



**Victoria Pumps Limited v Magare & another; Kenya Ports Authority & another (Interested Parties) (Judicial Review Cause E007 of 2024) [2024] KEHC 13251 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13251 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW CAUSE E007 OF 2024  
OA SEWE, J  
OCTOBER 17, 2024**

**BETWEEN**

**VICTORIA PUMPS LIMITED ..... APPLICANT**

**AND**

**HON JUSTICE KIZITO MAGARE ..... 1<sup>ST</sup> RESPONDENT**

**THE HIGH COURT OF KENYA AT MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA PORTS AUTHORITY ..... INTERESTED PARTY**

**OCEANFREIGHT (EA) LIMITED ..... INTERESTED PARTY**

**RULING**

1. By their Chamber Summons application dated 12<sup>th</sup> April 2024, the applicants moved the Court seeking orders that:
  - (a) Spent
  - (b) The Court be pleased to grant them leave to apply for an order of Certiorari to remove into the High Court for quashing the decision made by Hon. Justice Kizito Magare dated 24<sup>th</sup> October 2023 in Mombasa High Court Civil Suit No. 1 of 2000: Victoria Pumps Ltd & Kenya Haulage Agency Limited v Kenya Ports Authority & 4 others, which awarded costs of USD 22,695 to each of the interested parties.
  - (c) The Court be pleased to grant the applicants leave to apply for an order of Prohibition to prohibit the Deputy Registrar of the High Court from issuing a Certificate of Costs in the sum of USD 22,695 or from permitting any form of execution to recover the said costs.



- (d) The grant of leave do operate as an order of stay of execution for the recovery of the said costs of USD 45,390 pursuant to the order made by Hon. Justice Kizito Magare in Mombasa High Court Civil Suit No. 1 of 2000.
- (e) The costs of the application be provided for.
2. The application was brought under Sections 8 and 9 of the *Fair Administrative Action Act*, No. 4 of 2015, Sections 9 and 10 of the *Public Officer Ethics Act*, Cap 183 of the Laws of Kenya as well as Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules. It was premised on the grounds that the 1<sup>st</sup> respondent delivered a judgment dated 24<sup>th</sup> October 2023 in Mombasa High Court Civil Suit No. 1 of 2000: Victoria Pumps Ltd & Kenya Haulage Agency Ltd v Kenya Ports Authority & 4 others which dismissed the applicant's suit and awarded costs of USD 22,695 to each of the interested parties.
3. The applicants further averred that, being aggrieved by the said decision, they filed a Notice of Appeal before the Court of Appeal, being Mombasa Civil Appeal No. E218 of 2023: Victoria Pumps Limited & Kenya Haulage Agency Limited v Kenya Ports Authority and Oceanfreight East Africa Limited. They further stated that, concomitantly, they filed an application for stay of execution pending appeal but the same was yet to be disposed of by the time of instituting the instant application.
4. Their basic complaint was that the 1<sup>st</sup> respondent awarded the interested parties costs in the sum of USD 22,695 each in a summary manner without a Party and Party Bill of Costs or taxation. They were of the view that the 1<sup>st</sup> respondent thereby acted not only irrationally but also in excess of jurisdiction. They further averred that, by so doing, the 1<sup>st</sup> respondent denied them their natural justice right to be heard before they were condemned in respect of quantum of the costs payable to the interested parties.
5. On account of the foregoing, the applicants filed the instant application, seeking leave to file a substantive judicial review application for orders of Certiorari to quash the impugned decision. They similarly sought leave to apply for an order of Prohibition to prohibit the Deputy Registrar of the Court from issuing a Certificate of Costs or permitting any form of execution to recover the disputed costs.
6. Although filed ex parte, the Court gave directions that the application be served before further directions could be given on an inter partes basis, in accordance with the proviso to Rule 1(4) of Order 53, Civil Procedure Rules.
7. In response to the application, the respondents and the interested parties filed separate Notices of Preliminary Objection, contesting the jurisdiction of the Court. On behalf of the respondents, the Attorney General filed the Notice of Preliminary Objection dated 17<sup>th</sup> April 2024, seeking that the suit be dismissed and/or struck out on the following grounds:
- (a) The suit, as filed, offends the mandatory provisions of Article 165(5) of *the Constitution* of Kenya, 2010.
- (b) The suit further offends the mandatory provisions of Article 236 of *the Constitution* of Kenya.
8. The interested parties similarly sought the dismissal of the suit vide their Notice of Preliminary Objection dated 23<sup>rd</sup> April 2024. They relied on the following grounds:
- (a) Article 165(1) of *the Constitution* as read together with Article 162(1) establishes the High Court as a superior court with seats across the country; however pursuant to Article 165(6) of *the Constitution*, the High Court lacks jurisdiction to review the decisions made by the High Court or any other superior court as settled by the Supreme Court in Kenya Hotel Properties



Limited *v Attorney General & 5 others (Petition No. 16 of 2020)* 2022 KESC 62 (KLR) (CIV) (7 October 2022).

- (b) The Judicial Review proceedings herein are in total violation of the provisions of Section 6 of the Civil Procedure Rules as read with Section 8 of the said Act in so far as the ex parte applicant had earlier lodged an appeal before the Court of Appeal, namely: Mombasa Civil Appeal No. E218 of 2023: Victoria Pumps Limited & another v Kenya Ports Authority & another, which appeal raises the same issues herein and is before a court of competent jurisdiction.
9. The Preliminary Objections were canvassed by way of written submissions which were highlighted on 16<sup>th</sup> May 2024. Mr. Kemei, learned counsel for the respondents relied on his written submissions dated 17<sup>th</sup> April 2024 in which he made reference to the jurisdiction of the Court as conferred by Article 165 of the Constitution; and in particular, the supervisory jurisdiction donated under Sub-Article (6), to support the submission that the High Court, being a superior court of record, is out of reach of its own supervisory jurisdiction. The respondents also relied on *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) (Civil Appeal 239 of 2018) 2018 KECA 330 (KLR)* and *Kennedy Mwaura Kibebe & 3 others v Annie Wanjiku Kibeh & 3 others 2021 eKLR* to bolster their submissions.
10. In respect of the second limb of their Preliminary Objection, the respondents relied on Articles 160(5) and 236 of the Constitution as well as Sections 6 of the *Judicature Act*, (Cap 8), Section 45 of the *Judicial Service Act*, 2011 and the case of *Bellevue Development Company Ltd v Gikonyo* (supra) to shore up their submission that a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. They accordingly prayed for the dismissal of the suit with costs.
11. The interested parties adopted similar lines of argument vide their written submissions dated 23<sup>rd</sup> April 2024. They relied extensively on the decision of the Supreme Court in *Kenya Hotel Properties Ltd v Attorney General* (supra) to underscore their argument that a High Court judge lacks cannot review the decisions of peers of equal and competent jurisdiction. They urged the Court to note that, following the delivery of the impugned judgment, the applicant appealed to the Court of Appeal. Consequently, it was the submission of the interested parties that this suit, having been filed during the pendency of that appeal, was filed in disregard of Section 6 of the Civil Procedure Rules, and is therefore an abuse of the process of the Court.
12. 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.”
13. Care ought to be taken so as not to miss the whole purpose of a preliminary objection, which was aptly captured in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others 2015 eKLR* as follows:
- (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.”(Emphasis supplied)

14. The Preliminary Objections, as has been pointed out herein above, challenge the jurisdiction of the Court and therefore were properly raised. The centrality of the issue of jurisdiction cannot be overemphasized. It was aptly stated in Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd 1989 KLR 1 that:

...a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. Indeed, in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others 2012 eKLR, the Supreme Court held that:

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 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...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 on 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.”

16. Accordingly, Article 165 of the Constitution should be the starting point in terms of the jurisdiction of the High Court. It is explicit, in Sub-Articles (3)(a) and (b) that:

- (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;”

17. 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—
- (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*
18. The Court is also entrusted with supervisory jurisdiction as provided for in Article 165(6) and (7) of the Constitution. It nevertheless instructive that in Article 165(6), the jurisdiction of the Court is delimited as follows:
- 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.” (Emphasis supplied)
19. Article 162(1) of the Constitution is explicit that the Superior Courts are the Supreme Court, the Court of Appeal, the High Court and specialized Court (Environment and Land Court and Employment Labour Relations Court) as established pursuant to Article 162(2) of the Constitution. The subordinate courts, on the other hand, are provided for at Article 169(1) of the Constitution. They are the Magistrates Courts, the Kadhis Courts, Courts Marital, and other courts or tribunals established by Acts of Parliament.
20. I therefore have no hesitation in holding that, in so far as the impugned decision was made by a judge of a superior court of coordinate jurisdiction as this court, this suit is misconceived. I find succour in the decision rendered in Robert Alai Onyango v Cabinet Secretary in Charge of Health & 7 others 2017 eKLR, in which the Petitioner challenged the decision of the Employment and Labour Relations Court. It was held:

There seems to be a general misconception among some legal practitioners, litigants, and a section of members of the public that this court, sitting as Constitutional and Human Rights Division of the High Court, has special jurisdiction to supervise superintend or direct other superior courts. Granted, the High Court has jurisdiction under Article 165 (6) to supervise subordinate courts and any person, body or authority exercising a judicial or quasi-judicial functions. The court also has jurisdiction to redress violation and infringement of fundamental rights under the Bill of Rights. However, sub Article (6) is clear that the High Court has no supervisory jurisdiction over superior courts. Superior courts in terms of Article 162 (1) are the Supreme Court, Court of Appeal, High Court and Courts of Equal status. Courts of equal status are those courts mentioned under Article 162(2); that is; Employment and Labour Relations Court and Environment and Land Court.

The High Court draws its jurisdiction from *the constitution*. It has wide jurisdiction to deal with allegations of violation and/or infringement of fundamental rights. It also has jurisdiction of supervisory nature but that supervisory jurisdiction is limited. It cannot be exercised over superior courts. Article 23(1) is also clear that the court must exercise the jurisdiction given under Article 165. Looking at the prayers in the petition, the court is being asked to assume a supervisory role and stay proceedings pending before a superior court as well as stop execution of orders issued by that superior court. Taking such a step would amount to this court exercising jurisdiction it does not have, and which is excluded.”



21. Similarly, in *Kenya Hotel Properties Ltd v Attorney General* 2020 eKLR, the Court of Appeal held:

*The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it... Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing.”

22. The above decision was upheld by the Supreme Court in *Kenya Hotel Properties Limited v Attorney General & 5 others* *Petition No. 16 of 2020* 2022 KESC 62 (KLR) thus:

“As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves. Again, we take cognizance of our finding in the Samuel Kamau Macharia case where we held that:

“A court 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 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.”

23. The second ground of the Preliminary Objections raised by the respondents and the interested parties was hinged on Articles 160(5) and 236 of the Constitution. Article 165(5) provides that:

A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

24. Article 236 on the other hand states:

A public officer shall not be—

- (a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or
- (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

25. It is plain therefore that it was erroneous for the applicants to sue either of the respondents. The rationale for judicial immunity was discussed in *Bradley v Fisher* 80 U.S. (13 Wall), 335, 351 (1972), in which it was held:

For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability



to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.”

26. Similarly, in *Moses Wamalwa Mukamari v John O. Makali & 3 others* 2012 eKLR Hon. Gikonyo, J. held:

The protection offered to judicial officers in Article 160(5) of the Constitution is inherent in the independence of the judiciary as a state organ within the doctrine of separation of powers. The protection encapsulates protection from being sued in a personal capacity in a cause of action based on an act or omission emanating from the lawful performance of a judicial function. I am convinced; this is intended to make the cover against personal liability complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that kind of interpretation will result into an absurdity, because, allowing the officer to be sued and appear in his personal capacity in a suit based on an act he did in the lawful performance of a judicial function, will already have blown away the very constitutional cover for the officer’s fallibility provided under Article 160(5) of the Constitution.”

27. In view of the clear provisions of *the Constitution* and the authorities aforementioned, it was utterly imprudent that the petitioners insisted on proceeding with the matter even after being granted time for reflection. I accordingly reiterate the observations of the Supreme Court in *Bellevue Development Company Ltd v Gikonyo & 3 others* (supra). The Court held:

82. Suing a Judge or judicial officer for rendering an unfavourable decision rather than appeal or seek a review, was in our opinion, a misconception and a step in the wrong direction on the part of the Petitioner. As a court, we are cognizant of the fact that at times, litigants may feel aggrieved by some of the decisions that Judges and judicial officers make. But this is not in any way an exoneration of the Petitioner in its actions. To seek relief by apportioning an unwarranted attack on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, who were lawfully exercising their judicial function, was not only tantamount to harassment and intimidation of the judicial officers, but also clearly a red herring that the Petitioner conceived to deny or delay the 4<sup>th</sup> Respondent’s right to a remedy under their contract. This Apex Court will not countenance such action.”

28. The foregoing being my view, it would be superfluous to consider whether or not the suit is sub judice. In the *Owners of Motor Vessel Lillian “S”* (supra), the Court of Appeal stated:

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 the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing.”

29. In the result, I find merit in the Preliminary Objections raised by the respondents and the interested parties. The same are hereby upheld, with the result that the applicants’ suit herein is hereby struck out for want of jurisdiction.

30. I have given some thought on whether or not to award the respondents their costs of the suit. It is now settled that costs follow the event and are at the discretion of the court. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No 4 of 2012*; 2014 eKLR the Supreme Court set out



the guidelines that a court must consider when exercising its discretion to either award or deny costs. The Court held:

- (14) So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words Judicial Hints on Civil Procedure, at p.94:

“The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure... Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

31. Further, in the case of *Mbithi Peter Mutuku v Council of Legal Education & 2 others* 2016 eKLR, Odunga, J (as he then was) held:

12. In determining the issue of costs, the Court is entitled to consider the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, whether a party has succeeded on part of his case, even if he has not been wholly successful, the extent of such success, the subject of litigation and the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of *the Constitution*. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. With respect to the conduct of the parties this includes the conduct before as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol and directions issued by the Court; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended his case or a particular allegation or issue; and whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. See Halsbury's Laws of England vol. 10 4<sup>th</sup> Edition of the re-issue at para 22 and *Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd* 1967 EA 287 and *Mulla* (12<sup>th</sup> Edn) P. 150...”

32. Taking all the foregoing into consideration, it is my considered view that the respondents and the interested party be awarded their costs in this matter. Accordingly, it is hereby ordered that:
- (a) The applicant's Chamber Summons application dated 12<sup>th</sup> April 2024 be and is hereby struck out for want of jurisdiction.
- (b) The applicants to bear the respondents' and applicants' costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**OLGA SEWE**

**JUDGE**

