



**Macharia v Mainga, the Managing Director, Kenya Railways & another (Judicial Review Application E008 of 2024) [2024] KEHC 9128 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9128 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
JUDICIAL REVIEW APPLICATION E008 OF 2024  
PN GICHOHI, J  
JULY 22, 2024**

**BETWEEN**

**MONICAH WAMUHU MACHARIA ..... APPLICANT**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**PHILIP J MAINGA, THE MANAGING DIRECTOR, KENYA  
RAILWAYS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Under a certificate of urgency, the Applicant and through the firm of Githui & Co. Advocates, filed an Ex Parte Chamber Summons dated 04/03/2024 seeking orders:-
  1. Spent.
  2. That in the first instance, the applicant be granted leave to commence a motion of judicial review for orders of Mandamus to compel the Managing Director of the 2<sup>nd</sup> Respondent , Mr. Philip J Mainga and /or his successor in title to perform his statutory duty and settle the decretal sum on Nakuru ELC E026 of 2020 .
  3. That costs of this application to abide the outcome of the substantive application.
2. The grounds on the face of the application, and emphasised in the Supporting Affidavit sworn by the Applicant on 04/03/2024, are that the court in Nakuru ELC E026 of 2020 ordered the 2<sup>nd</sup> Respondent to pay to the Applicant a sum of Kshs. 45,000,000/= being damages for illegal demolition of the Applicant's property. That the said application was allowed and the 2<sup>nd</sup> Respondent ordered to deposit the decretal sum in an interest earning account within 90 days. However, the period lapsed but the 2<sup>nd</sup> Respondent had not complied with the conditions of stay.



3. It is stated that the 1<sup>st</sup> Respondent has a duty under Section 88 of the Kenya Railways Corporation to settle decretal sum without delay.
4. When this application came at the certificate stage, this court published directions on 09/04/2024 that:-
  1. There is no urgency in this matter.
  2. It is apparent that the subject matter of the application for judicial review was handled by the Environment and Land Court.
  3. The Applicant to attend Court on 22/04/2024 to clarify why the application should not be filed before the ELC.
5. On the stated date, Counsel notified the Court of having served the Respondent and upon being reminded what the matter was coming for, he sought a date to address the Court on the issue. He was granted that request and on 27/05/2024, both parties attended and both parties intimated that they had filed and exchanged submissions. Mr. Githui also confirmed having filed a Supplementary Affidavit and also 2<sup>nd</sup> Supplementary Affidavit on the issues raised by Respondent in their replying affidavit.
6. The only issue the parties were to address the Court on were specific in the directions given on 09/04/2024. It was simply:- “Whether this Court has jurisdiction to handle this application.”

#### **Applicant’s Position**

7. It is the Applicant’s position in both the Supplementary Affidavit and submissions that under article 162(2) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, the jurisdiction of the ELC court is limited to matters relating to occupation and use of land.
8. That the matter before this Court does not entail ownership, use or title to land and therefore, the issues herein fall perfectly within the domain of the High court and not the ELC court.
9. It is submitted that though Section 88 of *Kenya Railway Corporation Act* mandates the Managing Director to cause to be paid and without delay, such amounts as may be by judgment or decree awarded against the Corporation, the Section also bars attachment against the property owned by the Corporation.
10. In the circumstances, the Applicant argues that where a duty is imposed on a public body/public servant by a statute and he fails to perform it, the High Court in the exercise of its supervisory jurisdiction can issue an order of mandamus to compel him to perform that duty.
11. In support of that argument, the Applicant relies on Article 165 (6) of *the Constitution* , Section 26 of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules* to argue that jurisdiction to issue the orders sought lies on High Court and not Environment and Land Court. Further and in support of the argument, the Applicant relied on the Supreme Court decision in *Republic v Karisa Chengo & 2 others* [2017] eKLR and the Court of Appeal decision in *Sabina Moraa Swanya v Everly Kemunto Ontiri & another* [2021]eKLR which echoed the Supreme Court finding.
12. Further, the Applicant urged the Court to consider and find that the sole pre-dominant question Judicial Review and sole purpose of these proceedings is to compel the 1st respondent to perform his statutory duties . He urged the Court apply in this matter the test as endorsed by the Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others* [2017]eKLR.



## Respondents' Position

13. The Respondent submitted that it is not in issue that; the basis for pursuing the writ of mandamus is because the decree in Nakuru ELC No E026 of 2020 is yet to be settled; the said decree arose from proceedings before the Environment and Land Court; the proceedings were conducted by the said Environment and Land Court which derived its jurisdiction to sit and make orders under Article 162 (b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act*; and that the matter at the Environment and Land Court pertained use of land wherein the Applicant was awarded damages.
14. In the circumstances, it was submitted that the Environment and Land Court has jurisdiction to deal with applications of this nature in execution of judgments and/or decrees under Section 13 (5) (h) of the *Environment and Land Court Act*.
15. It was further submitted that Article 165 (5) (b) restricts this Court's power to handle matter reserved for the Environment and Land Court. It is their argument that this application is such matter that whose jurisdiction lies with the Environment and Land Court.
16. In support, the Respondents relied *Karisa Chengo & 2 others* (supra) where the Court of Appeal in distinguished the jurisdiction of the High Court, the Employment and Labour Relations Court and the Environment and Land Court and held that either court cannot handle matters whose jurisdiction is reserved for the respective courts as set out in the law, a finding that was affirmed by the Supreme Court in *Republic v Karisa Chengo & 2 others* (supra) .
17. Further, they relied on the holding by Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank and two others* (2012) eKLR that a court of law can only exercise jurisdiction conferred upon it by *the Constitution*, the Statute or both.

## Analysis and Determination

18. The issue of jurisdiction or want of it has long been stated in the celebrated case of *Owners of the Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi, J.A., (as he then was), and while relying, inter alia, on a treatise by John Beecroft Saunders titled "Words and Phrases Legally Defined" held as follows: -

“...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.”
19. That means that if this Court has no jurisdiction, it cannot proceed to handle issues on merit. A look at the affidavits by both parties reveals that the Replying Affidavit, sworn on 09/05/2024 by Stanely Gitahi Ag. General Manager Legal Services and Corporation Secretary of the 2<sup>nd</sup> Respondent on one side, and the 2<sup>nd</sup> Supplementary Affidavit sworn by Githui John Advocate for the Applicant on the other hand are clearly on merit of the application.
20. It is only in the Applicant's Supplantation Affidavit sworn on 14/04/2024 by Githui John Advocated for the Applicant, his submissions dated 24/04/2024 and the Respondent's submissions dated 23/05/2024 which have addressed the issue of jurisdiction and that is what this Court has focused on.



21. The issue of jurisdiction of courts was addressed in the case of *Samuel Kamau Macharia & Another* (supra) where the Supreme Court addressed the issue of jurisdiction of courts as follows:

“(68) 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. 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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the *Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. 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*.....”.

22. The authorities cited by both parties are apt but it is the interpretation of the provisions of the said authorities and the law differ in their rival submissions.

23. Indeed, and as parties rightly put it, the fact that Environment and Land Court and High Court are of equal status does not mean that ECL is High Court or vice versa. Flowing from that understanding, and having moved the Court under Order 53 rule 1, the Applicant wishes to capitalize on Order 53 rule 4 and 6 of the *Civil Procedure Rules* so as to argue that jurisdiction to issue the orders sought lies in High Court.

24. Order 53 of the *Civil Procedure Rules* which deals applications for Judicial Review provides:-

- “(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
- (3) ...
- (4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.
- (5) ...
- (6) On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been



served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.”

25. It is important to note that under Rule 2, the application shall be mad exparte before “a judge in chambers.” However , Rule 4 and 6 refer to “High Court.” However, it is this Court’s view that the said reference should no longer confuse parties. Indeed , the Court of Appeal in [Karisa Chengo & 2 others](#) (supra) made that distinction in respect of the ELC, ELRC and High Court and went on the say:

“In concluding this aspect of die matter, we reiterate that the High Court, the ELRC and ELC are courts of equal status, autonomous of each other and each exercises peculiar jurisdiction. They are not one and the same. Indeed, the provisions of Article 165(3)(a) leave no doubt that the High Couarl has unlimited original jurisdiction in criminal and civil mailers save those reserved for the two special courts.”

26. That was affirmed by the Supreme Court in [Republic v Karisa Chengo & 2 others](#)[2017] eKLR and further stated:-

“...Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of [the Constitution](#) intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.”

27. From the above, it is important to note undisputed fact that the genesis of this application is a suit filed by the Applicant against the 2<sup>nd</sup> Respondent in the Environment and Land Court being Nakuru ELC No. E026 of 2020 [Monica Wamuhu Macharia \(Being the administrator of the Estate of the late Peter Macharia Marianjugu\) v Kenya Railways Corporation](#).

28. The said Court was exercising its original jurisdiction pursuant to [the Constitution](#) and specifically, Section 13 of the [Environment and land Court Act](#) which provides that:-

- “(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.”

29. The parties need not belabour the point. The Environment and Land Court has powers to enforce its own judgment and decree arising from matters they have handled and to its logical conclusion. To argue otherwise would be contrary to settled law and elevating this Court to a level of superiority in ranking to the said Court untenable. Neither of the courts can supervise the other and neither High Court nor ELC can handle matters reserved for the other.
30. Filing such applications as this before High Court and in the circumstances would not only lead to unnecessary costs and also unnecessary backlog of cases.
31. In conclusion, this Court lacks jurisdiction to deal with this application and as a consequence then, the same calls for striking out. However, this Court is of the view that substantive justice would be served by a transfer of the matter rather than striking it out. In doing so, this court is guided by Court of Appeal decision in Prof. *Daniel Mugendi Vs Kenyatta University & Others, Civil Appeals No. 6 of 2012* where it held: -

“And in order to do justice in the event where the High Court, the Industrial Court or the Environmental Land Court Division comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar and equal status should in the spirit of harmonization effect the necessary transfers among themselves....”

32. It is for those reasons that this Court makes the following orders:-
1. The High Court Judicial Review No. E008 of 2024 Monicah Wamuhu Macharia -vs- Philip J. Mainga, The Managing Director, Kenya Railways & another be and is hereby transferred to the Environment and Land Court, Nakuru for determination.
  2. The file be urgently placed before the Presiding Judge of the Environment and Land Court Nakuru for further directions.

**DATED, DELIVERED AND SIGNED AT NAKURU THIS 22<sup>ND</sup> DAY OF JULY, 2024.**

**PATRICIA GICHOCHI**

**JUDGE**

In the presence of:

Mr. Githui for Applicant

Ms Moraa for the Respondents

Ruto Court- Assistant

