



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 202 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLE 27, 40, 43 AND 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, SECTIONS 4, 7, 8, 9, 10 & 11**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**JOYCE CHEROP KASPANDOY & 609 OTHERS.....APPLICANTS**

**AND**

**KENYA POWER AND LIGHTING COMPANY.....RESPONDENTS**

**RULING**

1. This ruling disposes a preliminary objection raised by the Respondent’s counsel. The substance of the objection is threefold: - *First*, that this suit is an abuse of court process, because there exists a substantially similar suit at the Environment and Land Court in which the applicants or some of them are plaintiffs. *Second*, that, this court is divested of jurisdiction to hear and determine this matter by dint of Article 162 (b) and 165 (5) (b) of the Constitution and section 13 of the Environment and Land Court Act.<sup>[1]</sup> *Third*, that the prayer of *certiorari* is not available since the same is time barred by dint of Order 53 Rule 2 of the Civil Procedure Rules, 2010

2. The crux of the applicants’ claim is that they are residents and owners of land along Saika Estate, Omega, Daylight, Chemichemi and Mwengeny area in Kayole, Embakasi Sub-county, Nairobi County where they have erected permanent structures ranging from single dwelling units, commercial buildings, small industrial units, schools, churches and other facilities. The applicants’ claim that the Respondent have earmarked the said developments for demolition on grounds that they are erected on the power line wayleave of 132KV.

3. They pray for an order of *prohibition* to stop the intended demolition. They also pray for an order of *certiorari* to quash the Notice whether verbal or written relating to the said demolition. In addition, they urge the court to declare that intended demolition violates their rights against equality and discrimination. Further, they pray for a declaration that being the legitimate owners of the said properties, they have a legitimate expectation to the enjoyment of all rights accruing from the ownership of their properties and that the demolition offends their individual rights to ownership of property, housing, education and social amenities.

**The Preliminary Objection**

4. The substance of the Respondent’s Preliminary Objection is contained in the Replying Affidavit of Emily Kirui, the Respondent’s Manager, Legal Services in her dated 26<sup>th</sup>June 2019 as follows:-

a. That there exists Nairobi ELC No. 171 of 2019, *Robert Odera Odhiambo & 576 Others v Kenya Power & Lighting Company Limited* that is strikingly and substantially similar to the instant case. The said suit involves same parties as in this case and that the two suits relate to the same subject matter, namely, the said land and developments within the wayleave area in question.

b. That the earlier suit seeks to stop the Respondent from demolishing the same structures erected within the wayleave reserve area, which the applicants encroached. Accordingly, this suit is a blatant abuse of court process.

c. In addition, she stated that pursuant to Articles 162 (2) (b) and 165 (5) (b) of the Constitution and section 13 of the Environment and Land Court Act,<sup>[2]</sup> the Energy Act,<sup>[3]</sup> and section 9 of the Fair Administrative Action Act,<sup>[4]</sup> this court lacks jurisdiction to hear this case.

d. Lastly, she averred that the prayer for certiorari is time barred because the notice complained of was issued on 14<sup>th</sup> December 2018 while this suit was filed on 24<sup>th</sup> June 2019, six months after the impugned decision was made, hence, it offends Order 53 Rule 2 of the Civil Procedure Rules, 2010.

## The arguments

5. Mr. Muga, the Respondent's counsel, essentially highlighted the averments in the Replying Affidavit and submitted that this suit is substantially similar to ELC 171 of 2019; hence, it is an abuse of court process. He referred the court to the copies of pleadings relating to the said case and pointed out the striking similarity between the two suits.

6. On jurisdiction, he pointed out that the applicant is seeking to stop eviction from a Wayleave area. He specifically referred to the prayers in the application, which seeks to stop eviction from land and their claim that they are legitimate owners. He argued that the core dispute is occupation on Wayleave land. He relied on Article 165 (b) of the Constitution and section 13 of the Environment and Land Court Act<sup>[5]</sup> and argued that this court has no jurisdiction to entertain this matter.

7. Regarding the alleged violation of fundamental rights, counsel submitted that the Environment and Land Court can address disputes relating to violation of fundamental rights and can grant the reliefs sought herein. He relied on *Karani Investments v National Land Commission & Another*,<sup>[6]</sup> *Republic v Chief Land Registrar & Another*,<sup>[7]</sup> *Republic v National Land Commission & Another*<sup>[8]</sup> and *Republic v Chairman, Business Premises Rent Tribunal & Another ex parte Carrington Complex Limited*.<sup>[9]</sup>

8. Mr. Macharia, the applicants' counsel argued that this is a matter of public interest. He placed reliance on *Mohamed Ali Baadi and others v Attorney General & 11 others*<sup>[10]</sup> in which the court stated that where a case raises hybrid issues cutting across the jurisdiction of different courts, the court ought to adopt the predominant test. To him, the predominant test in this case is violation of fundamental rights. He argued that the impugned decision is unreasonable and relying on the further affidavit filed on 2<sup>nd</sup> July 2019, he submitted that this court has jurisdiction to entertain this matter. However, he urged the court in the event that it finds it has no jurisdiction to transfer the case to the Environment and Land Court.

9. Regarding the argument that the prayer for certiorari is time barred, he submitted that the decision was communicated orally.

10. On the argument that this suit is an abuse of court process, he argued that at the time of filing this suit, the applicants were not aware of ELC No. 171 of 2019, and, that, the existence of the said suit does not affect these proceedings.

## Determination

11. I will first address the question whether these proceedings constitute abuse of court process. A reading of the copies of pleadings relating to ELC Civil Suit No 171 of 2019 annexed to the Respondent's Replying Affidavit shows that the first plaintiff in the said suit, a one Robert Odera Odhiambo also appears as number two in the list of applicant's in annexure JCK1 in the instant application. Indeed the same applicants in the instant application are plaintiffs in the said suit.

12. Another notable similarity between the two suits is that the reliefs sought in both suits are substantially similar. More fundamental is the fact that both suits relate to the same subject matter that, is the Wayleave land in question. The core complain in the two suits is alleged eviction from the said Wayleave land. The question of occupation and or use of the said land an issue in both suits. The grounds in support of the instant application and the application dated 21<sup>st</sup> May 2019 filed in the said case are substantially similar, just like the prayers sought in the said application and in the instant application.

13. I find it disturbing and despite the said striking similarities, the applicants did not disclose the existence of the earlier in the instant application. It is settled law that a person who approaches the court or a tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge, or, which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or attempting to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.<sup>[11]</sup>

14. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.<sup>[12]</sup> The applicants were under a solemn duty to bring to the attention of the court the existence of the earlier suit at the earliest opportunity possible and leave it to the court to determine the merits or otherwise of their case.

15. The duty of a litigant is to make a full and frank disclosure of the material facts. The material facts are those, which it is material for the court or Tribunal to know in dealing with the issues before the court or tribunal. The duty of disclosure therefore applies not only to material facts known to the applicants, but also to any additional facts, which they would have known if they had made inquiries.

16. The question that inevitably follows is whether the non-disclosure in this case was innocent, in the sense that the applicants did not know the facts or they did not perceive the relevance of the case. In my view, the non-disclosure in this case cannot be said to be innocent bearing in mind the striking similarity between the two cases.

17. I have in numerous decisions<sup>[13]</sup> observed that it is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."<sup>[14]</sup> The situations that may give rise to an abuse of court process are indeed in exhaustive. It involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

a) *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

c) *Where two similar processes are used in respect of the exercise of the same right.*

d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.*<sup>[15]</sup>

f) *Where a party has adopted the system of forum shopping in the enforcement of a conceived right.*

g) *Where an appellant files an application at the trial court in respect of a matter, which is already subject of an earlier application by the respondent at the Court of Appeal.*

h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.*<sup>[16]</sup>

18. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.<sup>[17]</sup>

19. It is settled law that a litigant has no right to pursue *paripasu* two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amounts to abuse of court/legal process.

20. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.<sup>[18]</sup> The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.<sup>[19]</sup> On this ground alone, this suit is hereby dismissed for being an abuse of court process.

21. Next, I will address the question of jurisdiction. 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 statute, charter, or commission under which the court is constituted imposes the limit of this authority. The authority may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

22. 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist.

23. 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.<sup>[20]</sup> A court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent.<sup>[21]</sup> The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*<sup>[22]</sup> where the late Justice Nyarangi JA stated as follows:-

*"... 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 tools in respect of the matter*

before it the moment it holds the opinion that it is without jurisdiction.”

24. A court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court<sup>[23]</sup> had this to say:-

*"Jurisdiction is determined on the basis of the pleadings,<sup>[24]</sup>... and not the substantive merits of the case... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."*

25. The applicants challenge the Respondent's decision to evict them from Wayleave land and to demolish their structures. They also claim that they are legitimate owners. It is evident that the substance of the dispute involves use, occupation and alleged ownership to land.

26. It is trite that a court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.<sup>[25]</sup> Article 165(1) of the Constitution vests vast powers in the High Court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction to hear any question respecting the interpretation of the Constitution. Article 23 (1) provides that the High Court has jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

27. The limitation of the vast powers conferred upon the High court under Article 165 is found in Article 165 (5). This provision states in mandatory terms that the high court **shall not** have jurisdiction in respect of matters:- (a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b). Clearly, this court has no jurisdiction to determine matters falling under Article 162 (2) (2) (a) & (b) of the Constitution.

28. However, what are these matters? The answer is found in the provisions of Section 13 of the Environment and Court Act.<sup>[26]</sup> The preamble to the said act states that it was enacted to give effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes. Section 13 of the Environment and Land Court Act<sup>[27]</sup> provides 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 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.*

*(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—*

*(a) interim or permanent preservation orders including injunctions;*

*(b) prerogative orders;*

*(c) award of damages;*

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs

29. 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 Act. In this regard, my view is that the intention in 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.

30. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters, which fall within the ambit of the Environment and Land Court. This is clearly provided for under Section **13 (3)** of the Act. In addition, sub-section **7 (b)** above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Judicial Review application challenging the decision of the Respondent to evict them from the land in question or to stop them from interfering with their occupation and use of the land. The said court can grant the reliefs sought herein.

31. I may usefully refer to *United States International University (USIU) v Attorney General*.<sup>[28]</sup> Although the said case related to labour issues, the contention was whether the Employment and Labour Relations Court established under Article **162 (2)** of the Constitution has the jurisdiction to interpret the Constitution and to grant the remedies provided under Article **23** of the Constitution. The court stated as follows:-

*"45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011."* (emphasis added).

32. The Court of Appeal has also had occasion to address itself on the issue in the case of *Daniel N. Mugendi v Kenyatta University & 3 others*.<sup>[29]</sup> The court allowed an appeal and set aside an order dismissing a suit on grounds that the Industrial Court was not possessed of jurisdiction to interpret the Constitution and to grant the remedies provided under Article **23** of the Constitution. It stated:-

*"In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."* (emphasis added).

33. In *Republic vs National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others*<sup>[30]</sup> the High Court rendered itself as follows:-

62. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by **Justice Mohammed Ibrahim** in *Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR*:

64. Whereas this Court had in the past entertained disputes wherein the core issue was that of jurisdiction of the National Land Commission, since the determination of the Supreme Court in *Petition No. 5 of 2015- Republic vs. Karisa Chengo & 2 Others* it has become clear that such matters ought to be dealt with by the specialized courts, when the Court expressed itself inter alia as hereunder:-

*"it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation...Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with **suis generis** jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."*

65. In this case, it is clear that even if this Court were to hear this matter the substratum of the dispute would remain unresolved. However, it is my view that the dispute herein falls squarely within the provisions of section 13(2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant's contended right to be heard stem from their yet to be determined interest in the suit land.

66. In this case, I am satisfied that the dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself

with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in ***Peter Oduor Ngogwe vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012***, [para. 29-30] where it was held:

*“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with ‘general’ original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework”.*

67. Similar sentiments were expressed in ***Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others*** in which it was held that:

*“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”*

34. A High court may not determine matters falling squarely under the jurisdiction of the ‘status courts’ namely the Employment and Labour Relations Court and the Land and Environment Court. Even with that clear-cut jurisdictional demarcation, on numerous occasions, 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 this case. It falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. I decline the invitation to venture into this forbidden sphere.

35. It is true the Constitution guarantees right to access courts. The Constitution does operate in a vacuum. It does not automatically oust other constitutional and statutory provisions brought to life by the legislative arm of government such as the Environment and Land Court Act.<sup>[31]</sup> As such, where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction will be inappropriate to invoke this courts vast jurisdiction. The jurisdictional boundaries of the High Court are clearly spelt out under the constitution. Consequently, I find and hold that the jurisdiction of this court in this matter has been improperly invoked and dismiss this suit.

36. The third ground of assault challenges the prayer for *certiorari* on grounds that the application was filed more than six months after the date of the impugned Notice. In support of this argument, the Respondent’s counsel cited Order 53 Rule 2 of the Civil Procedure Rules, 2010 which provides as follows:-

*Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by an act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*

37. Prior to the promulgation of the Constitution of Kenya, 2010, there was a two tier legal basis for judicial review jurisdiction of the Kenyan courts. The two critical references in search for answers to this question were Sections 8 and 9 of the Law Reform Act,<sup>[32]</sup> which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules, 2010 which was the procedural basis of judicial review of administrative actions on the other hand. The promulgation of the Constitution of Kenya, 2010 and the legal developments thereafter have brought into focus other legal bases of jurisdiction for judicial review of administrative actions in Kenya. A legal practitioner, judicial officer, student or other researcher in the realm of judicial review as a remedial stream of our courts has to consider all this for completeness sake.<sup>[33]</sup>

38. This court has had the opportunity to address the above provisions in several cases among them *Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory limited*<sup>[34]</sup> and *Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments*.<sup>[35]</sup> The following excerpt is illuminating and to the point:-

*“There are also instances of direct recognition of judicial review remedies, jurisdiction and grounds in the body of the Constitution. Article 23 of the Constitution is the remedial appendance to article 22 of the Constitution. Article 22 vests courts with jurisdiction for enforcement of fundamental rights and freedoms set out in or recognized by the Bill of Rights. Among the reliefs available in proceedings for enforcement of fundamental rights and freedoms is an order of judicial review.*

*Article 47 of the constitution codifies every person’s right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action. Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.*

*Article 165 of the Constitution establishes and vests jurisdiction in the High Court. Part of the jurisdiction vested in the High Court is: "supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function ...". There is explicit judicial review content in this normative prescription of jurisdiction."*

39. In the above-cited cases, this court was emphatic that the entrenchment of the right to access the court in the Constitution opened the doors to access justice, a position aptly captured by the phrase "*Justice is open to all, like the Ritz Hotel*"<sup>[36]</sup> attributed to a 19<sup>th</sup> Century jurist. Article 22 of the Constitution guarantees the right to institute court proceedings to enforce the Bill of Rights. Article 23 grants the court the authority to uphold and enforce the Bill of Rights.

40. Article 48 guarantees the right to access court while Article 258 provides that every person has a right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. I need not mention the supremacy of the Constitution and its binding nature decreed in Article 2.

41. Article 47 provides for the right to a fair Administrative Action. To give effect to Article 47, Parliament enacted the Fair Administrative Action Act.<sup>[37]</sup> Section 2 of the act defines an "administrative action" to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

42. Article 23 (3) provides the remedies the Court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article 22, the court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, and invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and *an order of Judicial Review*.

43. Section 7 of the Fair Administrative Action<sup>[38]</sup> provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to— (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said section. I find it useful to recall the words of the court in *Masai Mara (SOPA) Limited v Narok County Government*<sup>[39]</sup> that:-

*"On the issue of the application of Order 53 of the Civil Procedure Rules to a constitutional petition where a party seeks judicial review reliefs, I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions and remedies were also subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive constitutional judicial review when one reads Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of rights, to grant by way of relief an order for judicial review. 55. Order 53 of the Civil Procedure Rules do not consequently apply to Constitutional Petitions where the court is expected to exercise a special jurisdiction which emanates from the Constitution and not a statute. 56. I consequently decline to accede to the Respondent's contention that the Petitioner ought to be denied the reliefs sought on the basis that the Petition was filed more than six months after the action complained of took place."*

44. Considering the above constitutional provisions, the question that arises is whether a citizen citing violation of the Constitution or violation of constitutional rights or challenging an administrative action or a decision of a tribunal can be locked out by the time limit specified in Order 53 Rule 2 of the Civil Procedure Rules, 2010.

45. All law must conform to the Constitutional edifice. The provisions of sections 8 and 9 of the Law Reform Act<sup>[40]</sup> and Order 53 of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed<sup>[41]</sup> "*All statutes must be interpreted through the prism of the Bill of Rights.*" The governing statute and the resultant decision must be interpreted through the prism of Article 47 of the Constitution and the Fair Administrative Action Act, which grants the right to apply for judicial review remedies. In fact, the applicants expressed their application under provisions of the Constitution, namely, Articles 10, 27, 47 and 232.

46. Judicial Review is now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa. In *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*,<sup>[42]</sup> the South African Constitutional Court held that the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution. It also stated that insofar as they might continue to be relevant to Judicial Review, the said principles gain their force from the Constitution. It added that in the Judicial Review of public power, the two are intertwined and do not constitute separate concepts. The court went further to say that, there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

47. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review because of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second*, the right to access the court is now guaranteed in the Constitution. This renders the time limit under Order 53 Rule 2 of the Civil Procedure Rules unnecessary, especially where a litigant moves the court under Article 47 of citing violation of fundamental rights. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3) (f). *Fourth*, section 7 of the Fair Administrative Action Act<sup>[43]</sup> provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.

48. Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.<sup>[44]</sup> Time has come for our courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

49. In the earlier cited decisions, I observed that time has come for Parliament to consider the relevancy and constitutionality of the provisions of the Law Reform Act<sup>[45]</sup> and Order 53 of the Civil Procedure Act, 2010 which require leave to apply for judicial Review remedies and limit time for approaching the court. The use of judicial review as a tool to enforce fundamental rights was appreciated even before the 2010 Constitution in *Republic Vs Kenya Roads Board ex parte John Harun Mwau*,<sup>[46]</sup> in which the court had this to say:-

*“The remedy of Judicial Review is available as a procedure through which the applicant can come to court for the determination of any Constitutional issue including striking down of legislation which may be unconstitutional. Judicial Review has an entirely different meaning in Commonwealth countries, which have adopted the written supreme Constitutional system. ... Judicial Review in this sense means the power to scrutinize laws and executive acts, the power to test their conformity with the Constitution and the power to strike them down if they are found to be inconsistent with the Constitution...”*

50. I am not persuaded by the invitation by the Respondent’s counsel to find that the prayer for *certiorari* is time barred. Such an interpretation cannot be read in a manner that is consistent with Articles 22, 23, 48 and 258 of the Constitution. Instead, I opt to hoist high the said constitutional provisions.

### **Final orders**

51. In view of my analysis and conclusions herein above, I find and hold that this suit is an abuse of court process. Further, I find and hold that this case relates to the question of use and occupation of land. It also relates to ownership to land. Such issues relate to interference with use, occupation and enjoyment of land. Such issues fall within the jurisdiction of the Environment and Land Court. Consequently, I find and hold that the Respondent’s Preliminary Objection succeeds. I allow the said preliminary objection and dismiss this suit with costs to the Respondents.

Orders accordingly. Right of appeal.

**Dated, Signed and Delivered at Nairobi this 5<sup>th</sup> day of November, 2019**

**John M. Mativo**

**Judge**

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[1] Act No. 19 of 2011.

[2] Act No. 19 of 2011.

[3] Act No. 1 of 2019.

[4] Act No. 4 of 2015.

[5] Act No. 19 of 2011.

[6] {2018} e KLR.

[7] {2019} e KLR.

[8] {2018} e KLR.

[9] {2019} e KLR.

[10] {2018}e KLR

[11] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[12] *Brinks-Mat Ltd vs Elcombe* {1988} 3 ALL ER 188.

- [13] See *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016
- [14] Black Law Dictionary, 6<sup>th</sup> Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11
- [15] *Jadesimi v Okotie Eboh* (1986) 1NWLR (Pt 16) 264
- [16] {2007} 16 NWLR (319) 335.
- [17] Justice Niki Tobi JSC of Nigeria.
- [18] Ibid.
- [19] Ibid.
- [20] John Beecroft, *Words and Phrases Legally Defined*, Volume 3:1-N, at Page 113.
- [21] The Supreme Court in the matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported).
- [22] {1989} KLR 1.
- [23] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.
- [24] *Fraser vS ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.
- [25] *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.
- [26] Act No. 19 of 2011.
- [27] Chapter 12A, Laws of Kenya.
- [28] {2012} eKLR.
- [29] {2013} eKLR.
- [30] {2018} eKLR.
- [31] Act No.19 of 2011.
- [32] Cap 26, Laws of Kenya.
- [33] See Elisha Ogoya, *The Changing Character of Judicial Review Jurisdiction Under the Constitutional and Statutory Order in Kenya*, <http://lsk.or.ke/Downloads/Elisha%20Ogoya%20-%20Judicial%20Review.pdf>
- [34] {2019} e KLR.
- [35] {2019} eKLR.
- [36] Sir James Matthew, 19th Century jurist.
- [37] Act No. 4 of 2015.
- [38] Act No. 4 of 2015.
- [39] Nairobi High Court Petition Number 336 of 2015.
- [40] Cap 26, Laws of Kenya.
- [41] *Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO and [2000]
- [42] 2000 (2) SA 674 (CC) at 33.

[43] Act No 4 of 2015.

[44] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[45] Cap 26, Laws of Kenya.

[46] **HC Misc Civil Application No.1372 of 2000.**