



Republic v Attorney General & another; Kathenge & 3 others (Interested Parties); Musyoka Kamusina (Exparte) (Environment and Land Judicial Review Case E002 of 2022) [2022] KEELC 2555 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2555 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2022

LG KIMANI, J

JUNE 28, 2022

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS AND

IN THE MATTR OF CIVIL SUIT NUMBER 67 OF 2019 IN TH CHIEF MAGISTRATE'S COURT AT KITUI ORDER RECORDED ON 2ND DECEMBER 2021 AND ISSUED ON 9.12.2022 AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDERS OF THE CIVIL PROCEDURE RULES 2010 AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015 SECTIONS 7,8,9,10,11 AND 12 IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

BETWEEN

REPUBLIC APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

THE HONOURABLE CHIEF MAGISTRATE KITUI LAW

COURTS 2ND RESPONDENT

AND

STANLEY MBOLE KATHENGE INTERESTED PARTY

AGNES SYONGAA KAMUSINA INTERESTED PARTY

NZOMO KAMUSINA INTERESTED PARTY

STEPHEN WAMBUA MUSYA INTERESTED PARTY

AND

MUSYOKA KAMUSINA EXPARTE



RULING

1. The Interested Parties have jointly filed a Notice of Preliminary Objection dated March 4, 2022 to the *Ex parte* Applicant's Notice of Motion dated February 28th February 2022 on grounds that:
 1. That the Honorable Court does not have jurisdiction to adjudicate on the dispute between the parties.
 2. That the application is bad in law, incompetent, devoid of any merit and discloses no reasonable cause of action.
 3. That the said application should be struck out with costs to the interested parties.
2. In order to effectively deal with the preliminary objection it is necessary to set out the prayers in the Notice of Motion dated February 28, 2022 which is the subject of challenge. The said Notice of Motion is brought under Article 22 and 23 of the Constitution of Kenya, Order 53 Rule 1 and 2 of the Civil Procedure Rules 2010, Section 7, 9 and 10 of the Fair Administrative Act seeking:
 - a) An order of mandamus directed to stop the 2nd Respondent, 1st Interested Party, agents, employees from proceeding in executing, implementing the Consent Orders recorded on December 2, 2021 and issued on December 9, 2021 in Civil Case no 67 of 2019 transferring, effecting registration restraining the *Ex parte* Applicant in respect of Plot Parcel No 15 Mosa registered with the County Government of Kitui.
 - b) An order of Prohibition directed against the respondents from enforcing the decree orders arising from consent order dated December 2, 2021 and issued on December 9, 2021 in Civil Case no 67 of 2019 made to the Respondent.
 - c) An Order of *Certiorari* to remove and/or bring to this Honourable Court and to quash proceedings of the 2nd Respondent in Civil Case No 67 of 2019 in respect to the Consent Order recorded on December 2, 2021 and issued on December 9, 2021 between Stanley Mbole Kathenge versus Agnes Syongaa Kamusina, Nzomo Kamusina, Stephen Wambua Musya, Thangu Kamusina & Musembi Musya.
 - d) That the cost of this Application is awarded to the *Ex parte* Applicant.

Brief Background

3. A brief background to the case is that the 1st Interested Party filed Chief Magistrates Civil Case no 67 of 2019 against the 2nd, 3rd, 4th and 5th Interested Parties and another party for recovery of Kshs 972, 000 a debt arising out of the sale of plot number 15 Mosa market within Kitui County. The *Ex parte* Applicant was not a party to the said suit. Judgment was entered against the Defendants in the said suit and execution proceedings commenced. That the execution proceedings were compromised by way of an Order by Consent recorded on December 2, 2021 and issued on December 9, 2021. It is necessary to set out the said consent order in full;
 1. That the defendants don't dispute that the Plaintiff purchased plot number 15 within Mosa market belonging to Musya Mutua (deceased) at a sum of Kenya Shillings Nine Hundred Thousand (Kshs 900,000/-) on May 20, 2019.



2. That since the said date the plot has never been transferred to the Plaintiff neither has been able to access the said plot the subject of this suit.
 3. That an order do and is hereby issued to the Defendants to hand over the said plot with immediate effect beginning December 2, 2021.
 4. That the 1st Defendant be and is hereby allowed to file for letters of Administration in order to transfer ownership of plot No 15 Mosa Market to the Plaintiff.
 5. That this decision has been reached since there are other parcels of land that have to be distributed to the other legal beneficiaries.
 6. That an order do and is hereby issued to the area chief Kitungute Location to issue a letter to the beneficiaries to enable them file a succession cause.
 7. That an order do and is hereby issued to the Defendant to allow the Plaintiff access the said plot the subject matter of this suit.
 8. That an order do and hereby issued to refrain one Musyoka Musya from interfering with the said plot the subject of this suit in any way or denying the Plaintiff access to the said plot subject of this suit..
 9. That an order do and is hereby issued directing one Musyoka Musya to remove all the restraints denying the Plaintiff access to the said plot the subject of this suit.
 10. That this consent has been executed voluntarily without any undue influence and as such should be adopted as an order of this Honorable court.
4. The *Ex parte* applicant filed an application by way of Notice of Motion dated December 8, 2021 seeking orders to enjoin the *ex parte* Applicant to the said suit, stay of execution of the consent orders and setting aside of the said orders and the said application is pending hearing and final determination having been stayed by an order of this court.
 5. There also exists a Succession Cause No 89 of 2019 (in the matter of the estate of Musya Mutua (deceased)) in which the *ex parte* Applicant is the Administrator and a Certificate for Confirmation of grant was issued on November 16, 2020 awarding the suit plot to him in whole.
 6. The 2nd Interested Party filed an application dated December 16, 2021 which seeks to preserve the estate and to prevent the *ex parte* applicant from disposing of properties of the estate. The Applicant further seeks revocation and/or rectification of the grant issued to the *ex parte* Applicant.

The Interest Parties submissions on the Notice of Preliminary Objection

7. The Interested Parties have jointly filed a Notice of Preliminary Objection dated March 4, 2022 based on grounds set out above, the 1st Interested Party filed written submissions and the 2nd, 3rd, 4th and 5th Interested Parties filed joint submissions.
8. On the question of whether the Court has jurisdiction, the 1st Interested Party relied on the case of *Samuel Kamau Macharia Vs KCB & 2 Others*, (2012) eKLR for the submission that

“ A Court's jurisdiction flows from either the *Constitution* or Legislation or both and that the court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law. He also relies on *The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd* (1989) KLR for the submission that a question of jurisdiction ought to be raised and decided at the earliest opportunity further that 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.

9. The 1st Interested Party claims that the 2nd Respondent is the court with jurisdiction to hear and determine this dispute since the value of the suit property falls within the pecuniary jurisdiction of the 2nd Respondent which was well exercised and the matter was well adjudicated upon. He further submitted that filing this Judicial Review Application before this Court when there are still pending and ongoing proceedings regarding the same subject matter and seeking similar reliefs in the lower court is tantamount to contradicting the parameters of jurisdiction. He therefore prays that the Court finds the Judicial review Application herein to be bad in law, incompetent, devoid of any merit and not disclosing any reasonable cause of action and the same should be dismissed.
10. The 2nd, 3rd, 4th and 5th Interested Parties associated themselves with the above submissions and reiterated that jurisdiction is either given by statute or the Constitution and the Court must confine itself within the parameters of its jurisdiction.
11. They submitted that it is disclosed that the land plot No 15 Mosi subject matter of CMCC No 67 of 2019 was registered in the name of Musya Mutua who is deceased and the *ex parte* applicant is the administrator vide succession cause No 89 of 2019. It is submitted that court does not have jurisdiction since the dispute is still ongoing before the Probate and Administration Court and this court lacks such jurisdiction over succession matters. They have reiterated that this court's jurisdiction is created under Article 162 (2) of the Constitution of Kenya 2010 and its jurisdiction is set out under Section 13 of the Environment and Land Court. They further submit that this court's jurisdiction to issue prerogative orders is limited to the jurisdiction given under Section 13 (2) of the act. They further claim that this court has no jurisdiction to issue orders under Article 22 and 23 of the Constitution.
12. They also submitted that the 2nd Respondent was exercising Judicial and not administrative function while taking proceedings and recording the consent order.
13. Lastly, they submitted that the impugned order was by consent of the parties and that the forum to dispute the consent order is the trial court. They therefore submit that the *Ex parte* Applicant's Notice of Motion Application is incompetent and ought to be struck out with costs.

The *Ex Parte* Applicants Submissions of the Preliminary Objection.

14. The *Ex parte* Applicant claims that the process that led to the decision of the 2nd Respondent was flawed tainted with illegality and that the 2nd Respondent overstepped his mandate. He states that he was denied his legal right to be heard despite him being the administrator in succession cause 89 of 2019.
15. The *Ex parte* Applicant states that the 2nd Respondent is still presiding over Civil Case No 69 of 2019 and a succession cause involving the suit land Parcel No 15 Mosa Market in respect to the Estate of Musya Mutua who is the registered owner of the property.
16. The *Ex parte* Applicant states that the allegations by the Interested Party that this Court lacks jurisdiction are unfounded, baseless and lack legal backing as this is not a succession matter but emanates for Chief Magistrate's ELC No 67 of 2019. Instead, the *Ex parte* Applicant states that this court has jurisdiction and is being asked to review the orders of the 2nd Respondent herein which were made following a process which is tainted by illegality, irrationality and impropriety.
17. He further submitted that the 2nd Respondent has a duty to exercise his powers fairly in good faith for the purpose it is meant for but submits that the powers were abused and that he engaged in illegality in arriving at the decision being challenged.



18. Section 9(1) of the Fair Administrative Action CAP provides that a person aggrieved by an administrative action may apply for Judicial Review of such a decision in the High Court or subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution 2010.
19. The *Ex parte* Applicant also urged the Court to find that the preliminary objection raised herein to be premature, frivolous, incompetent, devoid of merit and that the same be dismissed with costs.

The Respondent's Case

20. The Respondents filed Grounds of Opposition dated March 23, 2022 opposing the Judicial Review Application on grounds:
 1. That the application herein is unmerited, misconceived, vexatious, bad in law and therefore an abuse of the processes of the court.
 2. That the application herein is intended to curtail the statutory functions and powers of the 2nd Respondent herein.
 3. That the *Ex parte* Applicant in essence, seeks that this Honourable Court directs a Public Officer to exercise or not to exercise his/her statutory discretion in a particular manner hence usurp the said officer's authority.
 4. That the Application as presented offends the provisions of Article 160(1) of the Constitution of Kenya, 2010 and Section 6 of the Judicature Act Cap 8 Laws of Kenya.
 5. That the Applicant has not shown how the said order by the Honourable Chief Magistrate at Kitui Law Courts has been tainted by illegality and procedural impropriety.
 6. That in the circumstances and based on the foregoing reasons, the Notice of Motion Application dated February 28, 2022 is therefore devoid of any merit and the orders sought should not be granted.
 7. That the Applicant has not demonstrated sufficient cause for grounds upon which the court can grant the orders sought.
 8. The application is an abuse of the court process.
21. The Respondents' submissions are not on record.

Analysis and Determination

22. I have considered all the documents filed and submissions on record relating to the Notice of Preliminary Objection by the Interested Parties dated March 4, 2022. The test of the true definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors ltd (1969) EA 696*.

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

The Court went further to note that: -

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side



are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

23. The Preliminary Objection challenges the jurisdiction of this Court to hear and determine the application placed before it. I will start by restating the place of a challenge to the jurisdiction of this court and rely on the classic case of *The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* (1989) KLR 1. Where Nyarangi J A held as follows:

'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.'

24. This position was confirmed by the Supreme Court of Kenya where it was stated that a court's jurisdiction flows from either the *Constitution* or legislation or both. This was stated thus in the case of *Samuel Kamau Macharia Vs KCB & 2 Others*, (2012) eKLR:

"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"

25. The Environment and Land Court is a creation of Article 162(2) (b) of the *constitution* which mandated parliament to establish courts with the status of the High Court "to hear and determine disputes relating to the environment and the use and occupation of and title to land." Under sub-article 3, Parliament was mandated to legislate on the jurisdiction and functions of courts contemplated in Clause 2. Parliament indeed enacted the *Environment and Land Court Act* No. 19 of 2011 being the requisite legislation which spelt out the jurisdiction of this court. The Environment and Land Court's jurisdiction is highlighted in Section 13 of Act No. 19 which states that the court shall have original and appellate jurisdiction to hear and determine disputes in accordance with Article 162 (2) (b) of the *Constitution* and with the provisions of that Act or any other law relating to environment and land.

26. This court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. This court being in equal status to the High Court is subject to the provisions of Article 165 (b) of the *Constitution* which states thus:

"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 superior court."

27. In the case of *Republic -v- Karisa Chengo & 2 Others* (2017)eKLR, the Supreme Court stated as follows:

"51. Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the court's operation. Courts can therefore be of the same status, but exercise different jurisdictions....."



52.we therefore entirely concur with court of Appeal’s decisions that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165 (5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.....
80. In this case, it therefore follows that Angote J, appointed as a judge of the Environment and Lands Court, and not of the High Court, had no jurisdiction to determine criminal appeals.....”
28. From the brief summary and background information on this suit it is confirmed that the case number 67 of 2019 started as a claim for recovery of Kshs 972, 000 a debt arising out of the sale of plot number 15 Mosa market within Kitui County. Again from a look at the consent order issued in execution of the stated judgment shows that the suit was compromised by transferring title to and occupation of the plot subject matter to the proceedings to the 1st interested party. I do find that the consent order places the matter under the jurisdiction of this court since the same amounts to and relates to “the use and occupation of and title to land” as envisaged under Article 162 (2) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#).
29. The *Exparte* Applicant seeks orders of mandamus directed to stop the 2nd Respondent, 1st Interested Party, from executing, implementing the Consent Orders recorded on December 2, 2021 in Kitui Chief Magistrates Civil Case No 67 of 2019 or transferring Plot Parcel No 15 Mosa situated in Kitui. Further seeks an order of Prohibition against the respondents from enforcing the decree orders arising from consent order dated December 2, 2021. Lastly he seeks an Order of *Certiorari* to remove and/or bring to this Honorable Court and to quash proceedings of the 2nd Respondent in Civil Case No 67 of 2019 in respect to the Consent Order recorded on December 22021. In my view all the issues raised and prayers sought fall squarely within the jurisdiction of this court as described in Article 162 (2) (b) of the [Constitution](#) and Section 13 of the ELC Act.
30. With regard to the question of whether this court can deal with land that is subject matter of a succession cause, I note the following concerning that issue; that the Judicial Review application before me does not seek any orders relating to the succession cause. Further that a certificate for confirmation of grant had been issued and the property of the deceased distributed though there is a pending application to revoke the grant. In my view the mere fact that the land in dispute is the subject matter of a succession case does not oust the jurisdiction of this court. Jurisdiction of this court as donated under Section 13 of the Environment and Land Court is not exhaustive and under subsection 2 (e) it provides that “In exercise of its jurisdiction under Article 162(2)(b) of the [Constitution](#), the Court shall have power to hear and determine disputes (e) any other dispute relating to environment and land. “ In the case of Republic v Senior Principal Magistrate Shanzu & 5 others; [Two Thirds Investment Limited \(Interested Party\); Ex-parte Kalama Said Kalama & 40 others](#) [2020] eKLR the court dealt with a case whose subject matter was land but had emanated from criminal proceedings and stated;
- “ As already stated, Section 13 (1) of the [Environment and Land Court Act](#) gives the court original and appellate jurisdiction to hear and determine all disputes relating to environment and land. (emphasis mine). Such disputes are provided in Section 13 (2) of the ELC Act and what is set out thereon are not conclusive and therefore the court can hear any other dispute relating to the environment and land.



There is no denial that in the instant case, the proceedings complained of were undertaken in a criminal court. The dispute however, is over land plot Nos. MN/II/390 situate at Utange area within Mombasa County. Section 13 (7)(b) provides that this court shall have power to make any order and grant any relief as the court deems fit and just, including prerogative orders. The matter herein being an application for judicial Review orders arising from a dispute over land in my view, falls within the purview of Article 162(2)(b) of the constitution and the Environment and Land Court Act. In my view, it is irrelevant that the matter arose in a criminal court. As long as the dispute touches on land and environment, the court no doubt has the power to hear and determine the matter. I note that the constitution and the Environment and Land Court Act did not exclude the court's jurisdiction where the dispute relates to the environment and land. I therefore find that the judicial review application herein is properly before this court and the court has jurisdiction to determine the matter."

31. I therefore find that this court has jurisdiction to hear and determine this dispute notwithstanding that the land subject matter of the suit emanates from a succession Cause as long as the dispute touches on land.
32. The Interested Parties contend that the above orders sought by the *Exparte* Applicant can only be granted by the trial court in Kitui Chief Magistrates Civil Case No. 67 of 2019 and that there is indeed a pending application seeking the same orders before the Chief Magistrates Court. In my view the Interested Parties may be correct in the submission that the Magistrates court can deal with the application to set aside the orders made. However it is my finding that the mere fact that there is an application pending before the said court seeking to set aside the consent order does not of itself oust the jurisdiction of this court. As stated earlier this court has supervisory jurisdiction over the Magistrates courts and further under Section 13 (7) (b) the court has jurisdiction to issue Prerogative orders. The said section states as follows;

"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 prerogative orders;"

33. I therefore find that this court has jurisdiction to deal with the Notice of Motion application dated February 28, 2022 and the Notice of Preliminary Objection dated March 22, 2022 lacks merit and the same is hereby dismissed with costs to the Interested Parties.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF JUNE 2022

HON L G KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and virtually in the presence of-

C Nzioka Court Assistant

Mbaluka Advocate for Exparte Applicant

Kariuki Advocate holding brief for Chimau for the 1st and 2nd Respondents

Musyoki and Mwendwa Advocate for the Interested Parties

