Nyambu v Munza & 4 others (Petition E038 of 2024)
[2024] KEHC 12101 (KLR) (2 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12101 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E038 OF 2024

OA SEWE, J

OCTOBER 2, 2024

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 22, 23, 40,43,47,50 & 165 (3) (B) OF THE CONSTITUTION OF KENYA

BETWEEN

JOSEPH MWAMBILI NYAMBU ..... PETITIONER

AND

CLINTON MWAKAVI MUNZA ..... 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER MOMBASA ..... 2ND RESPONDENT

ASSISTANT COUNTY COMMISSIONER MOMBASA ..... 3RD RESPONDENT

O.C.S CHANGAMWE POLICE STATION ..... 4TH RESPONDENT

O.C.S RAILWAYS POLICE STATION ..... 5TH RESPONDENT

RULING

1. Along with his Petition, the petitioner filed the Notice of Motion of dated 28th June 2024 seeking the following orders:

   (a) Spent

   (b) That pending the hearing and determination of the application, the Court be pleased to grant a temporary injunction restraining the respondents by themselves, their agents, servants, representatives or any other person acting on their behalf from interfering with the running of the petitioner's business, impounding his motor vehicle registration number KDL 330N, contacting his clientele, writing threatening letters/demands, evicting the petitioner from all that premises known as MNR/500-Reference No37574 at Changamwe, harassing, arresting,

or visiting his business premises and/or acting in any other manner which infringes on the petitioners' rights to freedom of movement and/or own property.

(c) That pending the hearing and determination of the Petition, the Court be pleased to grant a temporary injunction restraining the respondents by themselves, their agents, servants, representatives or any other person acting on their behalf from interfering with the running of the petitioner's business, impounding his motor vehicle registration number KDL 330N, contacting his clientele, writing threatening letters/demands, evicting the petitioner from all that premises known as MNR/500-ReferenceNO 37574 at Changamwe, harassing, arresting, or visiting his business premises and/or acting in any other manner which infringes on the petitioners' rights to freedom of movement and/or own property.

(d) Any other relief the Court deems fit and just in the circumstances.

(e) That costs of the application be provided for.

2. The application was filed pursuant to Articles 22, 23, 40, 165(3)(b) of the Constitution, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules and all other enabling provisions of the law. The petitioner explained that he is the proprietor/director of Coast Bin Enterprises Limited, a company situated at Changamwe in Mombasa County. He averred that the company is engaged in the business of shredding waste polythene, plastic and paper for recycling.

3. The petitioner further averred that, on the 14th March 2024, officers from the Sub-County Public Health Office, Changamwe, visited his business premises for purposes of routine inspection. Thereafter, they prepared a report which alleged that the petitioner was not disposing of the waste as required; and that he was dealing in used medical equipment. On the basis of these findings, which the petitioner disputed, the public health report recommended that the premises be vacated. He added that he was arrested and detained by police officers from Changamwe Police Station before being charged and arraigned before court vide Mombasa Criminal Case No. E980 of 2024: Republic v Joseph Mwambile Nyambu.

4. The petitioner annexed the pertinent documents to his Supporting Affidavit. They include a copy of the report aforementioned, permit to handle garbage and notice to vacate. He explained, that he obtained a bank loan to start the subject business and therefore he stands to suffer irreparable harm should the orders sought not be granted to him.

5. In response to the application the 1st respondent, Clinton Mwakavi Munza, filed a Notice of Preliminary Objection dated 12th July 2024 on the grounds that:

(a) The Petition does not meet the threshold for a constitutional petition as set out in Anarita Karimi Njeru Case.

(b) The Petition is otherwise frivolous and an abuse of the court process.

(c) The Petition is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore unsustainable in the obtaining circumstances.

6. The 1st respondent also filed a Replying Affidavit sworn on 12th July 2024. He averred therein that he is the owner of the suit premises; and that on the 19th January 2024 he noted the presence of solid and liquid waste material dumped upon the premises. He therefore made a complaint to the Changamwe Sub-County Public Health Office for inspection to be done. Upon investigations being done, it turned out that the petitioner's company was conducting its business in contravention of the *Public Health*

Act and *Environmental Management and Co-ordination Act* (EMCA), Chapter 387 of the Laws of Kenya. The 1st respondent also mentioned that, in the Public Health Report, a recommendation for relocation from the residential area to an ideal site was made.

7. The 2nd, 3rd, 4th and 5th respondents also opposed the application. They filed Grounds of Opposition dated 9th July 2024, contending that:

   (a) The application for a temporary injunction is not in the interest of the public as it seeks continuation of business that is subject to orders of improvement under the Environment Management and Conservation Act (EMCA).

   (b) The orders for a temporary injunction are moot and in vain since there already exist orders under the EMCA preventing continuation of the said business.

   (c) The application for temporary injunction and the Petition in general is an attempt at forum shopping for orders to circumvent the National Environment Authority (NEMA).

   (d) The protection from eviction in respect of business premises lies with the Business Premises Rent Tribunal (BPRT) and therefore the application has been filed in the wrong forum.

   (e) The balance of convenience lies against the petitioner.

8. The 2nd, 3rd, 4th and 5th respondents also filed a Replying Affidavit sworn by PC George Engalu, deposing to the factual aspects of the case in support of the Grounds of Opposition aforementioned. In addition, they filed a Notice of Preliminary Objection dated 12th July 2024 on the following grounds:

   (a) That the High Court's Constitutional and Judicial Review Division lacks jurisdiction to hear a matter on environmental issues, as the same is granted to the Environment and Land Court (ELC) under Article 162(2)(b) of *the Constitution*.

   (b) That the petition and application offend the doctrine of constitutional avoidance as the petitioner has not approached the National Environment Tribunal (NET) under Section 129(1)(e) of the EMCA to overturn the Improvement Order.

   (c) That the petition and application offend the doctrine of constitutional avoidance as the petitioner has not approached the NET under Section 129(1)(a) of EMCA to claim that a licence has been denied.

   (d) That the petitioner violates the doctrine of constitutional avoidance as there exists a dispute resolution mechanism under the Landlord and Tenants (Shops, Hotels, Catering Establishments) Act, Chapter 301 of the Laws of Kenya.

   (e) That the protection from eviction in respect of business premises lies with the Business Premises Rent Tribunal and therefore the application has been filed in the wrong forum.

9. On account of the foregoing, the respondents prayed for the dismissal of the Petition with costs. Granted the nature of the Preliminary Objections, directions were given on 15th July 2024 that they be given priority and that they be canvassed by way of written submissions. Accordingly, the 1st respondent filed written submissions erroneously dated 16th May 2024. He made reference to the cases of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 and Samuel Kamau Macharia & anetoher v Kenya Commercial Bank Ltd & 2 others [2012] eKLR on jurisdiction and urged the Court to down its tools.

10. The gist of the 1st respondent's arguments on jurisdiction was that the Petition does not meet the threshold for a constitutional petition as set out in the case of Anarita. He relied on Mumo Matemu v

Trusted Society of Human Rights Alliance & others [2014] eKLR and Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR in which the Supreme Court restated the principle of the Anarita Case, among other authorities.

11. The 1st respondent also submitted that there are alternative dispute resolution mechanisms available which the petitioner could have used before seeking the intervention of this Court. In particular, the 1st respondent submitted that, in addition to the Business Premises Disputes Tribunal, the petitioner had the option of approaching the NET for redress. In his view this Court does not have the jurisdiction to determine this matter.

12. On behalf of the 2nd, 3rd, 4th and 5th respondents, their counsel, Mr. Penda, filed written submissions dated 16th July 2024. They relied on Article 162(2)(b) of the Constitution, Section 13 of the *Environment and Land Court Act* and the case of Republic v Karisa Chengo & 2 others [2017] eKLR as to the distinct demarcation of the jurisdiction of the High Court and the ELC.

13. The 2nd, 3rd, 4th and 5th respondents also relied on the doctrine of constitutional avoidance and submitted that the dispute is one that can be resolved without invoking the constitutional jurisdiction of the Court. In particular, they pointed out that, since the dispute as to whether or not the petitioner should be evicted from the suit premises, the petitioner ought to have approached the BPRT for redress instead of this Court.

14. 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."

15. The Supreme Court had occasion to express itself on the purpose of a preliminary objection in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR. Here is what the apex court had to say:

> (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."

16. Needless to mention that the issue of jurisdiction is indeed a proper subject to raise as a preliminary issue. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, it was held:

> ...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 tools in respect of the matter before it the moment it holds that it is without jurisdiction..."

17. Additionally, the Supreme Court in the case of Ngugi v Commissioner of Lands; Owindo & 63 others (Interested Parties) (Petition 9 of 2019) [2023] KESC 20 (KLR) (Civ) (31 March 2023) (Judgment) held:

> 36. Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity...
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> 37. It is, therefore a basic rule of procedure that jurisdiction must exist when the proceedings are initiated. Because the question of jurisdiction is so fundamental, a limitation on the authority of the court, it can be raised at any stage of the proceedings by any party or even by the court suo motu. As a matter of practice, this court has a duty of jurisdictional inquiry to satisfy itself that it is properly seized of any matter before it.
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> 38. It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by *the Constitution* or statute. It cannot be conferred by judicial craft. See Samuel Kamau Macharia & another v Kenya commercial Bank &2others, SC Application No 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.

18. Jurisdiction is donated either by *the Constitution* or Statute and is therefore not left to conjecture or judicial craft. The Supreme Court made this clear in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR, thus:

> ...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*. Where *the Constitution* confers power upon 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..."

19. With the foregoing in mind, I have perused the Petition dated 28th June 2024. It alleges infringement of the petitioner's rights under Articles 29, 40 and 43 of the Constitution. In the circumstances, there can be no doubt that, by dint of Article 163(3)(b) the Court has jurisdiction to entertain and determine the Petition. However, *the Constitution* also creates co-equal courts to the High Court with jurisdiction as spelt out in Article 162(2) thereof. One of them is the ELC. And, in this respect, Article 165(3)(5) of *the Constitution* is explicit that:

> 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)."

20. In the light of the foregoing, the two issues for determination that cuts across the two Notices of Preliminary Objection are:

(a) Whether the Petition is compliant in terms of the requirement for specificity as enunciated in Anarita Karimi Njeru case.

(b) Whether the Petition was wrongly filed before this Court, in the light of the doctrine of constitutional avoidance.

(c) Whether the Court has jurisdiction to hear and determine the Petition and the interlocutory application filed therewith given the predominant nature of the dispute.

A. On the Requirement for Specificity:

21. It is now a well settled principle that a litigant approaching the constitutional court for redress must plead his case with reasonable precision. In Anarita Karimi Njeru v Republic (supra) the Court of Appeal held:

> ...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

22. The principle was affirmed by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR as hereunder:

(42) ...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

23. The petitioner set out the background of the Petition and the legal basis thereof in addition to the prayers sought. At paragraphs *17* and 18 the petitioner pleaded Articles 29, 39, 40 and 43 of the Constitution as the provisions underpinning his Petition. He however did not state, alongside those provisions, in what way those provisions were violated by the respondents. Instead the information was given in conjunction with his prayers, particularly prayers 1 and 2. The petitioner also supplied particulars of what he labelled as "collusion, malice, ill blood by the respondents, their agents, servants and/or associates" at paragraph 16 of the Petition. To my mind there was sufficient compliance with the requirement for reasonable precision, bearing in mind that, in Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, it is recognized that:

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."

24. I am therefore in agreement with the expressions of Hon. Odunga, J. (as he then was) in Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR that:

> On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation..."

25. Indeed, in Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR, the Court of Appeal pointed out that:

> ...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

26. It is noteworthy that, in this respect, the Court of Appeal reiterated the viewpoint taken by a 3-judge bench of the High Court in Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR in which it was held that:

> We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case..."

27. Thus, it is my considered finding that the Petition is indeed compliant as to specificity.

B. On the doctrine of avoidance:

28. The doctrine of avoidance was well-discussed by the Supreme Court in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR (29th September 2014) (Judgment) thus:

> (256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional CourtKentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
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> > "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."
>
> (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).
>
> (258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court..."

29. In the case of K K B v S C M & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Hon. Mativo, J. (as he then was) also expressed himself on the doctrine as hereunder:

> In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause..."

30. Further in the case of *Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020)* [2022] KEHC 287 (KLR) (27 April 2022) (Judgment) Hon. Mativo, J. (as he then was) indicated:

> 27. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.
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> ...
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> 29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system..."

31. Needless to mention that the doctrine of constitutional avoidance does not, of itself, divest this Court of the jurisdiction to hear and determine Constitutional Petitions. The doctrine only serves to restrain the court from hearing and determining a matter where there exists another appropriate forum that can hear and determine the matter more effectively. I say so because 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;"

32. 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—
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> (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*"

33. The Petition seeks declaratory orders for purposes of enforcing the constitutional rights under Articles 19, 29, 39, 40 and 43. Prima facie, these are grievances that can only be enforced by way of a constitutional petition and are valid causes for complaint against the Government. However, as against an individual such as the 1st respondent, questions have been posed whether such an action is tenable where other remedies lie? In this instance there can be no doubt that the petitioner could have approached the BPRT or the NET for more efficacious interventions.

34. I am therefore in full agreement with the position taken by Hon. Lenaola, J. (as he then was) in Patrick Mbau Karanja v Kenyatta University [2012] eKLR thus:

> I should only say this as I conclude; in Francis *Waithaka -vs- Kenyatta University Petition No. 633 of 2011*, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in Teitinnang -vs- Ariong (1987) LRC (const.) 517 where it was held as follows: -
>
> > "Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. *The Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by *the Constitution* under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of *the Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold".

35. Hon. Lenaola, J. further stated:

> I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights."

36. Hon. Chacha, J. was of a similar view in Godfrey Paul Okutoyi & others v Habil Olaka & Another [2018] eKLR, thus:

> "65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure."

37. I am therefore of the finding that the doctrine of constitutional avoidance is applicable to the facts of this case as pleaded by the petitioner.

C. On the predominant issue and whether this Court has the jurisdiction to entertain the Petition:

38. As has been pointed out herein above, Article 165(5)(b) of the Constitution states in peremptory terms that:

> (5) The High Court shall not have jurisdiction in respect of matters: -
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> ...
>
> b) Falling within the jurisdiction of the courts contemplated in Article 162(2).

39. Section 13 of the *Environment and Land Court Act*, 2011, an Act of Parliament enacted pursuant to Article 162(2) of the Constitution states 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 interest in land; and
>
> e) any other dispute relating to environment and land.

40. The Petition clearly reveals that the dispute is between the petitioner and the 1st respondent as tenant and landlord respectively. This is adverted to at paragraphs 8, 12 and *16*. There is also another dimension of the dispute that touches on allegations of environmental pollution. There can be no doubt therefore that the predominant issue, namely the tenancy contract between the petitioner and

the 1st respondent, is a matter that falls within the jurisdiction of the Environment & Land Court, notwithstanding that the issue may have a constitutional perspective to it.

41. Section 13(3) of the Environment and *Land Act* leaves no doubt that the ELC has the requisite powers to attend to the constitutional aspects of the dispute. It provides that:

> (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of *the Constitution*.

42. Hence, in Delmonte Kenya Limited v County Government of Murang'a & Another [2019] eKLR a multiple bench of the High Court held that:

> 89. In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under Article 162(2) of *the Constitution* as read with Section 13 of the ELC Act. We also find that although the petitioner claims violation of various constitutional rights, those claims are intertwined with the dominant issue and that the ELC has jurisdiction to deal with the alleged violations."

43. Likewise, in Republic v Chief Land Registrar & another [2019] eKLR Hon. Mativo, J., being of a similar view, held that:

> 14. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. In this regard, my view is that the intention of *the Constitution* is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction. My strong view is that this suit ought to have been transferred to the proper court the moment *the Constitution* of Kenya 2010 divested this court the jurisdiction to hear the case. Buttressed by the provisions of *the Constitution* and section 13 of the *Environment and Land Court Act*, I am clear in my mind that this court cannot properly entertain the application before me.
>
> 15. It is beyond argument that a High Court may not determine matters falling squarely under the jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court, whether it is a substantive hearing or an application such as the instant application.
>
> 16. Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise - that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of *the Constitution* were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status.
>
> 17. Where *the constitution* and legislation expressly confers jurisdiction to a court as in the present case, invoking this courts vast jurisdiction is inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under *the Constitution*. On this ground, I dismiss the Application dated 26th February 2018."

44. Moreover, it is now trite that a suit filed in a court without jurisdiction cannot be transferred to another court. The Supreme Court of Kenya restated the position 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, thus:

> (153) ...the purposive reading and interpretation of Article 162 together with Article 165(5) of *the Constitution* leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) supra, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.
>
> (154) However, 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."

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

> Decided cases on this issue are legion and we cannot cite all of them...The Court succinctly settled this point in the following words:-
>
> > "When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.
> >
> > We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.
>
> 20. 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 transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. Civil Appeal No. 6 Of 2018 Phoenix East Africa Assurance Co.ltdv. S.M. Thiga t/ aNewspaperServicesis therefore a nullity as it was based on a nullity."

46. In view of the above, the Preliminary Objections dated 12th July 2024 are hereby upheld with the result the Petition dated 28th June 2024 and the Notice of Motion filed therewith are hereby struck out for want of jurisdiction.

Each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 2ND DAY OF OCTOBER 2024

OLGA SEWE

JUDGE