



**Kundu v Director of Public Prosecutions (Constitutional Petition
E001 of 2023) [2023] KEHC 23343 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E001 OF 2023
AC MRIMA, J
OCTOBER 12, 2023**

BETWEEN

EVANS KUNDU PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

1. The Petitioner herein, Evans Kundu, filed a Petition dated 17th January, 2023 challenging his prosecution in several anti-corruption cases pending before the Anti-Corruption Courts in Nairobi. The cases related to the dealings at the National Youth Service in Nairobi.
2. Citing various contraventions of *the Constitution* and the law, the Petitioner sought for the following reliefs in the Petition: -
 - a. A declaration that prosecution of the Petitioner in coinciding and corresponding trials using similar category of evidence via Anti-Corruption chief Magistrate at Milimani ACC Nos.8,10 and 11, Republic v Lilian Omollo & Others amounts to unfair trials and violates article 50(1) and (2) read with 157 of *the Constitution*.
 - b. A declaration that the trial of the Petitioner outside the 24 months provided for by section 62 of the *Anti-Corruption and Economic Crimes Act* violates the principle of rule of law and is unlawful.
 - c. A judicial review order of certiorari quashing Chief Magistrate Court at Milimani ACC Nos.8, 10 and 11 of 2018, Republic v Lilian Omollo & Others.
 - d. General damages for exposure of the Petitioner to unfair trials via Milimani ACC Nos.8, 10 and 11 of 2018, Republic v Lilian Omollo & Others.



- e. Any other or further relief that this court will deem appropriate to grant.
 - f. Costs of this suit.
3. The Petition was fiercely opposed by the Respondents on two fronts. First, by way of a Notice of Preliminary Objection dated 7th February, 2023 and, second, by an evenly dated Replying Affidavit sworn by one Hellen Mutellah, a Senior Principal Prosecution Counsel.
 4. On the directions of this Court, the Notice of Preliminary Objection was first heard, hence this ruling.

The Objection:

5. The Notice of Preliminary Objection was tailored as follows: -
 1. That this honourable court lacks/should not entertain the petition dated 2nd February, 2023 as the cause of action/offences in the matter arose in Nairobi with other accused persons and witnesses based in Nairobi.
 2. That there is established a High Court Anti-Corruption and Economic Crimes Division vide Gazette Notice No.9123 dated 11th December, 2015.
 3. That the scope of the said division is to among others to hear/entertain/determine all petitions and judicial review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crime related matters vide special issue Vol.CXVIII.153 Gazette Notice No.10263 of 9th December, 2016.
 4. That the petition herein is wrongly filed contrary to Gazette Notice No.7262 on the Practice Directions for the Anti-Corruption and Economic Crimes of the High Court which provides that all new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination.
 5. That the issue raised by the Petitioner in regard to section 62 of the Anti-Corruption court was settled in the High Court of Kenya at Nairobi Anti-Corruption and Economic Crimes Division ACEC Revision Application No.E001 of 2022, Lilian Mbogo Omollo Versus Republic.
 6. That the petition herein falls outside the honourable court's territorial jurisdiction.
6. The objection was dealt with by way of written submissions. Each party duly obliged.

Analysis:

7. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.
8. From the objection, the parties' pleadings, depositions and submissions, two issues arise for determination. They are: -
 - i. Whether the Preliminary objection is sustainable in law.



- ii. If the answer to (i) is in the affirmative, whether the Court has jurisdiction over the instant dispute.

9. I will deal with the issues in seriatim.

Whether the objection is sustainable in law:

10. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.

11. To that end, the locus classicus decision in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* (1969) E.A 696 at page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, 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.

...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.

12. The Supreme Court weighed in on the issue in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others* [2015] eKLR and stated thus: -

.... Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

13. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit v West End Distributors case (supra)* in Civil Suit No. 85 of 1992, *Oraro v Mbaja* [2005] 1 KLR 141 when he observed as follows: -

.... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed....

14. In *John Musakali v Speaker County of Bungoma & 4 others* (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....



15. Finally, in *Omondi v National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....
16. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in Petition No. 7 of 2013 *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.
17. The objection in this case fiercely challenges the jurisdiction of this Court. As such, and going by the decision of the Supreme Court in *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others* case (supra), jurisdiction being a pure point of law ought to be determined at the earliest possible moment.
18. Therefore, the objection has been properly raised.

Whether the Court has jurisdiction over the instant dispute:

19. The Respondent vehemently submitted that this Court lacks jurisdiction over this matter by dint of Practice Directions issued by the Honourable Chief Justice which established the Anti-Corruption and Economic Crimes Division of the High Court in Nairobi.
20. The Respondent, therefore, urged this Court to down its tools and refer the matter to the Anti-Corruption and Economic Crimes Division of the High Court in Nairobi.
21. Perhaps, it is imperative to look at the concept of jurisdiction and how the High Court derives its mandate.
22. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 *Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others* consolidated with Civil Appeal No. 139 of 2017 *County Government of Embu & Another v Eric Cheruiyot & 15 Others* (2022) KECA 15 (KLR) had the following to say on the aspect of jurisdiction: -
 36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance,



or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

36. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders 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.

36. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
36. The Supreme Court in *In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011* held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

36. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held 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 itself jurisdiction exceeding that which is conferred upon it by law.

23. Returning to the matter at hand, the High Court and its jurisdiction is provided for under Article 165 of *the Constitution* as follows: -

165. High Court

(1) There is established the High Court, which—

- (a) shall consist of the number of judges prescribed by an Act of Parliament; and



- (b) shall be organised and administered in the manner prescribed by an Act of Parliament.
- (2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction 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
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162(2).
- (6) 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 a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred



to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

24. *The Constitution* does not create any Divisions of the High Court. In other words, the High Court is one throughout the country. The Divisions of the High Court were created by the Hon. Chief Justice pursuant to various Practise Directions.
25. Courts have variously dealt with the purpose of the practise directions. In *Hadija Mlao Mlingo v Director of Public Prosecutions & 3 others; Wilberforce Malanga Wambulwa & 5 others (Interested Parties) [2020]* eKLR, the High Court in Mombasa faced with an application to transfer a Constitutional Petition seeking to challenge a criminal case filed at the Chief Magistrates Anti-Corruption and Economic Crimes Court in Mombasa had the following to say: -

17. However, for clarity purposes in Nairobi High Court Constitutional Petition No. 534 of 2016 *Peter Wanyama Manyonge v Chief Justice of the Republic of Kenya & 5 others* the 2016 Practice directions were challenged as unconstitutional only for the requirement that all matters be filed in Nairobi. They were not declared unconstitutional. The Court pursuant to a consent recorded by the parties directed that Rule No.2 of the Practice Directions dated 09/12/2016 vide Gazette Notice No. 10263 be amended to allow the Chief Justice to establish sub registries outside Nairobi. Consequently, the 2016 Practice Directions were indeed amended vide Kenya Gazette Notice No. 7262 of 2018 being the 2018 Practice Directions.

18. My considered view is that this Court has unlimited original jurisdiction in criminal and civil matters by virtue of powers conferred to the High Court under the provisions of Article 165(3) of *the Constitution* of Kenya, 2010.

19. In the case of *Ethics and Anti-Corruption Commission & another v William Baraka Mtengo & 4 others* [2017] eKLR the Court had the occasion to consider the argument that the Practice Directions have taken away the jurisdiction of the High Court and observed as follows:

The Respondent contends that the said Practice Directions have taken away the jurisdiction of this Court and that the Chief Justice has no power to take away jurisdiction from the High Court. I entirely agree with the Respondent that the Chief Justice has no authority whatsoever to take away jurisdiction from any court or to confer jurisdiction to any Court.

20. Further in the case of *Shakeel Ahmed Khan & another v Republic & 4 others* [2019] eKLR the Court in agreement with the William Baraka Mtengo case (supra) observed that:

The Chief Justice as head of the Judiciary has power under Section 16 of the *High Court (Organization and Administration) Act* to establish sub-registries of the ACEC Division and indeed full ACEC divisions outside Nairobi. The failure to do so has in my view the net effect of stripping the High Court in stations outside Nairobi of the jurisdiction conferred upon it by *the Constitution*.

21. I totally agree. However, I will appraise Direction 4 of the Practice Directions. It lays down the overriding objective of the Practice Directions which is the just, expeditious, proportionate and accessible adjudication of disputes related



to corruption and economic crimes. This leads to the conclusion that the Practice Directions, were among other things, intended to aid the efficient and timely disposal of the matters identified therein. To that extend, I agree with the Respondent/Petitioner that the overriding objective of the Practice Directions of the Anti-Corruption and Economic Crimes Division of the High Court and the Constitution of Kenya, 2010 is to have expeditious and accessible dispensation of justice to all parties.

22. Whereas the Constitution at Article 48 requires that justice be accessible, the same Constitution at Article 159(2)(b) demands that justice shall not be delayed. Time and again this court has held the preposition that the right to access justice ought to be balanced with the need to ensure that justice should not be delayed. As earlier noted, the subject of the Petition herein is the continued prosecution of the Petitioner in Mombasa Chief Magistrate's Court Anti-Corruption Case No. 10 of 2011. To now direct that the matter be transferred to the Anti-Corruption and Economic Crimes Division in Nairobi would in my view delay the hearing of the same. Likewise, the intention of the Practice Directions to facilitate the efficient and timely disposal of the matter would be defeated. If the sub registries or divisions are not established outside Nairobi, the Practice directions will not only fly in the face of the Constitutional imperative that Justice shall not be delayed, but will also increase the cost of justice.
23. For the reasons stated in this Ruling, allowing this application will militate against the overriding objective of the very practice directions of the just, expeditious, proportionate and accessible adjudication of disputes related to corruption and economic crimes. The upshot of the foregoing is that I disallow the 2nd Respondent/Applicant's Application dated 10/06/2019. Parties shall fix a hearing date for the petition at registry on priority basis.
26. The above rendition aptly captures the correct position on the High Court. Unless and until the Hon. Chief Justice establishes the Divisions of the High Court as called upon by law throughout the country, the Practise Directions cannot operate to oust the jurisdiction of the High Court bestowed upon by the Constitution.
27. Further, Courts must remain alive the constitutional-calling to expedite disposal of cases and enhance access to justice. If all Constitutional Petitions and other matters in the High Court in Kenya arising from criminal cases filed within the Anti-Corruption and Economic Courts in the Magistracy are to be heard in the Anti-Corruption and Economic Courts Division of the High Court in Nairobi, then that will effectively mean that the matters are likely to stay in Court for so long. I say so because the Anti-Corruption and Economic Courts Division of the High Court in Nairobi has overtime been mostly handled by one Judge.
28. The High Court stations outside Nairobi and where the Anti-Corruption and Economic Courts Divisions of the High Court are yet to be established should, therefore, exercise unhindered jurisdiction over matters challenging anti-corruption and economic crimes cases filed in the Magistrates Courts which the High Court stations exercise supervisory jurisdiction over.
29. Having so said, this Court is alive to the fact that the above position must have exceptions. One of the exceptions may be instances where some anti-corruption and economic crimes matters are instituted in a Magistrates Court and then one or more of the parties files a Petition or an application challenging



the prosecution of those cases in a different High Court station from the one which ordinarily exercises supervisory jurisdiction over the Magistrates Court where the anti-corruption and economic cases are instituted.

30. Likewise, where there are several accused and some or all decide to file Petitions or applications challenging the prosecution in different High Court stations, then the exception must be upheld.
31. In this case, the Petitioner was charged in several anti-corruption and economic crimes cases in Nairobi alongside many other co-accused. The cases are at an advanced stage of hearing. There were also some previous challenges to the prosecution of the cases which were taken up before the Anti-Corruption and Economic Crimes Division of the High Court in Nairobi. Further, it is imperative to note that the High Court of Kenya at Kitale does not exercise supervisory jurisdiction over Magistrates Courts in Nairobi.
32. The Petitioner, aware of all that, opted to file his Petition before the High Court of Kenya in Kitale. Resulting from the above discussion, this matter is, therefore, rightly captured by the exceptions to the general rule that the High Court stations where the Anti-Corruption and Economic Crimes Division of the High Court are yet to be established have jurisdiction over Petitions challenging anti-corruption and economic crimes cases instituted within Magistrates Courts in the areas where the High Court exercises supervisory jurisdiction.
33. This is a matter in which proper case management calls for it to be dealt with before the Anti-Corruption and Economic Crimes Division of the High Court in Nairobi.
34. Consequently, the following orders do hereby issue: -
 - a. The Notice of Preliminary Objection dated 7th February, 2023 is hereby upheld.
 - b. This matter is hereby transferred to the Anti-Corruption and Economic Crimes Division of the High Court in Nairobi for further dealing.
 - c. Once the Court file is received at the Anti-Corruption and Economic Crimes Division of the High Court in Nairobi, the Hon. Deputy Registrar shall fix it, with notice to parties, for directions before the Presiding Judge.
 - d. Costs of the objection shall be in the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 12TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Dr. Okubasu, Learned Counsel for the Petitioner.

Miss. Mutellah, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

