



**Republic v Principal Secretary State Department for Lands and Physical Planning; Kiptugen (Exparte Applicant) (Judicial Review Application E004 of 2024) [2024] KEHC 12287 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12287 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
JUDICIAL REVIEW APPLICATION E004 OF 2024  
E OMINDE, J  
OCTOBER 16, 2024**

**IN THE MATTER OF ARTICLE 22 (1), (2) AND (4), ARTICLE 23 (1), (2),  
ARTICLE 47 (1), (2), ARTICLE 159 OF THE CONSTITUTION OF KENYA  
2010 AND SECTION 2 OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY STATE DEPARTMENT FOR LANDS AND  
PHYSICAL PLANNING ..... RESPONDENT**

**AND**

**DAVID KIPTUGEN ..... EXPARTE APPLICANT**

**RULING**

1. Daudi Kitugen, the applicant herein, moved this Court exparte by way of a Notice of Motion application dated 22<sup>nd</sup> April 2024, seeking the following orders:
  1. Spent.
  2. That by way of judicial review an order of mandamus do issue commanding, directing and or compelling, Hon. Nickson Korir, the Principal Secretary State Departments For Lands and Physical Planning, to forthwith and without any delay pay or cause to be paid the sum of Kshs.2, 031, 103 (Kenya Shillings Two Million Thirty One Thousand One Hundred and Three) and accrued interest to be computed from 22/2/2023 at 14% per annum.
  3. That the said payment be made within 30 days from the date of the order.



4. That in default a warrant of arrest do issue against the Respondent and the same be effected and or executed by the Inspector General of Police and thereafter be committed to civil jail for six months for contempt of Court.
2. The application is premised on the grounds therein and is further supported by the Affidavit sworn by the applicant on the same date.
3. The applicant sets out the Grounds upon which his application is premised as follows;
4. That the ELC Court in Eldoret ELC No. 787 of 2012 entered judgement against the respondent awarded costs of the suit. That costs were eventually assessed at Kshs.2,031,103 on 22/2/2023 and a Certificate of costs issued,
5. That despite being served with the Certificate of Costs against the Government, the respondent has ignored, refused and or neglected to settle the claim.
6. That in view of *Government Proceedings Act* it has been difficult for the Ex-parte Applicant to execute against the Government thus the only recourse available is that the Principal Secretary be compelled to settle the decretal sum and in default be cited for contempt and punished accordingly.
7. It is the applicant's contention is that when a decree and/or judgment is passed against the Government, it is under an obligation to settle the same and does not enjoy any special privileges with regard to its liabilities.
8. That the Respondent does not enjoy any immunity from obeying Court orders specifically is so far as payment of Government debts is concerned, and is thus culpable of being cited for contempt.
9. In the Affidavit sworn in support of the application, the applicant deposes that despite being served with the Certificate of Costs against the Government, the Respondent has ignored, refused and/or neglected to settle the claim. He annexed as DK 1 the documents in support of this deposition.
10. The Respondent opposed the application by way of Grounds of Opposition dated 10<sup>th</sup> July 2024 which grounds are as hereunder;
  - a. The Notice of Motion is a non-starter and prematurely instituted hence a grope in the dark.
  - b. The Applicant has not exhausted all the available dispute resolution mechanisms under the *Government Proceedings Act* Cap 40 Laws of Kenya and other laws.
  - c. There is no evidence adduced that Respondent is not willing to satisfy the Certificate of order for costs. On the contrary, the same is subject to budgetary allocation.
11. The application was canvassed by way of written submissions. The applicant filed his submissions on 20<sup>th</sup> September 2024. The Respondent did not file any even after being given an opportunity to do so.

### **Submissions**

12. In his submissions, Counsel for the applicant urged the Court to be guided by the following cases; *Republic v Kenya National Examination Council ex parte Gathenji & 9 Others* [1997] eKLR, *Republic v Principal Secretary, Ministry of Internal Security & Another Ex parte Schon Noorani & Another* [2018] eKLR, *Republic v Permanent Secretary Ministry of state for Provincial Administration and Internal Security* [2012]eKLR and *Republic v Town Clerk of Webuye County Council & Another* HCCC 448 of 2006.



13. In conclusion, Counsel urged the Court to find that the Applicant has met the threshold for granting the orders sought.

### **Analysis and Determination**

#### **Issues for determination:**

14. I note that the genesis of this application as stated by the applicant in the Grounds upon which his application is premised and as deposed in his Affidavit in support of the ex-parte application is a suit filed by the said applicant against the Respondent in the Environment and Land Court to wit Eldoret ELC No. 787 of 2012.
15. In this regard then, it is my considered view that the Court must firstly satisfy itself on whether it has the requisite jurisdiction to handle the application as a preliminary issue before it can proceed to look at the merits of the application.
16. The Court therefore sets out the first issue for determination as follows;
- “Whether this Court has jurisdiction to hear and determine the ex-parte Notice of Motion dated 22/4/2024.”
17. With respect to the matter of jurisdiction, the Court is guided by the often cited decision of the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 which states as follows:
- “By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of 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.....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”
18. Further on this issue of the jurisdiction of Courts in the case of *Samuel Macharia & Another v Kenya Commercial Bank and 2 Other* [2012] eKLR the Supreme Court addressed itself as follows;
- “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.”
19. The Jurisdiction of the High Court is provided under Article 165 of the *Constitution* as follows;
165. (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 Constitution of Kenya, 2010 99
    - (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.
20. Save for the provision under Article 165(5) the High Court has Original and Unlimited Jurisdiction in all matters Criminal and Civil. The Jurisdiction of the High Court shall not be exercised in matters where jurisdiction is conferred upon the Supreme Court or to the Courts contemplated under Article 162(2).



21. The Courts contemplated under Article 162(2) of the *Constitution* are the Environment and Land Court and the Employment and Labour Relations Court as follows;

- “162. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause
- (1) Court and the courts mentioned in clause
  - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
    - (a) employment and labour relations; and
    - (b) the environment and the use and occupation of, and title to, land.
  - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

22. The *Environment and Land Court Act*, which elaborates on the jurisdiction of the Environment and Land Court was subsequently enacted. Section 13 thereof states as follows:

- (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.
- (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 healthy environment under Articles 42, 69 and 70 of the *Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

23. Further, the Supreme Court in the case of *Republic v Karisa Chengo & 2 others*[2017] eKLR stated as hereunder on the jurisdictions of the Courts of Equal Status as provided under Article 162(1) of the *Constitution*:-

“...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.”

24. Without a doubt then, the Environment and Land Court (ELC) has powers to enforce its own judgment and decree arising from matters that have been handled by these Courts to their logical conclusion. Arguments to the contrary would be unsustainable as they would go against established law and elevate this Court above the ELC Court.
25. In this regard then, seeing as the decree sought to be executed by the applicant herein emanated from a judgement of the Environment and Land Court who as I have herein above demonstrated is the one that is clothed with the original and unlimited jurisdiction to deal with disputes over land and the environment, it is my finding that this Court lacks the jurisdiction to determine this application.
26. I therefore find the instant application to be misconceived and bad in law and the same is accordingly dismissed in its entirety with costs to the respondents.

**READ DATED AND SIGNED AT ELDORET ON THIS 16<sup>TH</sup> DAY OF OCTOBER 2024**

**E. OMINDE**

**JUDGE**

