the Respondents. In the said Petition he alleges that he is the registered owner of L.R No. Kisii Municipality/block 111/177 where he has constructed assorted structures which he has rented out to tenants for purposes of commercial use. It is the Petitioner's case that on or about the 15th or 16th day of April 2021, the Respondents in purported exercise of their powers under section 20 of the *Urban Areas and Cities Act*, 2011 caused a demolition notice to be affixed on the frontage of the Petitioner's premises threatening to demolish the Petitioner's premises on the grounds that they were unauthorized kiosks/makeshift stalls.
2. It is the Petitioner's case that in issuing the said notice, the Respondents contravened the provisions of Article 10(2) of *the Constitution* and threatened his rights under Article 40 of *the Constitution* of Kenya. The Petitioner further claims that he is entitled to protection of his rights under Articles 20(2), 21(1), 27 and 40 of *the Constitution* of Kenya. The Petitioner therefore seeks the following reliefs:
 - a) A declaration be issued that to the effect that the Petitioner is entitled to protection under *the Constitution*, 2010 in line with the provisions of Articles 10(2), 20(2), 21(1), 27 and 40 of *the Constitution*, 2010.
 - b) A declaration that the Respondents herein are not conferred and/or bestowed with the authority and/or mandate to undertake any approval and/or review of approval pertaining to and/or affecting any structural construction and/or developments within the Municipality pursuant to the provisions of the *Urban Areas and Cities Act*, 2011.
 - c) A declaration that the Respondents herein are not conferred with the mandate and/or authority to issue any demolition Notice and/or otherwise undertake any demolition of structures of whatsoever (sic) nature let alone the structures standing on L.R No. Kisii Municipality/Block111/177 belonging to and registered in the name of the Petitioner.
 - d) An order of Judicial Review in the nature of certiorari be issued to and against the demolition notice dated the 13th day of April, 2021 by and at the instance of the Respondents herein who are not conferred and/or bestowed with any mandate to issue any demolition notice and/or undertake any demolition, whatsoever, over and in respect of the structures standing on inter alia L.R No. Kisii Municipality/Block 111/177.



- e) A permanent injunction restraining the Respondents either by themselves, their agents, servants and/or employees, from further issuing any demolition notice and/or undertaking the demolition of structures built and/or erected over and in respect of L.R No. Kisii Municipality/Block111/177 whatsoever and/or howsoever.
 - f) General damages for breach and/or threatened breach of the Petitioner's legitimate expectations and economic rights pursuant to and/or under the provisions of Article 40 of the Constitution of Kenya, 2010.
 - g) The costs of the Petition be borne by the Respondents jointly and severally.
 - h) The Honourable Court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.
3. Contemporaneously with the Petition, the Respondents filed an application for injunction under Certificate of Urgency. Upon being served with the Petition and application for injunction, the Respondents filed a Notice of Preliminary Objection dated 12th May, 2021 raising three main grounds. The first one is that this Honourable court lacks the jurisdiction to hear and determine this matter pursuant to Articles 23 and 165 (2) (b) and (d) of the Constitution of Kenya. The second ground is that the Environment and Land Court has no jurisdiction to hear and determine matters relating to violation of constitutional rights and freedoms. The third ground is that the Petition and Notice of Motion both dated 27th April, 2021 are fatally defective and ought to be struck out with costs.
 4. The Court directed that the Preliminary Objection be heard first and that the same be canvassed by way of written submissions. Both parties filed their submissions in accordance with the court's directions.

Petitioner's submissions

5. It was submitted by the Petitioner that this court is clothed with jurisdiction to hear and determine issues relating to the environment, use, occupation and title to land in accordance with the provisions of Article 162 (2) (b) of the Constitution. The Petitioner submitted that the jurisdiction of the court is elaborated in the Environment and Land Court Act No. 19 of 2011. It was contended that the Petition relates to a Notice of demolition issued by the Respondents in respect of structures constructed by the Petitioner on the suit property which essentially affects the use and occupation of the suit property by the Petitioner and his tenants. It is therefore his contention that in terms of the right to property under Article 40 of the Constitution, he is entitled to protection from arbitrary processes like the ones adopted by the Respondents herein who have purported to issue a demolition notice without following due process.
6. In submitting that jurisdiction flows from the Constitution or written law, the Petitioner placed reliance on the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* (2012) eKLR. Reliance was also placed on the cases of *Pepe Limited v Kenya Railways Corporation & 3 Others*; *Kenya Revenue Protection Services & Another Interested Parties* (2019) eKLR and *Kuria Kiarie Kiromo v Settlement Fund Trustees & 3 Others* (2021) eKLR where the court held that the Environment and Land Court has jurisdiction to hear and determine disputes involving land and environment.
7. Regarding the reliefs sought, the Petitioner contended that this court has jurisdiction to grant the reliefs stipulated under section 13(7) of the Environment and Land Court which include interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution;; declaration and costs.



Respondents' submissions

8. It was the Respondents' submission that the dispute herein falls within the jurisdiction of the High Court pursuant to Article 165 of *the Constitution*. They relied on the case of *The Speaker of the National Assembly v Hon. James Njenga Karume* Civil Application No. 92 of 1992 (unreported), where the court held that where the procedure for redress of any particular grievance is prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
9. It was contended that the issues raised in the Petition invited the court to interpret the provisions of section 8 part 2 of the Fourth Schedule of *the Constitution* of Kenya, 2010 as read with section 29 of the Physical Planning Act No. 6 of 1996 which falls within the purview of the High Court pursuant to Article 165(2) of *the Constitution*. They relied on the cases of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate & 4 Others* (2013) eKLR and *Centre for Human Rights and Democracy & Another v The Judges and Magistrates Vetting Board & 2 Others*.
10. The Respondents further contended that the Conservatory orders sought by the Petitioner in her application did not exist in the Kenyan legal regime. They relied on the case of *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another* (2016) eKLR.

Issues for determination

11. The issues that fall for determination are:
 - i. Whether this court has jurisdiction to hear and determine this matter.
 - ii. Whether the application should be granted.

Analysis and determination

12. The importance of jurisdiction cannot be overemphasized and once the question of jurisdiction is raised, the same must be dealt with at the first instance. In the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 3 Others* (2013) eKLR the Court of Appeal observed as follows:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain

The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into merits of a cause was best captured in the timeless words of Nyarangi J.A in *The Owners of the Motor Vessel Lillian 'S' vs. Caltex Kenya Ltd* [1989] KLR 1;

“I think that 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. 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.



13. In order to determine the question of jurisdiction, it is important to analyze the provisions of Articles 162 and 165 of *the Constitution* which establish the Superior Courts and sets out the jurisdiction of each court. Articles 162 and 165 provide as follows;
162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
- (2) Parliament shall establish courts 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.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
- (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.
165. (1) There is established the High Court, which—
- (a) shall consist of the number of judges prescribed by an Act of Parliament; and
 - (b) shall be organized and administered in the manner prescribed by an Act of Parliament.
- (2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
- (3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.



(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(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.

14. Under Article 162(2) of *the Constitution*, Parliament is given the mandate to establish courts 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. Additionally, under Article 162(3), Parliament is empowered to determine the jurisdiction of the court of the status of the High Court. Section 13 of the *Environment and Land Court Act*, 2011 sets out the jurisdiction of the court as follows;

Section 13.

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



15. In the instant suit the Petitioner’s case is that the Notice of demolition issued by the Respondents in respect of the structures on the suit property is bound to affect the use and occupation of the suit property by the Petitioner and his tenants. The Petitioner therefore contends that unless the proper procedure is followed by the Respondents, his right to property under Article 40 of *the Constitution* will be violated. Land rights are part of the rights protected under the Bill of Rights.
16. It has been argued that under Article 165 (3) the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened is vested in the High Court. It is however important to note that Article 165(5) specifically forbids the High Court from exercising jurisdiction over matters falling within the jurisdiction of the Supreme Court and the courts contemplated under Article 162(2). This means that the High Court cannot deal with matters set out in section 13 of the Environment and Land Act as these exclusively fall within the jurisdiction of the Environment and Land Court. Allowing the High Court to deal with constitutional matters incidental to property rights would be tantamount to allowing the High Court to supervise a superior Court contrary to the provisions of Article 165(6) of *the Constitution*. In arriving at this finding, I am guided by the decision in the case of *United States International University (USIU) v Attorney General* (2012) eKLR where the Court held that:
- “In order to determine whether the Industrial Court has the jurisdiction to deal with matters concerning the enforcement of fundamental rights and freedoms, it is important to consider *the Constitution* as a whole bearing in mind that all provisions bearing upon a specific issue should be considered together; this is the principle of harmonization. As was held in *Olum v Attorney General of Uganda* [2002]2 EA 508, “the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without in subordinating any one provision to the other.”
17. Although the USIU case applies to the Industrial Court (Employment and Labour Relations Court) the same arguments hold true for the Environment and Land Court which is similarly created under the provisions of Article 162(2) of *the Constitution*. See also the case of *Kuria Kiarie Kiromo v Settlement Fund Trustees & 3 Others* (2021) eKLR.
18. In light of the foregoing, I am of the considered view that this court has jurisdiction. Consequently, I find no merit in the Preliminary Objection and I dismiss it with costs to the Petitioner.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF MAY, 2022.

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J.M ONYANGO

JUDGE

