



**Muli & others v County Commissioner, Mombasa & 4 others; Kenya Ports Authority & 2 others (Interested Parties) (Constitutional Petition 59 of 2015) [2024] KEHC 6649 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6649 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 59 OF 2015**

**OA SEWE, J**

**MAY 23, 2024**

**BETWEEN**

**RAPHAEL MULI & OTHERS ..... PETITIONER**

**AND**

**COUNTY COMMISSIONER, MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**OFFICER COMMANDING POLICE DIVISION (O.C.P.D) CHANGAMWE  
POLICE DIVISION ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER COMMANDING STATION (O.C.S) CHANGAMWE POLICE  
STATION ..... 3<sup>RD</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**KENYA PORTS AUTHORITY ..... INTERESTED PARTY**

**COUNTY COUNCIL OF MOMBASA ..... INTERESTED PARTY**

**COMMISSIONER FOR LANDS ..... INTERESTED PARTY**

**RULING**

- (1) The petitioners approached the Court *vide* their Petition dated 21<sup>st</sup> October 2015, which was later amended on 20<sup>th</sup> November 2015, contending that, at all material times, they were the occupants of the parcel of land known as LR MN/VI/3794 (hereinafter, the suit property) within the County of Mombasa. They averred that they obtained injunction orders on 8<sup>th</sup> March 2002 in connection with



- the suit property which they duly served on the parties. They further averred that the orders were extended from time to time by consent of counsel on record pending the hearing of the suit.
- (2) They were therefore aggrieved that, early morning on the 22<sup>nd</sup> September 2015, armed police officers under the command of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, accompanied by a group of youths who were armed with “rungus” and a bulldozer, encroached on their parcel of land and caused great damage by demolishing structures the suit property. They averred that the demolition was carried out despite the fact that the injunction orders were shown to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.
  - (3) In the circumstances, the petitioners filed the instant Petition alleging violation of their rights and fundamental freedoms as well as violation of various provisions of the Constitution. By way of reparation, they prayed for the following orders:
    - (a) A declaration that the demolition by the respondents is illegal, irregular and unprocedural and contrary to Articles 2, 10, 11, 19, 20, 21, 22, 23, 27, 28, 31, 40, 47, 50, 165(3)(b) and 258 of the Constitution and therefore null and void.
    - (b) A conservatory order prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents either by themselves, their agents, employees or persons working for and on their behalf or so delegated from interfering with the petitioner’s peaceful enjoyment of the suit property.
    - (c) A declaration that the petitioners herein and other members of the public are entitled to full enjoyment of the right to property, economic and social rights that are about to be violated and are already violated and award of compensation for the illegal demolitions and destructions.
    - (d) Any other relief/orders the Court deems just and appropriate against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and the necessary party for willful disobedience of a Court Order issued on 8<sup>th</sup> March 2002.
    - (e) Any other relief that the Court deems just and meet in the circumstances.
  - (4) The 1<sup>st</sup> interested party, Kenya Ports Authority, has since filed a Notice of Preliminary Objection dated 27<sup>th</sup> October 2023 contending that:
    - (a) The Court has no jurisdiction to hear and finally make a determination and/or any further orders on the hearing and determination of the Petition or order a transfer of the Petition to another Court by dint of Article 162(2)(b) as read with Article 165(5)(b) of the Constitution.
    - (b) By dint of Article 162(2)(b) of the Constitution of Kenya and Section 13(2) of the Environment and Land Court Act only the Environment and Land Court is vested with jurisdiction to give directions, hear and determine this Petition.
    - (c) The Petition falls short on the doctrine of res sub-judice under Section 6 of the Civil Procedure Act as there is a suit on the same subject matter pending determination under ELC No. 84 of 2002: Raphael Muli & Others v Kenya Ports Authority.
    - (d) By dint of the decision of the Court of Appeal in The Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] KLR1, Phoenix of EA. Assurance Co. Ltd v S.M. Thiga T/a Newspaper Service [2019] eKLR and the decision of the Supreme Court in R v Karisa Chengo & 2 Others [2017] eKLR the Petition ought to be dismissed with costs to the 1<sup>st</sup> interested party.
  - (5) The Preliminary Objection was urged by way of written submissions. To that end, Mr. Ondego for the 1<sup>st</sup> interested party relied on his written submissions dated 15<sup>th</sup> December 2023. He reiterated the grounds set out in the Notice of Preliminary Objection and addressed the Court on the twin issues



of whether the Court has jurisdiction to determine the Petition and whether the suit is res sub judice. Counsel relied on *Lady Justice Kalpana H. Rawal & 2 Others v Judicial Service Commission & 6 Others* [2016] eKLR, *Republic v Karisa Chengo & 2 Others* (*supra*) and *Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour Travel* [2016] eKLR to buttress his arguments.

- (6) In particular, counsel pointed out that their Preliminary Objection is premised on the pleadings filed by the parties, notably the Amended Petition and its Supporting Affidavit by which the petitioner adverted to the existence of Mombasa High Court Civil Case No. 84 of 2002 in which the order of 8<sup>th</sup> March 2002 was issued. He therefore submitted that the pendency of that earlier case is undisputed. At paragraphs 16 and 17 of the 1<sup>st</sup> interested party's written submissions, counsel attempted to demonstrate the similarity in both suits. He concluded his submissions by relying on *David Ndiu & Others v Attorney General & Others* [2021] eKLR for the proposition that it is vexatious and oppressive for a claimant to sue concurrently in two courts.
- (7) On his part, the petitioner filed written submissions dated 14<sup>th</sup> March 2024. His posturing was that the 1<sup>st</sup> interested party has misconstrued the nature of the Petition. He relied on Article 165(3)(b) of the Constitution, the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR and Rule 8(1) of the *Mutunga Rules* which provides that petitions for infringement of rights and fundamental freedoms be instituted in the High Court within whose jurisdiction the alleged violation took place.
- (8) The petitioner urged the Court to consider the age of this suit and whether it would be fair to dismiss it ten years down the line without a merit hearing. In his view, such a course would contravene the overriding objective of the *Civil Procedure Act* as espoused in Sections 1A and 1B thereof. In the alternative, the petitioner prayed for the transfer and consolidation of this suit with ELC No. 84 of 2002.
- (9) As has been pointed out herein above, the Preliminary Objection was raised by the 1<sup>st</sup> interested party. In Rule 1 of the *Mutunga Rules* the term "interested party" is defined as follows:

"interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation."

- [10] My considered view, therefore, is that such a party cannot be heard to seek the striking out of a suit, granted that the role of an interested party is fairly circumscribed. Indeed, the Supreme Court pointed out in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR that:

"A suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and *Rules*, under the *Civil Procedure Code*, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

- (11) Nevertheless, the centrality of the issue of jurisdiction cannot be overemphasized and can be taken suo motu by the Court. As was explicated in *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* [1969] E.A 696, a preliminary objection consists of:

"...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples



are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

- (12) Care should be taken so as not to miss the whole purpose of a preliminary objection, which was aptly captured in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR.

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

- (13) Thus, the issue of jurisdiction is indeed a proper subject to raise as a preliminary issue. In *Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 it was held:

“I think that 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 its stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

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- (14) Indeed, in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held that:

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of



law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

(15) Accordingly, Article 165(3)(b) of the Constitution is explicit that:

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

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;"

(16) Moreover, Sub-article (3)(d) adds that the High Court has jurisdiction:

"(d) ...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 Constitution of Kenya, 2010"

(17) It is plain therefore that, in so far as the Petition seeks declaratory orders for purposes of enforcing the constitutional rights and fundamental freedoms, the Petition is properly before the Court.

(18) It is nevertheless evident from the facts pleaded in the Petition that the dispute revolves around ownership of the suit property, LR No. MN/VI/3794. Consequently, the question of jurisdiction is based on two grounds; first, that this court lacks jurisdiction by dint of Article 162(2) (b) as read with Article 165 (5) (b) of the Constitution, on the ground that the suit herein ought to be heard by Environment and Land Court. Second, the Petition falls short in view of the doctrine of res sub judice as a suit of the same subject matter is pending before a court of concurrent status, namely, Mombasa ELC No. 84 of 2002: Raphael Muli & Others v Kenya Ports Authority. I propose to consider the Preliminary Objection on the basis of those two grounds:

A. On Article 162(2)(b) of the Constitution:

(19) Article 162(2)(b) of the Constitution stipulates that:

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

...

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

[20] Section 13 of the Environment and Land Court Act, on the other hand, provides thus with regard to the jurisdiction of the Environment and Land Court:



- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
  - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;
  - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - (e) any other dispute relating to environment and land
- (21) A perusal of the Petition confirms that the suit is hinged on a claim to ownership of the suit property. It follows therefore that although the High Court has jurisdiction to handle constitutional petitions generally, where the underlying issue is a dispute as to the ownership of land, the Court with jurisdiction is the Environment and Land Court. Article 165(5) of the Constitution precludes the High Court from determining matters falling within the jurisdiction of specialised courts, and vice versa.
- (22) Needless to add that the Environment and Land Court also has jurisdiction to interpret the constitution where the same arises in a matter relating to Articles 42, 69 and 70, of the Constitution (see Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others (Petition E004 & E002 of 2023 (Consolidated)) [2024] KESC 3 (KLR) (21 February 2024) (Judgment), a decision relating to the jurisdiction of the Employment and Labour Relations Court, a court of equal status to the ELC.

B. On *res sub judice*:

- (23) It is a peremptory requirement of Section 6 of the Civil Procedure Rules that:
 

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
- (24) The underlying rationale for this provision is not difficult to discern. It is to prevent courts of concurrent jurisdiction from simultaneously hearing two parallel suits in respect of the same subject matter. Hence, in Kenya Airports Authority v Anthony Mutumbi Wachira [2015] eKLR, the Court of Appeal took the following view:
 

“We think, as a matter of policy of the law that finds expression in Section 6 of the Civil Procedure Act for instance that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief



claimed. The sound object behind that policy is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits or proceedings in respect of the same subject matter in issue."

- (25) The existence of the previous suit was the bulwark of the Petition. It was pleaded not only at paragraph 5 of the Amended Petition, but also at paragraphs 2, 3 and 4 of the Supporting Affidavit. It is also significant that, at paragraph [d] of the petitioners' prayers, they asked for appropriate relief from the necessary party for willful disobedience of the Court Order of injunction issued in the prior suit on 8<sup>th</sup> March 2002.
- (26) Hence, counsel for the interested party pointed out the similarities in the two suits at paragraph 17 of his written submissions thus:
- (a) The parties are the same save for an inclusion of the County Commissioner and the police.
  - (b) The subject matter is the same, namely, LR No. MN/VI/3794.
  - (c) The cause of action is the alleged interference of the respondent to the detriment of the petitioners' quiet possession and enjoyment of the property.
  - (d) Prayer [d] of the Amended Petition seeks a just and appropriate relief as against the 1<sup>st</sup> to 4<sup>th</sup> respondent for the willful disobedience of the Court Order issued on 8<sup>th</sup> March 2002.
  - (e) The remedies sought are conservatory or injunctive orders as against the respondents from interfering with the quiet possession of the petitioner.
  - (f) The two matters are before courts of equal status.
- (27) It is therefore my finding that indeed, this Petition is untenable on the ground that it is sub judice. As to whether I ought to transfer it to the Environment and Land Court, Mombasa, for hearing and determination, it is now trite that a suit filed in a court without jurisdiction is not transferrable. In *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, the Supreme Court held (at paragraph 154):

"...as it was well elucidated in the case of *Kagenyi v Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law."

- (28) Likewise, in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, the Court of Appeal held that:

"Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself...It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity *ab initio* and was not transferrable



to another court; jurisdiction cannot be transferred by consent and ultimately, all orders emanating from that suit are null and void...”

(29) I have taken into account the plea by the petitioners to consider that this is a matter that has been pending since 2015 and that striking out may result in injustice. That cannot be the case. The petitioners acknowledged that ELC No. 84 of 2002 is still pending hearing and determination. They are therefore in a position to still raise all their concerns herein in that suit.

[30] In the result, it is my finding that indeed the Court lacks the jurisdiction to entertain this matter. The Petition is accordingly struck out with no order as to costs, granted the nature of the dispute.

31. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23<sup>RD</sup> DAY OF MAY 2024**

**OLGA SEWE**

**JUDGE**

