



Alugaya & 3 others v Cabinet Secretary of Energy and Petroleum & 2 others; Oil Marketer Companies (Interested Party) (Constitutional Petition E001 of 2023) [2023] KEHC 1614 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CONSTITUTIONAL PETITION E001 OF 2023
RM MWONGO, J
MARCH 10, 2023**

BETWEEN

**DUNCAN AGESA ALUGAYA 1ST PETITIONER
JAMES NDIRANGU NDURURI 2ND PETITIONER
DUNCAN MWENDA GICHUNGE 3RD PETITIONER
FESTUS KIPKOGEI KEMEI 4TH PETITIONER**

AND

**CABINET SECRETARY OF ENERGY AND PETROLEUM 1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT
COMPETITION AUTHORITY 3RD RESPONDENT**

AND

OIL MARKETER COMPANIES INTERESTED PARTY

RULING

Introduction

1. This Petition filed under certificate of urgency, challenges the authority and propriety of the Respondents in publishing oil supply importation rules. Specifically, it challenges the procedural propriety of Legal Notice No. 3 of 2023 (Petroleum Importation Rules) and Gazette Notice No. 15803 of December 23, 2022.
2. The Petition also challenges an international tender to exclusively award (an) international supplier a 100% market share of all the petroleum products consumable in Kenya.



3. The Petition was certified urgent on February 7, 2023 for purposes only of hearing the parties on the question as to the proper venue of the High Court with requisite jurisdiction to hear and determine the petition. This is the only issue to be determined in this ruling.
4. For this purpose the petitioner was directed to serve all the other parties, all of whom were ordered to appear before the Judge on the sole question posed by the court. Parties complied save for the 2nd respondent and the Interested Party. The hearing on the sole question was held on March 9, 2023.

Parties Submissions

5. The Petitioner submitted that this court as a High Court has original unlimited jurisdiction under article 165 of the Constitution:
 - a) in all criminal and civil matters (article 165 (3) (a))
 - b) to determine the question where right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened (article 165) (3) (b)).
 - c) To hear any question respecting the interpretation of the Constitution including the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of the Constitution (article 165) (3) (d)(ii)).
6. The Petitioner’s Counsel argues that he is aware of the territorial jurisdiction of the High Courts as spread out in various counties. He noted that the 1st petitioner (as indicated in the Petition), who deposed the supporting affidavit, resides in Kirinyaga as indicated in paragraph 1 thereof.
7. Counsel argued that the 2nd - 4th petitioners also reside in Kirinyaga and had given the 1st petitioner authority to file and depose on their behalf. However, no instrument to that effect was pointed to or exhibited.
8. Counsel for the 1st and 3rd respondents took a common position articulated by counsel for 1st respondents. He submitted that they were not served with the petition but became aware of it through their own contacts. They requested that they be served formally.
9. Counsel pointed out that in paragraph 1 of the substantive petition, the petitioners were described “as residing and working for gain in Nairobi”. This, he pointed out, indicated that the matter ought to be heard in Nairobi.
10. Counsel further referred to the “Mutunga Rules” on territorial jurisdiction. Rule 8, he said required a party to file where the alleged violation took place. He argued that whilst the petition raises human rights issues, these are ensconced in a commercial and procurement foundation. He urged that since tendering was done in Nairobi the file should be transferred there.

Analysis and Determination

11. Having carefully considered the parties rival submissions, I make the following observations and findings.
12. There is no doubt that the High Court, as an organ of state is endowed with original jurisdiction in all criminal and civil matters, save those vested in courts of equal status or the Supreme Court.



13. article 165 (1) of the [Constitution](#) which establishes the High Court, mandated that the High Court:
- “(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

To this end Parliament enacted The High Court (Organisation and Administration) Act No. 27 of 2015. (HCOAA).

14. The [HCOAA](#) for purposes of facilitating “reasonable and equitable access of the services of the court”, provides at section 12 for establishment of various court stations within the counties. Section 11 also establishes Divisions of the High Court for promoting effectiveness and efficiency in the administration of Justice.

15. Further section 25 of the [HCOAA](#) provides that:

“The court shall exercise its jurisdiction in accordance with the rules of practice and procedure prescribed by written law”.

16. In civil matters, where the question arises as to where a matter ought to be filed, the first port of call is the [Civil Procedure Act](#). Sections 11-17 COA cover the issue “Place of suing” for different kinds of suits. Section 15, however, provides:

“ 15 Subject to the limitations aforesaid; every suit shall be instituted in a court within the local limits of whose jurisdiction -

- a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
- b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
- c) the cause of action, wholly or in part, arises.

17. In essence, the defendant’s or respondent’s domicile should be considered in determining where to file a suit in the High Court.

18. In matters of constitutional litigation, [the Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013, (“The Mutunga Rules”) provide as follows:

“ 8

- (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.
- (2) Despite subrule (1) the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party”.



19. Given all the foregoing provisions, there can be no doubt that this court has original civil jurisdiction to entertain the petition. However, the *HCOAA* having created Divisions and Stations of the court for efficiency and effectiveness of the administration of justice, demands that exercise of jurisdiction by the court be in accordance with written rules of practice and procedure.
20. This takes us to the Mutunga Rules and the *Civil Procedure Act*. These demand that the suit be instituted either where the alleged violation took place or at the defendant's place of residence.
21. In the present scenario, the petition shows that the defendants are likely domiciled in Nairobi, and the Petitioner is resident in both Nairobi (paragraph 1 Petition) and in Kirinyaga (paragraph 1 supporting affidavit).
22. Applying the written law, I find and hold that the appropriate court to handle this Petition is the Constitutional Division of the High Court, Nairobi.

I therefore direct as follows:

- a. That the file be mentioned before the Presiding Judge, Constitutional Division on Tuesday March 14, 2023.
 - b. That the petitioner do file evidence of service of the petition.
 - c. That the petitioners rectify the names of the petitioners in the certificate to conform to those in the Petition.
23. Orders Accordingly.

DELIVERED AT KERUGOYA THIS 10TH DAY OF MARCH, 2023

R. MWONGO

JUDGE

Delivered in the presence of:

Mwangi Ndegwa for Petitioners.

Nura for 1st Respondent.

Ms. Maina holding brief for Omari for Competition Authority.

Gichigo instructed by Interested Party.

