IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR MANDAMUS BY WAY OF JUDICIAL REVIEW

IN THE MATTER OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF OPORATIONALIZATION

OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

-BETWEEN-

REPUBLIC.....APPLICANT

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

HON. THE CHIEF JUSTICE.....2ND RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....3RD RESPONDENT

BENSON IRUNGU KAHURA.....EXPARTE APPLICANT

JUDGMENT

Before me is the substantive notice of motion dated 19th march 2012. The ex parte applicant seeks the following judicial review orders:

1. THAT an order of mandamus do issue compelling and or directing the Attorney General of the Republic of Kenya, the Chief Justice of the Republic of Kenya and the Judicial Service commission to constitute and or operationalize the Environment and Land Court established under section 4 of the Environment and Land Court Act No. 19 of 2011 pursuant to the provisions of Articles 162 (2) of the Constitution of the Republic of Kenya read together with Article 165(5) of the Constitution.

2. ***THAT an Order of Mandamus do issue compelling and or directing the Attorney General of the Republic of Kenya, the Chief Justice of the Republic of Kenya and the Judicial Service Commission to constitute and or operationalize the Environment and Land Court Act No. 19 of 2011 pursuant to the provisions of Articles 162 92) of the Constitution of the Republic of Kenya read together with Article 165 (5) of the Constitution within sixty days from the date of the Court order or any other date as the court deems fit.***

The applicant is a member of the Anglican Church of Kenya (ACK) Kisauni Mombasa. He filed this

matter on his own behalf and on behalf of all the People of Kenya.

ACK Kisauni is the registered owner of plot Mombasa/Mwelegeza/168. That land according to the applicant has been trespassed by squatters claiming to be true owners of that land. That dispute according to the applicant ought to be heard and determined by a court with competent jurisdiction. The applicant and other members of ACK Kisauni require a forum where they can ventilate that issue, which the applicant termed as an infringement of their rights. The rights he refers to are those rights enshrined in the constitution relating to interest to land. In this regard the applicant stated that the High Court does not have jurisdiction to entertain that dispute in view of the provisions of Article 165 (5) and Article 162 (2) (b) of the constitution of Kenya 2010. Article 165(5)provides:

"The High Court shall <u>not</u> have jurisdiction in respect of matters-

(a) ……

(b) ***falling within the jurisdiction of the courts contemplated in Article 162(2)."****(underlining mine)*

And Article 162(2)(b) provides;

"Parliament shall establish courts with the status of the High court to hear and determine disputes relating to-

(a)……..

(b) the environment and the use and occupation of, and title to, land."

Those Articles the applicant stated denied the High Court jurisdiction to hear matters relating to environment, use and occupation of land and title to land. It is deponed that the respondent despite the enactment of The Environment and Land Court Act No. 19 of 2011 had failed to operationalize that court. That in view of that failure the respondents had impeded access to justice to the applicant to enable the applicant to ventilate his grievances relating to his rights as provided in Article 40 of the Constitution. That the respondent had a duty to operationalize that court because the respondents are expected to respect the Constitution and its provisions. It is on that basis that the applicant sought the judicial review orders.

In submissions learned Counsel Mr. Ochwa stated that Act 19 of 2011 empowered the Judicial Service Commission (JSC) to make recommendations to the Chief Justice for the appointment of Judges of the High Court to that Court. That provision is to be found in Section 7(2) of Act 19 of 2011. He submitted that despite that power in that section, the respondents had failed to act and as a consequence that court was not operationalized and hence the violation which is now alleged by the applicant in this matter. The applicant through his counsel referred to the gazette notice issued by the Chief Justice being gazette notice number 1617. He argued that the notice confered jurisdiction to the high Court to hear land matters which jurisdiction according to the Constitution was reserved to The Environment and Land Court. He submitted that Article 165 (5) and Article 162(2) (b) did not provide a transitional clause and accordingly, section 30 of Cap 19 of 2011 violated the constitution. The applicant relied on the following authorities:

In the case **<u>Mwau Vs Principal Immigration Officer Misc. Civil Appeal No. 299 of 1983 [1985] KLR 72</u>** he relied on the citation of **<u>Shah vs Attorney General of Uganda[No. 3] [1976] E.A 543</u>** which was in the following terms:

"In mandamus cases it is recognized that when statutory duty is cast upon a crown servant in his official capacity and the duty is one owed not to the crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it….."

Republic Vs Chairman, Electoral Commission of Kenya ex parte Welamondi [2008] 2 KLR (EP) 393; the

court held:

"Mandamus is the appropriate remedy for compelling a person to perform a duty imposed by statute which duty he has refused to perform. A fortiori it is the appropriate remedy to compel the performance of a constitutional duty."

The Owner of Motor Vessel 'Lilian S' Vs Caltex Oil (Kenya) Ltd E.A. No. 50 of 198. [1989] KLR 1; the court of appeal in discussing jurisdiction stated:

"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 holdsthe opinion that it is without jurisdiction."

The 2nd and 3rd respondents through their Learned Counsel Mr. Issa, opposed the notice of motion by relying on the replying affidavit of the Chief Registrar of the Judiciary, who is also the secretary of the 3rd respondent (JSC). In that affidavit, it was stated that the 3rd respondent being a commission established under Article 171 was independent and could not be directed as sought by the applicant through judicial review orders. Further that the 3rd respondent had in any case advertised for judges for The Environment and Land Court to fill thirty (30) posts. By the time the 3rdrespondent's secretary swore the affidavit in reply, she stated that the 3rd respondent was in the process of short listing those that had responded to the advertisement. I should state, and it is in the public dormain, that the 3rd respondent is presently interviewing those that were shortlisted for those posts. The secretary of the 3rd respondent further deponed:

"That the Judicial Service Commission has an obligation to ensure that the process of short listing and interviewing applicants is transparent, efficient and effective so that deserving and merited recommendations are made for appointment of judges to The Environment and Land Court."

Learned counsel Mr. Issa submitted that the applicant was wrong to have sued the 2nd respondent (CJ) because the act of appointing judges to The Environment and Land Court was the responsibility of the 3rd respondent. He therefore argued that the 2nd respondent was wrongly joined in these proceedings. To bolster that argument, he relied on the case; **Republic Vs Evan Gicheru (Hon) & 3 Others Nairobi Misc. Application No. 920 of 2005**; the court in discussing the position of the Chief Justice in JSC stated:

"These utterances confirm our view that the Judicial Service was the only proper respondent in this matter and that the addition of other parties as respondents was unfortunate misjoinder. The only decision that falls for consideration is that Judicial Service Commission and not the acts of the individual members and offices."

Finally, counsel submitted that the order of mandamus was only available to the applicant if the respondent had not started the process. The process of recruiting judges for that court as stated is under way.

I have considered the notice of motion, the statement s of facts and the verifying affidavit in its support. I have also considered counsels' submissions and the authorities they rely on. The Constitution which is 'The Supreme Law of this Republic binds all persons and all state organs at both levels of Government'. See article 2. It follows therefore that that lofty statement by the Constitution is an indication that the respondents and all a sundry are allbound by its provisions. They are all bound to fulfil it to the letter.Article 165 (5) as will be seen above, provides that the High Court does not have jurisdiction to entertain matters relating to The Environment and Land. Article 162 (2) (b) provides that it is The Environment and Land Court which has jurisdiction over those matters. The 6th Schedule section 22 of the Constitution provides that whatever matters were pending before the court before promulgation of the

Constitution shall continue to be heard by that court. It is in the following terms:

"all judicial proceedings pending before any court shall continue to be heard and shall be determinedby the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court."

Parliament enacted Act 19 of 2011 on 30th August 2011. That is the Act that brought into being the Court contemplated under Article 162 (2) (b). The scenario presented by applicant relates to matters of Environment and Land that were to be filed after the promulgation of the Constitution. The Constitution was promulgated on 27th August 2010. The issue for determination is; does the High Court have jurisdiction to entertain Environment and Land matters filed after the 27th August 2010?

Section 30 of Act 19 of 2011 is a replica of 6th Schedule section 22 reproduced above. Those two sections gave power to the Chief Justice to give directions on the hearing of the cases that were pending before court before the promulgation of the Constitution. The Chief Justice gazette directions on how matters of land were to be dealt with in the absence of operationalization of the Environment and Land Court. That gazette notice is in the following terms:

"THE CONSITUTION OF KENYA
THE ENVIRONMENT AND LAND COURT ACT
(No. 19 of 2011)

IN EXERCISE of the powers conferred by the sixth schedule part 5 section 22 of the Constitution of Kenya, 2010, and in pursuance of section 30(1) of the Environment and Land Court Act, (No. 19 of 2011) of the laws of Kenya on transitional provisions for proceedings relating to the environment and the use and occupation of, and title of land, as read with section 31 of the Act, the Chief Justice makes the following practice directions pending the establishment of the Environment and Land Court. All proceedings relating to the environment and the use and occupation of, and title of land pending before the Court of Appeal, High Court, Subordinate Courts or Local Tribunal of competent jurisdiction other than Land Disputes Tribunals which existed under the now repealed Land Disputes Tribunals Act, No. 18 of 1990, shall continue to be heard and determined by the same Courts or Tribunal. Any proceedings which were pending before the District Land Disputes Tribunals as at the date of the enactment of the Environment and Land court Act, 2011, shall be moved to the nearest Resident Magistrate's Court for hearing and determination by a court presided over by a magistrate of the rank of Resident Magistrate.

All proceedings which were pending before the ProvincialLand Appeals Committees as at the date of the enactment of the Environment and Land Court Act, 2011, shall be moved to the nearest High Court for hearing and determination.

The proceedings to be moved to the Resident Magistrate's Courts and High Court respectively, shall be under separate registers to facilitate ease of movement to the Environment and Land Court once established in the event that the proceedings are not concluded before the establishment of the said court.

All new disputes relating to the environment and the use and occupation of, and title to land shall be filed in the nearest High Court under a separate register to facilitate ease of movement of the proceedings to the Environment and Land Court once established.

Dated the 9th February, 2012-03-27
W. MUTUNGA,
Chief Justice/President, Supreme Court of Kenya."

The applicant has submitted that not only was section 30 of Act 19, 2011 unconstitutional but that also that the gazette notice, in so far as it dealt with matters that were filed after the promulgation of the

Constitution. At present as stated by the learned counsels in their submissions the JSC is in the process of vetting candidates who shall subsequently be appointed as judges in The Environment and Land Court. Act 19 of 2011 which brought into being the Environment and Land Court was enacted on 30th August 2011. It follows that until that enactment, JSC could not appoint judges to that court. The Constitution did not give a time frame within which the environment and Land Court was to be operationalized. The only limitation that was given in the Constitution was the time given to parliament within which they were to enact an Act bringing into being the Environment and Land Court. Parliament was to enact that legislation within 1 yearfrom the date of the promulgation of the Constitution. Article259 (8) of the Constitution provides:

"If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises."

The period from August 2011 when Act 19 of 2011 was passed to now when the candidates for Environment and Land Court are being interviewed cannot in my view be said to be unreasonable delay in operationalizing that court. This is especially when one considers that the appointment of such judges in that court has to be in accordance with Article 166 (2) (a) (5). It is also not unreasonable delay by JSC in operationalizing that court, when one considers that when the Constitution of Kenya 2010 was promulgated, it found a judiciary that was so short staffed of judicial officers which was leading to delay in dispensation of justice. JSC had an enormous act to carry out recruitment to address this shortage. It is in the public dormain that many judges both in the High Court, the Court of Appeal and of course the Supreme Court were taken through the recruitment process by JSC to address that shortage. I therefore find that JSC did not unreasonably fail to appoint judges for the Environment and Land Court as required under Article 162. Since no time limit was provided in the Constitution of whenthe Environment and Land Court was to be operationalized, I will be guided by the provisions of Article 259(1)(3) which considers how the Constitution should be construed. Under sub-article 1 in interpreting the Constitution, one is required to promote its purposes, values, principles amongst other things. Article 259(3) provides:

"Every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking …"

When one considers that aspect of interpreting the Constitution, one should bear in mind that the people of Kenya could not have intended when they adopted, enacted and gave themselves the Constitution of Kenya 2010 that there would be a time when legal disputes could not be addressed by the court. To therefore state that matters of Environment and Land cannot be addressed until the Environment and Land Court is operationalized would go against the provisions of Article 48 which provides: 'The state shall ensure access to justice for all persons;it would also be contrary to the provisions of article 159 which states: '*justice shall not be delayed*.'

Since the Constitution should be construed as always speaking, the court will take it that it would be speaking and saying that no one should be locked out and be denied the right to seek justice. Accordingly, matters of Environment and Land should continue to be heard by the High Court until the appropriate court is operationalized. That finding however, should not be taken to be a blanket permission to JSC to fail to operationalize that court. The Constitution after all requires that there be no unreasonable delay in the implementation of the Constitution. It is for that reason that I find that the order of mandamus should be granted to limit the period within which the respondent shall appoint judges for The Environment and Land Court. To grant orders of mandamus would not be interfering with the independence of the JSC as argued. The independence of JSC guaranteed in the Constitution does not permit JSC to act contrary to the Constitution. Where a court would find that they have so acted, such a court would be free to grant orders on mandamus to require it to act as provided in the Constitution. I would add by stating that in this case the inclusion of the Chief Justice was necessary because the applicant was attacking the direction given by the Chief Justice in the gazette notice reproduced above. To that extent this case is distinguishable from the one relied upon by the respondent that is **Republic Vs Evan Gicheru** (*supra*).

I grant the following orders:

1. THAT an Order of Mandamus is hereby issued compelling and or directing the Attorney General of the Republic of Kenya, the Chief Justice of the Republic of Kenya and the Judicial Service Commission to constitute and or operationalize the Environment and Land Court Act No. 19 of 2011 pursuant to the provisions of Articles 162 (2) of the Constitution of the Republic of Kenya read together with Article 165 (5) of the Constitution within six months from the date of this order.

2. Each party shall bear their own costs in view of the fact that the applicant filed this matter on his own behalf and on behalf of other people who may wish to use the court.

DATED at **MOMBASA** this **21st** day of **JUNE, 2012**

Mary Kasango

JUDGE

DATED and **DELIVERED** at **MOMBASA** this ***21st*** day of ***June, 2012.***

F. Tuiyott

JUDGE