



**Apondi v Attorney General (Constitutional Petition 13 of 2015) [2024] KEHC 14370 (KLR)
(Constitutional and Human Rights) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 13 OF 2015**

EC MWITA, J

NOVEMBER 15, 2024

BETWEEN

HON JUSTICE MUGA APONDI PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

JUDGMENT

The petitioner's case

1. On 8th May 2013, the petitioner filed constitutional petition No. 235 of 2013 against The Judges and Magistrates Vetting Board, the Judicial Service Commission and the Attorney General, challenging the decision of the Vetting Board that had found him unfit to serve as a judge.
2. On 21st November 2014 during the mention of his petition, the petitioner learnt that there were appeals before the Supreme Court (Petition Nos. 14, 15 and 13A of 2013 (consolidated) Law Society of Kenya v the Attorney General and the Judges and Magistrates Vetting Board, supported by the Judicial Service Commission over decisions that had been made by the Vetting Board against other judges and magistrates. The petition was supported by an affidavit and written submissions.
3. On 5th November 2014, The Supreme Court handed down its judgment in those appeals on 1th November 2014, allowing the consolidated appeals. In that decision, the Supreme Court made an order (Order No C), directing superior court divisions or stations having to adjudicate on matters raising similar issues to the petitions it had determined, to list those matters for mention within 15 days of the date of its decision and dispose of those matters in accordance with the terms of its judgment and orders.



4. The cases to be affected were those challenging jurisdiction of the Vetting Board, merit of the decisions of the Vetting Board; challenge on the competence of the Vetting Board to determine suitability of a judge or magistrate to continue serving and any contest to the Vetting Board's process or outcome.
5. The petitioner's case was obviously one of the cases affected by the directive of the Supreme Court and was thus, determined as the Supreme Court had directed. This prompted the petitioner to file this petition arguing that the decision of the Supreme Court violated his right to a fair hearing guaranteed under articles 50(1) and 160 of *the constitution*, since he was not a party to the proceedings before the Supreme Court.
6. The petitioner invoked this court's jurisdiction, arguing that it has jurisdiction to hear and determine this petition because it is grounded on the violation of his right to a fair hearing by the Supreme Court decision. The petitioner relied on articles 23(1) and 165 (3) (b) and (d) (ii) of *the constitution* to support this argument.
7. The petitioner again relied on the decisions in Owners of the Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd [1989] eKLR; Council of Governors & 3 others v The Senate & 53 others [2015] eKLR and Protus Buliba Shikuku v Attorney General [2012] eKLR.
8. Further reliance was placed on the decisions in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others [2013] eKLR and Andrew Nthiwa Mutuku v Court of Appeal & 3 others [2021] eKLR.
9. Regarding the substance of the petition, the petitioner took the view, that not being a party to the proceedings before the Supreme Court, its decision violated his right to a fair trial as he was not heard in his case. The petitioner cited articles 19(1), (3)(a), 25(c) and 50(1) of *the constitution* to support his position. He also relied on Francis Karioko Muruatetu & another v Republic [2017] eKLR and Andrew Nthiwa Mutuku v Court of Appeal & 3 others (supra) to support his case.
10. The petitioner further relied on the decision in Kalpana H. Rawal & 2 others v Judicial Service Commission & 3 others [2016] eKLR to argue that by directing the manner in which the superior court was to handle his petition, the decision denied him the right to have his dispute determined by a competent court within the dictates of article 160(1) of *the constitution*.
11. On the basis of the foregoing, the petitioner sought a declaration that order (c) of the Supreme Court's decision dated 5th November 2014 in petition No. 13A of 2013 (consolidated with petition Nos. 14 of 2013 and 15 of 2013), the Judges and Magistrates Vetting Board & 2 others and the Centre for Human Rights and Democracy & 11 others was a violation of his right to a fair hearing. He also prayed for cost of the petition and any other order the court would deem fit and just in the circumstances.

Respondent's case

12. The respondent opposed the petition through grounds of opposition and written submissions. The respondent contended that this court has no jurisdiction to determine the matter, and that the petition is res judicata and bad in law.
13. The respondent relied on the decisions in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (supra); Re the Matter of Interim Independent Electoral Commission [2011] eKLR and Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, for the proposition that Article 165(5) of *the Constitution* ousts the jurisdiction of this court to hear and determine this petition.
14. The respondent relied on Article 50(1) of *the Constitution* and the decision in R v Aga Khan Education Services ex parte Ali Sele & 20 others (High Court Misc. Application No. 12 of 2002), to argue that



the Supreme Court decision was arrived at after hearing all the parties and followed *the Constitution* and the law. The petition having not demonstrated the contrary, the respondent urged the court to dismiss the petition.

Determination

15. This petition raises two main questions for determination, namely; whether this court has jurisdiction and whether the directive by the Supreme Court violated the petitioner's right to a fair hearing.

Jurisdiction

16. The respondent argued that this court has no jurisdiction to hear and determine this petition. According to the respondent, Article 163(7) of *the constitution* ousts this court's jurisdiction. The petitioner on his part, maintained that the court has jurisdiction because the petition is grounded on the violation of his right to fair hearing.
17. Jurisdiction is the power or authority given to a court to hear and determine disputes before it. Challenge to jurisdiction is a threshold and fundamental question that the court has to determine promptly. If the court determines that it has no jurisdiction to hear the matter, that is the end. The court should not take any further step, but down its tools. (See Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (supra).
18. In Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012] eKLR, the Supreme Court stated:
 - (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 to itself jurisdiction exceeding that which is conferred upon it by law... 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.
19. In re the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 [2011] eKLR, after referring to Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (supra), the Supreme Court again stated:
 - [30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such 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. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.
20. The jurisdiction of this Court is provided for in article 165(3) of *the constitution*. The Court has the jurisdiction to, among others, determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) dhear any question respecting the interpretation of *the Constitution*, including the determination of—(ii) the question whether anything said to be done under the authority of *the constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*.
21. The import of article 165(3) is that it authorises the High Court to decide all matters other than those reserved for other courts as contemplated in article 162 (2), that is, matters reserved for the exclusive Jurisdiction of the Supreme Court and Employment and Labour Relations Court and Environment



- and Land Court-article 165(5) and restricted by Article 165(6). Article 165(6) states that the High Court has supervisory jurisdiction over subordinate courts and over any person or body exercising judicial or quasi-judicial function, but not over a superior court.
22. According to the sweep of the constitutional authorisation given to the High Court, the court has wide jurisdiction to hear and determine various matters that may be brought before it. Whether or not this court has jurisdiction to hear and determine this petition must, therefore, be viewed through the prism of article 165(3)(b) and (d).
 23. This petition alleges violation of the right to fair hearing, a right in the Bill of Rights. The petitioner claims that he was not a party before the Supreme Court and, therefore, his case was determined without a hearing in violation of his right to a fair hearing. In other words, the petitioner argues that his case was determined without being given audience by the court in violation of the right guaranteed in article 50(1) of *the constitution*.
 24. Based on the issue raised in this petition, it is clear to me, that it centres on whether the petitioner's right to a fair hearing was violated. This clearly falls within the jurisdiction of this court under article 165(3)(b).
 25. As this Court pointed out in *Cami Graphics Limited v Chief Registrar of the Judiciary & 2 others; Commissioner of Lands & 4 others (Interested Parties) (Constitutional Petition 543 of 2022)* [2024] KEHC 2999 (KLR) (Constitutional and Human Rights) (15 March 2024) (Ruling):
 - (22) Where a party moves this Court under Article 22 of *the Constitution*, the Court has jurisdiction in terms of Article 23(1) as read with Article 165(3)(d) to determine the petition. However, the claim must be that the action complained of violates or threatens a right or fundamental freedoms and the relief sought must be aimed at redressing that violation.
 26. It is plain from the pleadings before this court that the petition was brought under article 22 as read with articles 23(1) and 165(3) of *the constitution*, alleging what the petitioner perceives to have been a constitutional infraction. The petitioner wanted this court to exercise its jurisdiction under article 165(3) (b) to investigate and determine whether there was infringement of his rights in the Bill of Rights.
 27. The respondent contended that the jurisdiction of this court is ousted by articles 163(7) of *the constitution*. It is worth noting, that article 163(7) is to the effect that decisions of the Supreme Court are binding on all other superior courts except the Supreme Court itself. This court is called upon to determine whether a right to fair hearing was violated. It is not a challenge to the validity of Supreme Court decision itself. As the petition raises a claim of infringement of fundamental rights and freedoms in the Bill of Rights, this court should give him opportunity to argue his case instead of locking him out.
 28. I must also point out that it is not a must that a petition challenging infringement of constitutional rights and fundamental freedoms in the Bill of Rights has to succeed. The philosophy of our constitutional requires that where a party has come to court alleging that rights or fundamental freedoms in the Bill of Rights have been violated or infringed, he should be accorded an opportunity to be heard so that the court can make an informed decision on the issue, rather than shut out the person from the seat of justice unless his is an open and shut case, or there is a clear constitutional provision denying the court jurisdiction to hear such a matter.
 29. In the circumstances, I find and hold that the issue raised in this petition falls within the ambit of article 23(1) as read with article 165(3)(b) and, therefore, within the jurisdiction of this court.



Right to fair hearing

30. Having determined the issue of jurisdiction; the next issue is whether the petitioner's rights were violated. The petitioner's case is that the decision of the Supreme Court to direct superior courts on how to deal with the pending petitions challenging decisions of the Vetting Board, violated his right to a fair hearing guaranteed under articles 50(1) and 160(1) of *the constitution*.
31. Article 50(1) provides that every person has the right to have any dispute that can be determined by application of law, decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 160(1) also states that "In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."
32. The right to a fair hearing is one of the inalienable rights in article 25, which provides:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

 - a. freedom from torture and cruel, inhuman, or degrading treatment or punishment.
 - b. freedom from slavery or servitude.
 - c. the right to a fair trial;
 - d. the right to an order of habeas corpus.
33. In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, (SC Petition No 18 of 2014 consolidated with Petition No 20 of 2014); [2014] eKLR, the Supreme Court stated that while article 50(1) refers to the right to a fair hearing for all persons, article 50(2) accords all accused persons the right to a fair trial. Article 25(c) also lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. "Often the terms 'fair hearing' and 'fair trial' are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference."
34. The Supreme court noted that fair hearing incorporates the rules of natural justice, which include the concept of (hearing the other side or that no one is to be condemned unheard) and no man shall judge his own case- the rule against bias. The Supreme court took the position that a public hearing is automatic where the matter is before a court of law. In other words, where the matter is before a court of law, the party is entitled to a public hearing as a matter of constitutional imperative given the words in article 50(1).
35. The petitioner argued that this right was infringed by the decision of the Supreme Court which directed how his petition was to be determined thus, denied him the right to be heard. In that respect, the petitioner argued that his right to a fair and public hearing guaranteed under article 50(1) of *the constitution* and which is an inalienable right under article 25 (c) of *the constitution* was violated.
36. The question this court must answer, is whether the decision of the Supreme Court dated 5th November 2014 violated the petitioner's inalienable right to a fair hearing. I have read that decision



and in particular, the direction in order (c) thereof. Under order (c) complained of, the Supreme Court directed thus:

The respective Superior Court Divisions or stations having to adjudicate upon matters of any of the following categories shall list them for mention within 15 days of the date hereof, and shall dispose them of forthwith in accordance with the terms of this judgment and these orders, that is to say:

- i. alleged lack of jurisdiction or merit on the part of the Vetting Board;
- ii. alleged want of exclusive competence of the Vetting Board to determine the suitability of a Judge or Magistrate to continue in service;
- iii. any contest to the Vetting Board's process (or outcome thereof) for determining the suitability of a Judge or Magistrate to continue in service.

37. There is no denial that the Supreme court directed superior courts to mention those matters and determine them in accordance with the terms of its judgment so long as those matters touched on decisions or actions of the Vetting Board.
38. In *Madan Mohan v State of Rajasthan & others* AIR SC 5848, the Supreme Court of India cautioned that a superior court in hierarchical jurisdiction should not issue directions/mandamus to subordinate courts commanding them to pass a particular order on any application filed by any party in order to guard judicial independence of every court to passing orders in cases before them and not to appear to interfere with such independence.
39. The court observed that when such an order is passed, it can be questioned by the aggrieved party in an appeal or revision, as the case may be, to the superior Court. It is then for the Appellate/ or Revisionary court to decide as to what orders need to be passed in exercise of its Appellate/Revisionary jurisdiction.
40. The court stated that "Even while remanding the case to the subordinate Court, the Superior Court cannot issue a direction to the subordinate Court to either "allow" the case or "reject" it. If any such directions are issued, it would amount to usurping the powers of that Court and would amount to interfering in the discretionary powers of the subordinate Court. Such order is, therefore, not legally sustainable."
41. The principle in that decision is distinguishable from the circumstances obtaining in this petition. In the Indian case, the superior court had directed the subordinate court to allow an application for bail. The Supreme court frowned upon such an order as allowing bail or not was an issue that depended on the discretion of the subordinate court to apply its independent judicial mind and pass appropriate reasoned order, keeping in mind the facts involved in the case and the legal principles applicable for granting or declining bail.
42. In the present case, however, to determine whether the petitioner's right to a fair hearing was violated or not, the court must take into consideration the nature of the directions issued by the supreme court. That is; were the directions on a preliminary matter over which the superior courts had discretion to apply their independent minds?
43. The impugned order (c) was made in the course of a final decision of the Supreme Court in matters it had finally determined. The Supreme court then directed the superior courts to mention similar matters still pending before them and dispose them of in terms of its judgment and orders. In other words, the Supreme Court having finally determined the issue of vetting of judges and magistrates,



that decision was binding on all the other superior courts in terms of article 163(7) of *the constitution*. The binding nature of that decision left no room for superior courts to manoeuvre.

44. Having determined the issue and the decision being a binding one over the other superior courts, I do not see how the directive by the supreme court that pending cases be determined in terms of its judgment and orders, violated the petitioner's rights to a fair hearing. Put differently, even if the petitioner's case proceeded to hearing, could it have been determined otherwise than according to the decision of the supreme court? The answer must obviously be in the negative.
45. In the circumstances, I am unable to agree with the petitioner that the directive of the Supreme Court which was in any case in a final and binding decision over the courts below it, violated his right to a fair hearing.
46. Consequently, and for the above reasons, the petition fails and is dismissed. Each party will bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2024

E C MWITA

JUDGE

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