



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 202 OF 2015**

ANNE MUMBI HINGA .....PETITIONER

VERSUS

THE HON ATTORNEY GENERAL

THE CHIEF REGISTRAR OF THE JUDICIARY

THE JUDICIAL SERVICE COMMISSION

THE CHIEF LAND REGISTRAR

SALIM DHANJI T/A SALIM DHANJI & CO.  
ADVOCATES.....RESPONDENTS

AND

VICTORIA NJOKI GATHARA .....INTERESTED  
PARTY

**RULING**

This is a ruling on a Preliminary Objection dated 21<sup>st</sup> July 2015.

The Petitioner filed a petition dated 13<sup>th</sup> May 2015 and sought the following reliefs:

a) A declaration that the following decisions were made in violation of the Constitution and hence are null and void.

i. Ruling dated 17<sup>th</sup> January 2002 in High Court Miscellaneous No 617 of 2000

ii. Ruling dated 24<sup>th</sup> September 2008 in High Court Miscellaneous application No 617 of 2000.

iii. Judgment delivered on 13<sup>th</sup> November 2009 in Court of Appeal Civil Appeal No 8 of 2009.

b) A declaration that the sub division and or transfer of parcel of land LR No 18084 in favour of the

interested party, Victoria Njoki Gathara was undertaken in breach of the constitution hence the same is null and void and an order for cancellations of the title.

c) General damages.

According to the petition, the petitioner and the interested party entered into a sale agreement for purchase of parcel Number 18084 for a consideration of Ksh1,500,000/- A deposit was paid but soon after a dispute arose. The matter was referred for arbitration and an award was made in favour of the interested party. The interested party then moved to court through miscellaneous application No. 617 of 2000 to have the award adopted as a decree which was done in the ruling dated 17<sup>th</sup> January 2002 The petitioner applied to have it set aside but his application was dismissed.

Being dissatisfied, the petitioner filed an appeal to the court of appeal in civil appeal no 8 of 2009. That appeal was also dismissed. The petitioner says she has filed another case being ELC Case No 373 of 2010 which is still pending before the Environment and Land Court. She has filed this constitutional petition to challenge the decisions referred to above saying they are unconstitutional and violated her fundamental rights.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a notice of preliminary objection dated 21<sup>st</sup> July 2015 filed in court on the same day. The grounds for objecting to the petition are that the petition was instituted in violation of Article 165 of the **Constitution** with regard to jurisdiction, that the petition is filed in a court that is not seized of jurisdiction, that this court is not the appropriate forum for resolution of the petitioner's complaint with regard to the decisions delivered by both the High Court and court of appeal; and that the petition is misconceived and bad in law.

In that context therefore, the preliminary objection raised by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is a jurisdictional one, that this court does not have jurisdiction to entertain the petition filed herein.

Parties filed written submissions which are on record. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's Counsel has submitted that this court does not have jurisdiction to hear the petition. Counsel relied on Article 165(6) of the **constitution** to show that the court lacks jurisdiction to determine the questions raised in the petition. In counsel's view, prayers (a) (i) (ii) and (iii) are coached in a manner meant to review decisions made by both the High Court and the Court of Appeal. Counsel referred to the decision in **Greenfields Investments Limited & Another v The State of the Republic of Kenya petition No 292 of 2012** for the proposition that this court cannot supervise other superior courts even when exercising its supervisory jurisdiction.

Counsel further submitted that the petition is res-judicata and referred to the case of **Okiya Omtata Okoiti v Communication Authority of Kenya and Others, Petition No 59 of 2015**, to buttress his point. Finally it has been submitted that 2<sup>nd</sup> and 3<sup>rd</sup> respondents cannot be held responsible for actions done in good faith by judicial officers. He relied on **Maina Gitonga v Catherine Nyawira Maina; Petition No 10 of 2014** (Nyeri).

Counsel for the 1<sup>st</sup> and 4<sup>th</sup> respondents supported the position taken by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. There was no representation on the part of the 5<sup>th</sup> respondent nor were submissions filed on behalf of this respondent.

For the petitioner, it has been submitted that the court has jurisdiction under **Articles 23 and 165(3)(d) of the Constitution**. According to counsel, the petition before court will involve interpretation of the **Constitution** and in his view, this court, as a constitutional court, has jurisdiction to hear the petition. Counsel referred to the judgment of **Mutunga CJ in Jasbir Singh Rai & 3 others v Tarlocham Singh Rai Estate & 4 others [2013]eKLR** in support of his position. He has urged the court to dismiss the Preliminary Objection.

This court has been called upon to decline to hear the petition through a Preliminary Objection on

grounds that it has no jurisdiction. What in reality is a Preliminary Objection was discussed in the case of **Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. It is in the nature of a demurrer, raises a pure point of law which is argued on the assumption that facts pleaded by either side are correct. When successfully argued the objection disposes the entire suit.

The facts of this case are not in dispute. The question therefore, is whether this court has jurisdiction to hear the petition. Jurisdiction is the power or authority vested in a court or tribunal to hear and render itself on disputes referred to it for resolution. If a court does not have that power or authority, it is said to be without jurisdiction. Any decision made without jurisdiction would be null and void. The court would have acted in vain.. In the case of **The Owners of Motor Vessel Lillian's" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, it was 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

The same issue was addressed by the **Supreme** Court of Kenya in the case of **Samuel Kamau Macharia and another V Kenya Commercial Bank Ltd and 2 others [2012] ekLR**, where the court said,

**“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 the other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where the constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limit. It cannot expand its jurisdiction through judicial craft or innovation.”**

Jurisdiction of the High Court is donated by Article 165(3) of the **Constitution**.

The court has unlimited original jurisdiction in criminal and civil cases under **Article 165 ( 3) (b)**, the court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. **Article 165(6)** is material to the objection before court. It provides-

**“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.”**

Superior courts, in **Article 162** of the **Constitution**, are the Supreme Court, the Court of Appeal, the High Court, and Courts of equal Status contemplated under **sub-Article 2**. These are the Employment and Labour Relations Court and the Environment and Land Court.

The issue raised in the preliminary objection is based on **Article 165 (6)** of the **Constitution**. **Article 23** provides that the High court has Jurisdiction in accordance with **Article 165** to hear and determine applications for redress of violation of fundamental freedoms in the Bill of Rights. **Articles 23** and **165** must therefore be read together. Under **Article 165(6)**, the High Court can exercise supervisory jurisdiction over subordinate courts, Tribunals and other bodies exercising judicial and quasi-judicial powers but not over other superior courts.

The petitioner has a right to approach this court for declarations and the court has jurisdiction under **Article 23(1)** to determine whether her rights under the Bill of rights have been violated. However, in doing so, the court must exercise its jurisdiction in accordance with the **Constitution**. **Article 165(6)** limits the court’s jurisdiction to the extent that it cannot supervise or superintend superior courts. This is a constitutional limitation. Although this court is said to be a constitutional court, it is only a division of the High Court established through an administrative arrangement for ease of disposal of certain cases. This arrangement does not confer on the court any special jurisdiction of its own It exercises jurisdiction as

conferred by **Article 165**. As long as that jurisdiction is limited by **Sub- Article 6**, this court cannot exercise supervisory jurisdiction over other superior courts or judges of such courts sitting in other divisions of the High court, or Courts of equal status.

**Lenaola J** (as he then was) dealt with a similar issue in the case of **Greenfield Investment Limited & Another v State of the Republic of Kenya & 3 Others 2013] eKLR**, where the court had been called upon to declare decisions made by different judges of the High court unconstitutional, and failure by both the Court of Appeal and Supreme Court to act expeditiously in determining the petitioner's applications, a breach of his right of access to justice. The learned judge allowed the Preliminary Objection holding that the court did not have jurisdiction to determine those issues before it

The same issue was addressed by Mumbi Ngugi J in the case of **Robert Mwangi v Catering Ltd and Another [2012] JeKLR** thus-

**“If I understand Mr. Odera correctly, his contention is that this court as a constitutional and Human Rights Division, in using its original jurisdiction conferred on the High Court under Article 165, can supervise even the Supreme Court and the Court of Appeal on matters of procedure. Even without reference to the existing judicial authorities on the point, this is not only an argument that flies in the face of clear constitutional provisions but is a totally fallacious argument that, taken to its logical conclusion, would lead to complete absurdities and reduce our judiciary into a comical farce.”**

I have read the record and facts in this petition. The petitioner went through arbitration proceedings, thereafter filed an application to set aside a decision of the High Court adopting the award as a decree of the court. That application was dismissed. The petitioner appealed to the Court of Appeal but the Court of Appeal dismissed that appeal. The petitioner now wants this court to exercise its jurisdiction as a constitutional court and declare those decisions a violation of the petitioner's fundamental rights. The petitioner has relied on a judgment by **Mutunga, CJ** in **Jabir Singh Rai** (supra) where the learned **Chief Justice** held that there is no violation the constitution cannot redress. That statement of law is correct. **Article 23** of the **Constitution** (the Bill of Rights) provides for redress for any violations of the Bill of Rights. The Article gives a wide range of remedies. However the court must still operate within its mandate.

The decisions the court is called upon to declare unconstitutional, were made by judges of Superior Courts, High Court and the court of Appeal. These courts exercised jurisdiction conferred on them by the constitution and the law. They did not act as inferior tribunals to this court. By dint of Article 165(6), this court cannot review or annul those decisions through supervisory jurisdiction. Article 165(6) is a constitutional limitation to this court's jurisdiction. Any attempt by this court to hear the petition would be tantamount to arrogating to itself jurisdiction it does not have. Its jurisdiction is curtailed in that respect. This court as a creature of the constitution derives its jurisdiction from the constitution and must therefore act within the constitution. It is my finding that this court lacks jurisdiction to hear the petition.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have also submitted that this matter is res-judicata, since similar issues have been heard and determined by courts of competent jurisdiction. They have relied on section 7 of the civil procedure Act, **Okiya Omtata** (supra) and **Usango v Wambugu** (supra). The essence of this submission is that the issues were litigated upon and concluded.

**Section 7 of the Civil Procedure Act** provides:

**“No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

Section 7 requires that four prerequisites exist for the case to be res judicata. There must have been a

previous suit in which the same matter was in issue; parties were the same or litigated under the same title; A competent court heard and determined the matter, and the issue has been raised once again. (**See - Uhuru High way Development Limited v Central Bank of Kenya & 2 Others [1997]eKLR. ).**

In the case of **Edwin Thuo Vs Attorney General and another Nairobi petition No.212 of 2012**, the court stated:

**“The courts must always be vigilant to guard against litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new course of action which has been resolved by a court of competent jurisdiction.”**

In **John Florence maritime services limited v & another v cabinet secretary for transport and infrastructure &3 others [2015] eKLR**, the Court of Appeal stated-

**“The rationale behind res judicata is based on public interest that there should be an end to litigation coupled with the interest to protect a party facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resource and timely termination of cases. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law...In a nutshell, res judicata being a principle of law, may be raised as a valid defence It is a doctrine of general application and it matters not whether the proceedings are constitutional in nature. The general consensus therefore remains that res judicata being a general principle of law that relates to jurisdiction of the court, may be raised as a defence to a constitutional claim...”**

The prayers in the petition seek to overturn the decisions made by both the High Court and Court of Appeal. They are designed to achieve what the petitioner did not succeed in doing in the previous litigation. The petitioner exhausted legal channel available for pursuing her cause. She cannot now come to this court by way of a constitutional petition to undo those decisions by introducing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as new parties in the petition to give her cause new impetus. A proper reading of section 7 of the Civil Procedure Act leaves no doubt that the issue herein was directly and substantially in issue in the previous actions. The doctrine of res-judicata seeks to ensure there is conclusiveness to litigation. Taking into account the facts of this petition, the law and precedent, it is my finding that this matter is res-judicata.

The final issue is whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents can be held liable for actions of judicial officers. Whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondents say they cannot, the petitioner has said nothing on this. The 2<sup>nd</sup> respondent holds a position provided for in the **constitution**. Her duties are merely administrative in nature. The 3<sup>rd</sup> respondent is a constitutional commission established under Article 171 of the **constitution**. Its functions are provided for under Article 172 of the constitution as well as the **Judicial Service Act No. 1 of 2011**.

**Article 160(5)** of the **Constitution**, section 6 of the Judicature Act (Cap 8) and Section 45 of Judicial Service Act, grant immunity to the 2<sup>nd</sup> respondent, members of the 3<sup>rd</sup> respondent Judges and judicial officers from civil action over matters or things done in good faith in the course of their duties. The judges of the High Court and those of the Court of Appeal exercised their jurisdiction in accordance with the **constitution** and Statute. Their decisions were made in the course of their duties. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents cannot be held liable for action of those judges in the face of clear constitutional and legal provisions. Allowing that would create disharmony within the judiciary.

For the above reasons, I am satisfied that the preliminary objection has merit and is hereby allowed. The petition dated 13<sup>th</sup> May 2015 is struck out. Regarding costs, the order I make is that each party do bear their own costs.

**Dated and Delivered at Nairobi this 3<sup>rd</sup> day of February 2017**

**E. C. MWITA**

**JUDGE**