



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E224 OF 2021

OKIYA OMTATAH OKOITI..... PETITIONER

VERSUS

1. THE NATIONAL ASSEMBLY

2. THE HON. ATTORNEY GENERAL RESPONDENTS

RULING NO. 1

1. This ruling relates to an objection on the jurisdiction of this Court.
2. The objection was raised by the 1st Respondent herein, *The National Assembly*. It is dated 6th July, 2021. It is supported by the 2nd Respondent, *the Hon. Attorney General*.
3. The Petitioner herein, *Okiya Omtatah Okiiti* is opposed to the objection.
4. Whereas the 1st Respondent filed written submissions in support of the objection, the 2nd Respondent relied on the submissions by the 1st Respondent. The Petitioner also filed submissions in opposition to the objection.
5. The objection is tailored as under: -

1. THAT the orders and the reliefs sought by the Petitioner are a clear violation of Articles 94 and 95 of the Constitution of Kenya. The orders prayed for in this Petition if granted will therefore undermine and violate the National Assembly's constitutional mandates by casting doubt on its competence while formulating legislation.

2. THAT under the doctrine of "exhaustion", where there is an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction conferred by law and must give deference to such dispute resolution mechanisms established by law with the mandate to deal with such specific disputes in the first instance.

*3. THAT under the doctrine of "ripeness", the issues raised in the petition have not yet crystalized for determination by this Court. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 Others* [2016] eKLR, the court dedicated a great part of the judgment to the doctrines of justiciability, ripeness and the political question. The Court, after discussing authorities from various comparative jurisdictions, rendered itself as follows:*

"The extensive quotations were deliberate. It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma.

There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either".

4. THAT the Petition is premature and speculative in that the Kenya Roads (Amendment) Bill, 2021 (National Assembly Bills No. 13 of 2021), is still undergoing the legislative process in the National Assembly.

5. THAT the Petitioners' Notice of Motion and Petition are not justiciable for violating the doctrine of ripeness which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies.

6. THAT the Petitioners' Notice of Motion and Petition are speculative and deals with prospective anticipatory circumstances rather than current or probable events.

7. THAT the Petitioners' Notice of Motion and Petition discloses no reasonable cause of action to warrant the Court proceeding in hearing and determining this matter.

8. THAT the Petition and the Notice of Motion is frivolous, incompetent, vexatious, misconceived and an outright abuse of the court process to the extent that the Petitioner is challenging Kenya Roads (Amendment) Bill, 2021 (National Assembly Bills No. 13 of 2021), which is still undergoing scrutiny by a Committee and not before the National Assembly.

6. The Petitioner and the 1st Respondent filed very comprehensive submissions on the objection. In this ruling, however, I will not reproduce verbatim the parties' submissions. However, I have carefully read the objection, the pleadings, the submissions and the decisions cited by the parties. I will, henceforth, proceed on with this discussion with the foregoing in mind.

7. In sum, the objection rests on two main limbs on jurisdiction. They are that the Court lacks jurisdiction to delve into internal processes of the National Assembly as far as the ongoing consideration of the Kenya Roads (Amendment) Bill, 2021 (hereinafter referred to as '**the impugned Bill**') is concerned and that the Court is further barred under the doctrine of ripeness and exhaustion.

8. The Court acknowledges and appreciates the Petitioner's and 1st Respondent's endeavour in correctly capturing, through various decisions of the superior Courts, the law on preliminary objections, the doctrine of ripeness and exhaustion as well as the Court's extent in dealing with matters before Parliament. I need not regurgitate the same.

9. This Court will only reiterate the settled caveat to the foregoing that the restraint urged by the 1st Respondent is qualified in that there are settled instances where the doctrine of ripeness and exhaustion is inapplicable and where the Court can rightly exercise jurisdiction even over proceedings and matters which are before Parliament.

10. As the objection was raised by way of a Notice of preliminary objection, it is of essence to look at the law on such objections.

11. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

12. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A. 696 page 700 when the Court observed as follows: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

13. In *Civil Suit No. 85 of 1992, Oraro vs. Mbaja* [2005] 1 KLR 141, **Ojwang J**, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -

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

14. In *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not

been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

15. The question whether jurisdiction is a point of law was set out clearly by the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, when the Learned Judges stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.

16. The Apex Court had earlier on in *Constitutional Application No. 2 of 2011, In the Matter of Interim Independent Electoral Commission (2011)* eKLR observed as follows in regard to jurisdiction and its source: -

... Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent.

17. Returning to the matter at hand, and as stated above, the Preliminary objection in this matter has two limbs. Both limbs are raised on the basis of pure points of law relating to constitutional provisions and settled legal principles. Further, the consideration of the limbs does not call for evidence. Lastly, if the objection is sustained, it is capable of disposing of the Petition.

18. It is, therefore, this Court’s finding that the Preliminary Objection passes the propriety test and the objection is for consideration.

19. I will now deal with the gist of the objection.

20. Jurisdictional contest goes to the root of a matter. It ought to be resolved at the earliest opportunity because without it, everything a Court purports to do is a nullity. In *Petition No. E282 of 2020, David Ndi & 4 others -vs- Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended Amicus Curiae) [2020]* eKLR, this Court spoke *in extenso* on jurisdiction in the following terms: -

24. *Jurisdiction is defined in Halsbury’s Laws of England (4th Ed.) Vol. 9 as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”. Black’s Law Dictionary, 9th Edition, defines jurisdiction as the Court’s power to entertain, hear and determine a dispute before it.*

25. *In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows:*

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of 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 like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

26. *That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -*

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...

27. *Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -*

*Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in **Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;***

1)

2) *The jurisdiction either exists or does not ab initio ...*

3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

28. *On the centrality of jurisdiction, the Court of Appeal in **Kakuta Maimai Hamisi -vs- Peris Pesu Tobiko & 2 Others (2013)** eKLR stated that: -*

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary

eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

29. On the source of a Court's jurisdiction, the **Supreme Court of Kenya in Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR** held that: -

29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent

30. Later, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR** Supreme Court stated 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 counsels 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 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.

31. **And, in Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR**, the Court of Appeal further stated: -

[44] a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court..

21. In this matter, there is no doubt that the impugned Bill is before the National Assembly. It was committed to the Committee on Transport, Public Works and Housing (hereinafter referred to as **'the Committee'**) pursuant to the National Assembly Standing Order No. 127(3) for among other things, the facilitation of public participation.

22. According to the record, the Committee is still dealing with the impugned Bill.

23. Whereas I agree with the Petitioner that the Court has unhindered jurisdiction to intervene and protect the Constitution in instances of either *threats or violation* to the Constitution, Parliament itself is also vested with a like duty. **Article 94(4)** of the Constitution states as follows: -

Parliament shall protect this Constitution and promote the democratic governance of the Republic.

24. **Article 3(1)** of the Constitution further reiterates the foregoing in the following manner: -

Every person has an obligation to respect, uphold and defend this Constitution.

25. It is on the basis of the above that Courts are called upon to exercise qualified restraint in dealing with matters before Parliament.

26. A keen consideration of the unique grievances raised in the Petition through the foregoing constitutional lenses inevitably leads to an objective finding that most of the issues raised by the Petitioner ought to, at least, be first placed before the Committee. Since the Committee has a constitutional duty to protect the Constitution under Articles 3(1) and 94(4) of the Constitution, the Petitioner stands to suffer no prejudice. Once the Committee, for instance, deals with the matter and makes decisions which the Petitioner still feels aggrieved, then one of the avenues available to the Petitioner would be to institute proceedings before this Court on *inter alia* the failure of Parliament to protect the Constitution.

27. This Court, therefore, and to an extent, agrees with the 1st Respondent that some of the issues before Court are yet to crystallize into justiciable disputes. The Petitioner still has recourse to clear constitutional avenues, and of course and ultimately, access to this Court. Some of the issues include the sufficiency of public participation, the legality or otherwise of the impugned Bill, among others.

28. A further look at the Petition also reveals that some of the issues raised do not fall within the purview of Parliament, but before this Court. One of them is whether Parliament has failed in its mandate to operationalize Article 118(1)(b) of the Constitution on public participation.

29. Having said so, it comes to the fore that the objection must, but partly succeed.

30. In the end, the following final orders hereby issue: -

(a) The Notice of Preliminary Objection dated 6th day of July, 2021 partly succeeds.

- (b) This Court declines jurisdiction over the matters surrounding prayers 1.1, 1.2, 1.3, 1.4, 2.1 and 2.2 of the Petition.
- (c) This Court has jurisdiction to deal with the matters leading to prayers 1.5, 2.3, 2.4 and 3 of the Petition.
- (d) On the basis of order (b) above, the Notice of Motion dated 17th June, 2021 be and is hereby struck out.
- (e) The remainder of the Petition shall be heard by way of reliance on the pleadings, affidavit evidence and written submissions.
- (f) The Respondents shall file and serve their respective responses to the remainder of the Petition within 14 days of this ruling.
- (g) Once served, the Petitioner will, within 14 days thereof, file and serve any supplementary responses, if need be, together with written submissions.
- (h) The Respondents shall thereafter file and serve written submissions within 14 days of service.
- (i) Matter shall then be fixed for highlighting of submissions.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 18th day of November, 2021

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Okiya Omtatah Okoiti, Petitioner in person.

Mr. Mwendwa, Learned Counsel for the 1st Respondent.

Miss. Chibole, Learned Counsel for the 2nd Respondent.

Elizabeth Wanjohi – Court Assistant.