



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL REFERENCE NO. 531 OF 2016

In the matter of Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 39, 40, 42, 47, 48, 50, 57, 60, 61, 64, 70, 159, 160 and 165 of the Constitution of Kenya as read together with the Children’s Act No. 8 of 2001

and

In the matter of contravention of Rights and Fundamental Freedoms Under Articles 1 (1) & (2), 2 (1), 3 ((1), 10 (1) & (2), 19, 20 (2) & (3), (b), 21 (1), (1) & (3), 24 (1), (2) & (3), 25, 27, 28, 29 (a), (c), (d) & (f), 31 (b), 35 (1), 40 (1), (2) & (3), 42, 47 (1) & (2), 48, 50 (1), 57 (c) & (d), 60 (1), 61 and 64 of the constitution of Kenya 2010

And

In the matter of sections 4, 144 and 148 of the Land Act

And

In the matter of sections 24 (a), 25 and 26 (1) of the Land Registration Act

And

In the matter of sections 4, 5, 6 and 7 Fair Administrative Action Act No. 4 of 2015

BETWEEN

David Ramogi.....1st Petitioner
Golden Lane Limited.....2nd Petitioner
Grace Nirasiwa Shabaan.....3rd Petitioner
David Pello Ntaya.....4th Petitioner
Siantei Pushti Mutamberia & Nampee Ene Pushati Mutamberia.....5th Petitioner

Versus

The Cabinet Secretary, Ministry of Energy & Petroleum & 6 Others.....Respondents

And

Kenya Electricity Transmission Co. Ltd.....Interested Party

RULING

Introduction

There has been a wide spread fallacy among a cross-section of Kenyans, literate and semi-illiterate; both the learned and ‘unlearned’ friends alike that somewhere in Kenya’s court structure lies a distinct court going by the name of a ‘Constitutional court’ vested with the exclusive mandate of determining matters concerning constitutional interpretation and violations of the Bill of Rights. The term ‘Constitutional court’ has often times been used synonymously with that of the Constitutional and Human Rights division. There has also been a misconception that the Constitutional and Human Rights Division situated at Nairobi has jurisdiction to superintend and wields power of review over decisions of other High court divisions. These unbelievable beliefs have resulted in the Division being swarmed with Constitutional Petitions; a fraction of which are misplaced, a chunk of others misguided, yet others lie at the verge of being simply ‘interesting’ and plainly frivolous. There has been tangible confusion and misunderstanding as to the jurisdictional confines of the divisions of courts by a section of the citizenry leading at times to unnecessary litigation and abuse of court process through multiple suits not to mention delay-dallying tactics in form of preliminary objections on jurisdictional questions.[1]

This ruling gives this court the opportunity to dispel this erroneous notion and demystify the concept of the mythical ‘Constitutional court’ against the backdrop of the Constitution of Kenya, 2010 as its framers intended and as Kenyans passed it. Premised on the fact that the country lacks a separate constitutional court per se, the ruling draws a parallel between what are administrative divisions of the High Court, in this case the Constitutional and Human Rights Division and substantive jurisdictional courts as established under the Constitution. I will also seek to establish that save in few exceptions provided under Constitution, any High Court judge has jurisdiction to interpret the Constitution and handle any matter touching on the Constitution. In so doing, it is hoped that this ruling will somehow aid in sealing the floodgates of superfluous litigation in our courts hence save on judicial time.

The Constitution must be a frame of reference for every lawyer and every judge. Not just those who find themselves sitting in the Constitutional and Human Rights Division, or in criminal trials but those who deal with company law, land, commercial transactions, negligence, labour law etc. Again the Constitution makes this clear: that national values bind us all not only when we apply or interpret the Constitution itself, but when we apply or interpret any law.[2] And those values include, of course, the rule of law, but also human dignity, equity, equality, social justice, non-discrimination, protection of the marginalised, integrity, transparency and accountability. And “any law” would include, in my view, rules of the common law, as well as statute.[3]

*Of paramount concern is the section of litigants who exhibit erroneous belief that only the Constitutional and Human Rights division of the High court possesses the jurisdiction to interpret the constitution or deal with allegations of breach or threatened breach of their bill of rights.[4] That may explain why a litigant will for instance file a land matter and while it is *sub judice* lodge a separate petition in the Constitutional and Human Rights division raising constitutional issues over the same property subject of adjudication in that other forum. The net effect of such stunts has been multiplicity of suits in our various court registries, possibility of duplication of judicial efforts and the risk of parallel orders in the same cause not to mention wastage of judicial time.[5]*

There has also been a misguided notion that the specific divisions of the High Court-say the Family division, Commercial and admiralty division, Civil and Criminal divisions lack jurisdiction to hear and determine constitutional issues or deal with an issue falling in a different discipline and that stem from matters before them. Counsels will be heard to raise preliminary objections and fiercely contest

jurisdiction where say, a commercial-related question arises as an ancillary issue in a succession matter in the Family division while another litigant will be seen to raise Grounds of opposition as to jurisdiction of a judge in say, commercial division handling a constitutional issue that arises in the course of hearing.^[6] I think it is high time we set apart substantive jurisdiction from the administrative walls [read divisions] of the High Court. This inevitably leads us to the question of jurisdiction.^[7]

The system of courts in Kenya, according to our Constitution comprises the Supreme Court at the apex, the Court of Appeal followed by the High Court and the special courts under **Article 162(2)**, namely, the courts dealing with employment and labour relations matters and the environment and land matters (Environment and Land court). The subordinate courts established under **Article 169** then follow.

The Constitution further lists superior courts as the Supreme Court, the Court of Appeal, the High Court and the 'courts of equal status' established under **Article 162(2)** namely, the Employment and Labour Relations court and the Environment and Land Court; while according to **Article 169**, the subordinate courts comprise the Magistrates courts, the Kadhis' courts, the Courts Martial and any other court or local tribunal as may be established by an Act of Parliament except the High Courts of equal status.

This ruling is not about the hierarchy of courts in our judicial system, it is about a more critical and somewhat controversial issue; that of jurisdiction. **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers 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** which also touches on jurisdiction of the High court provides that; "23. (1) The High Court has jurisdiction, in accordance with Article 165, 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."

Article 23(2) nevertheless mandates Parliament to enact legislation giving original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation of a fundamental right or freedom in the Bill of Rights. From the foregoing, it becomes clear that 'constitutional court' is not part of the hierarchical structure in our Kenyan judicial system. In fact, nowhere in the Constitution of Kenya 2010 is there a mention of the term 'constitutional court'! It would also follow that every High Court judge in Kenya has jurisdiction to discharge functions falling under Article 165 of the Constitution because the Constitution only makes blanket reference to 'the High court.' It is thus not difficult to fathom why for instance a land matter disputing ownership in the Environment and Land Division (ELC) and over which a constitutional petition is subsequently framed invoking the breach of the right to property under **Article 40** of the Constitution is unlikely to be enthusiastically entertained in the Constitutional and Human Rights Division in the first instance.

Courts have also on numerous occasions emphatically ruled that where there is a specific mechanism given for resolution of disputes, then that must be followed and that the Constitution is not meant to replace the existent statutory regime.^[8] That is why for instance a constitutional petition solely claiming maintenance and custody of children and which invokes say, **Article 53** of the Constitution on equal parental responsibility is likely to be rerouted back to the Children's court for hearing and determination.^[9]

Comparative Jurisprudence

Majority of the countries of the world lack independent constitutional courts whose mandate is to exclusively handle constitutional matters while in other jurisdictions, the name may differ yet retaining the functional aspect of a distinct constitutional court, yet in others, this function is shared with the existent courts such as the High Court or Supreme Court as the case may be.

The Kenyan situation is distinguishable from some of the jurisdictions whose Constitutions specifically entrench a constitutional court in their justice system with clear cut jurisdiction. The Republic of South Africa is one such good example whose Constitution singles out 'the Constitutional court' identifying it as one of the courts in her judicial system; others being the Supreme Court of Appeal, the High Court's

(including any high court of appeal), the Magistrates' Courts and any other court established or recognized in terms of an Act of Parliament.^[10]

The Constitution of Republic of South Africa (1996) specifically establishes the Constitutional court as the highest court in all constitutional matters and provides for its composition and mandate. The constitution also provides for functions within the exclusive domain of the court such as matters to do with disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state, questions on the constitutionality of any parliamentary or provincial Bill and the constitutionality of any amendment to the Constitution, constitutionality of any amendment to the constitution amongst other functions. The court is mandated to make the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and is the court that must confirm any order of invalidity made by the Supreme Court of Appeal, High Court, or a court of similar status before that order has any force.

Closer home, a glance at the Constitution of the Republic of Uganda (1995) discloses some reference to a Constitutional court under its Article 137. This scenario is however different from the South African one because such a court is what could be referred as 'make-shift' as it is temporary to be reconstituted from the existent Court of Appeal when need arises with the appellate court then sitting as the constitutional court.^[11] It is this court that is to hear questions regarding the interpretation of the Constitution or petitions regarding acts or omissions thought to be inconsistent with or in contravention of a provision of the Constitution. However where the constitutional court as constituted considers that there is need for redress in addition to the declaration(s) sought, it may grant an order of redress or refer the matter to the High Court to investigate and determine the appropriate redress.

It has become pedestrian to find litigants seeking remedies through the 'constitutional court' in what is in effect an attempt at bypassing what would ideally be resolved by way of civil claims or normal appeal process. Crafty or politely call them 'innovative' litigants have devised means of seeking to have a second (sometimes even a third) bite of the cherry by trying to present what in essence is an appeal by way of constitutional petitions and an attempt at circumventing orders and decrees of competent courts.^[12] It is no longer astounding to find an unsuccessful litigant in say, a land dispute in the ELC division subsequently repackage and seek to re-introduce the same issues by way of a constitutional petition alleging for instance, breach of their right to property under **Article 40** or housing and other socio-economic rights under **Article 43**, the latter being especially common in mass eviction cases.^[13]

These parties have often invoked **Article 22** which gives any one a right of access to the court on allegations of breach or threatened breach of the bill of rights^[14] while others have tried to impress on the unlimited original jurisdiction of the High court in all matters as captured under Article 165. What these Parties however fail to appreciate and what want to emphasize is that the Constitution does not operate in a vacuum and did not oust the normal statutory mechanisms unless these are shown to be contradictory to constitutional provisions. The Constitution buttresses this point when at its **Article 19(3)(b)** it pronounces itself on the Chapter on the Bill of Rights as follows; *"The rights and fundamental freedoms in the Bill of Rights-(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter;"*

Regarding Article 22, the court has been categorical that this right of access is not the exclusive means of enforcement of fundamental rights and freedoms. In the case of *John Githongo and 2 others v Harun Mwau and 4 others*,^[15] for instance, the court stated in part as follows:-

"While Article 22 of the Constitution provides an independent and direct access to the High Court for enforcement, it is not the exclusive means for enforcing fundamental rights and freedoms... Firstly, the High Court under Article 165(3)(b) 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(3)(d) also grants the High Court jurisdiction respecting interpretation of the Constitution including a question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the

*Constitution is consistent with or in contravention of the Constitution...**This jurisdiction is not an independent jurisdiction, it is exercised in ordinary cases or disputes coming before the court and it need not be exercised through an Article 22 application.***"[16]

The preliminary of objection

On 5th January 2017, counsel for the Interested Party filed a notice of preliminary objection stating that this court lacks jurisdiction to hear and determine this petition on grounds that the same contravenes Article 162 (2) & (3) of the constitution of Kenya, 2010 as read with section 13 (2) & (3) of the Environment and Land Court Act.[17]

Briefly, in their petition, the petitioners averred that the second, third, fourth and fifth petitioners herein are the registered proprietors of parcels of land numbers *Kajiado/Kitengela/6686*, *Kajiado/ Kisaju/5402*, *Kajiado/Kaputiei/Central/66*, *Kajiado/Kitengela/33* respectively all situated within Kajiado County and that there is no dispute on the ownership of the said parcels of land and the question before court touches on "purely constitutional questions arising from the unlawful invasion of police on private land comprising of the above parcels of land."

It is alleged that the third Respondent, an independent contractor is constructing a 60 meter way leave trace for its 400KVA transmission line project which runs from Mombasa to Nairobi and through the above parcels of land. It is averred that the proprietors have never executed any way leave agreement or in any way allowed the third Respondent any form of entry either for the passage of the transmission line or otherwise over their parcels of land and hence the action complained of herein above amounts to forced entry into the said parcels land. It is also alleged that the 4th, 5th and 6th Respondents have threatened to arrest the 2nd to 5th petitioners and that heavily armed officers have been deployed by 4th, 5th & 6th Respondents to unjustifiably and unlawfully assist the 3rd Respondent to gain entry into the said parcels of land, hence the said officers have unlawfully gained entry and possession of the parcels in question.

It is averred that the acts complained of are unconstitutional and a violation Articles 1 (1), 22 (1), 23, 24, 25, 27, 28 29, 31 (b), 40 (1), 42, 47 (1), 48, 50 (1) 57, 60 (1), 61 & 64 of the constitution. Paragraphs 47 to 51 of the petition are also relevant to the issue before me as they touch on alleged interference with "quiet possession and use of the said parcels of land, trespass and or illegal entry and occupation." Also relevant to this ruling are the issues posed by the petitioners in the petition which in my view can be narrowed into two, namely, "interference with use and occupation of private land and the constitutionality of the said action."

Similarly, the reliefs sought in the petition can safely be grouped into two, namely, "reliefs seeking to declare the unconstitutionality or otherwise of the actions complained of and reliefs touching on the legality or otherwise of the alleged invasion, interference to use occupation and generally rights to private property." Evidently, the petition raises issues touching on constitutionality or otherwise of the actions complained of and alleged violation on property rights.

Submissions in support of the preliminary objection.

At the hearing of the preliminary objection, counsel for the interested party submitted that Article 162 (2) & (3) of the constitution talks of the Environment and Land Court as a court of equal status. Counsel also cited Article 165 (5) (b) on the court's jurisdiction and stated that it ousts this court's jurisdiction in matters touching on Environment and Land. Counsel also referred to section 13 of the Environment and Land Act[18]which provides for the jurisdiction of the Environment and Land Court.

In support of his argument that this court lacks jurisdiction, counsel cited the court of appeal decision in *Prof. Daniel N. Mugendi vs Prof. Olive M. Mugenda*[19]where the dispute related to employment and the court upheld the High Court's decision dismissing the case on grounds that an employment claim should have gone to the Industrial Court in accordance with Article 162 (2) (a) and that the Industrial and Labour Relations court can determine labour matters alongside claims of fundamental rights ancillary and incidental to those matters.

Counsel also cited the decision in *Ernest Kevin Luchido vs The Hon A.G & 2 Others*^[20] where the court held that the High Court lacks jurisdiction to in any manner deal with matters that fall under the Environment and Land Court. Counsel submitted that the issues in the case may require the court to delve into issues of compensation and that the issues in question touch on ownership of land and urged the court to uphold the preliminary objection.

Counsel for the Hon. Attorney General supported the preliminary objection and correctly submitted that without jurisdiction a court cannot move.

Submissions in opposition to the preliminary objection.

Counsel for the petitioners submitted that Article 162 (2) (b) is clear in that Environment and Land Court is meant to handle cases pertaining to Environment, occupation and title to land and further submitted that this petition relates to invasion of land by police officers an act which the petitioner terms to be a violation of their constitutional rights. Counsel cited the decision in the case of *Patrick Musimba vs National Land Commission & 4 Others*^[21] where a five judge bench of high court judges held that the high court had jurisdiction to hear the matter which related to property rights, the right to just compensation upon compulsory acquisition of land, fair administrative action, contravention of article 10 of the constitution, right to dignity, access to public information, right to clean water and environment and breach of principles of natural justice. Counsel also cited the decision in *Leisure Lodge Ltd vs Commissioner of Lands and 767 Others*^[22] decided by a bench of three High Court judges where it was held that both the High court and the ELC court have concurrent and or coordinate jurisdiction and could determine constitutional matters when raised touching on the environment and land and that neither the constitution nor the Environment and Land Act limited the court's jurisdiction.

Also cited is the decision in *Arnacherry Limited vs Attorney General*^[23] where the petitioners land had been converted into public use by erecting a police camp and government offices and the High court (single judge) found that the petitioners rights had been violated and awarded damages among other remedies.

Determination

The *locus classicus* on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*^[24] where **Justice Nyarangi** held as follows:-

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has 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."

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 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. 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 judgement is given.^[25]

I must point out that the decisions cited by both counsels render two seemingly contradicting positions

taken by courts of coordinate jurisdiction. Except the decision in *Prof. Daniel N. Mugendi vs Prof. Olive M. Mugenda*[26] which was rendered by the court of appeal on 17th May 2013 and is binding to this court, the other decisions were rendered by courts of coordinate jurisdiction. I must hasten to point out that the decision in the case of *Patrick Musimba* cited by the petitioners counsel was rendered on 5th June 2015, but the judges did consider and distinguished the said decision.

Thus, I have the court of appeal decision and the High court decisions cited above which in my view rendered seemingly different interpretations. A decision of a court of co-ordinate jurisdiction is not binding on this court[27] but merely persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to *stare decisis*. In the case of *R. v. Nor. Elec. Co.*,[28] McRuer C.J.H.C. stated:-

“.....The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary...” (*Emphasis added*).

In my opinion, I think that *“strong reason to the contrary”* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was *“given without consideration of a statute or some authority that ought to have been followed.”*

In this regard, I propose to recall with approval the observation made in the case of *Vadag Establishment vs. Y A Shretta & Another*[29] where the High Court held that:-

“It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same.”

Bearing in mind the fact that the above decisions rendered by a court of coordinate jurisdiction are not binding to this court, but merely persuasive, the question that follows is whether or not I have *“strong reason to the contrary”* to depart from either of the two conflicting positions bearing in mind that the phrase *“strong reason to the contrary”* does not mean a strong argumentative reason appealing to me, but something that may indicate that the decision(s) was *“given without consideration of a statute or some authority that ought to have been followed.”*

Talking of authority that ought to have been followed, what comes to my mind is the court of appeal decision rendered on 19th September 2014 in *Judicial Service Commission vs Gladys Boss Shollei & another*[30] which does not appear to have been considered in the Patrick Musimba case. Even though the decision related to an objection on the jurisdiction of the Industrial and Labour Relations Court to handle issues pertaining to violation of constitutional rights, the court of Appeal held that the Industrial and Labour Relations Court had jurisdiction to handle complaints relating to violation of constitutional rights arising out of a labour dispute.

“[45] In this case, the respondent filed her petition in the Constitutional and Human Rights Division of the High Court and the same was properly transferred to the Industrial Court by the High Court as the violations alleged arose from the employment relationship. Accordingly, I would thus reject the contention that the Industrial Court had no jurisdiction to entertain the respondent’s claim.”

A Court’s jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in *the matter of the Interim Independent Electoral Commission*,[31] at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner; *“ Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent.”*

Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. [32]Article 162 of the constitution of Kenya 2010 provides that:-

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Article 165 (3) of the Constitution provides as follows:-

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(5) The High Court shall not have jurisdiction in respect of matters— **(a)** reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or **(b)** falling within the jurisdiction of the courts contemplated in Article 162 (2). Clearly, this court has no jurisdiction to determine matters falling under Article 165 (2). But what are these matters? In my view, the answer can be found in the provisions of section 13 of the Environment and Court Act,[33]an Act of Parliament 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 act provides for the Jurisdiction of the Court as follows:-

(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

At this point, I wish to clearly state that the jurisdiction of the Environment and Land Court is only 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 and control, then this High Court will have no jurisdiction. If the dispute touching on land is for anything else other than which I have stated, my view is that, that dispute will be outside the jurisdiction of the Land Court.[\[34\]](#)

The other closely related issue is of 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.

A similar issue arose in the case of *United States International University (USIU) vs. Attorney General*[35] where Majanja, J dealt with it at a very great length. Although the said case related to labour issues one of the issues in contention was whether or not the Employment and Labour Relations Court as created 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 which remedies are clearly stated to be a sole preserve of the High Court. The Learned Judge expressed himself on the said issues 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).

It is instructive to note that the Court of Appeal has also had an occasion to address itself on the very issue in the earlier cited case of *Daniel N. Mugendi vs. Kenyatta University & 3 others*[36] where the in allowing an appeal and setting aside an order dismissing a suit on the finding 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 settled the issue in *toto* in respect to such matters within the jurisdiction of both the Employment and Labour Relations Court as well as those before the Environment and Land Court. I stand guided by the said decision. The Court of Appeal expressed itself in the following words:-

"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).

The Privy Council in the *Harrikisson v A.G.*[37].” warned of what it saw as danger light if the right to apply to the High court were allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action, noting that such a move risked diminishing the value of the protection of fundamental rights and freedoms guaranteed under the Constitution. Litigants and their legal counsels might do well to take note of words of Justice Nyamu, as he then was in the case of *Rodgers Muema Nzioka v AG*,[38] where in terming such applications as trivializing of the Constitutional jurisdiction remarked thus;

“This court has held that constitutional jurisdiction should not be trivialized and should be confined to purely constitutional matters. Where the ordinary law provides for relief that relief must be pursued. In this case there are provisions for relief by way of compensation under the Mining Act and this is what the Petitioner is entitled to pursue as a remedy.”

The learned Judge then went on to state that where a party deliberately avoided to pursue the statutory remedies for compensation or any other remedy and instead purported to invoke the Constitution, then such a move constituted abuse of the court process and also trivialized the Constitutional jurisdiction.

Drawing a line between what matters squarely fall under a particular High Court division, particularly the Constitutional and Human Rights Division is, in my humble view not always a work of mathematical precision especially bearing in mind, let’s face it, most if not all disputes before a court of law will necessarily involve some form of constitutional infraction, directly or indirectly; however remote. Perhaps this is a riddle better solved by way of ‘elimination method.’[39]

First, it ought to be borne in mind that divisions of the High Court are administrative in nature and do not necessarily dictate as to the jurisdictional confines of the sitting judge. As earlier discussed, the divisions are administrative walls, the common denominator being that first and foremost, they are substantively High Courts in the hierarchical structure in the judicial system. And we have one High Court. It would therefore follow that every High Court judge is seized with equal jurisdiction and all High court judges

are at par to handle matters dealing with interpretation of the Constitution and violations of the Bill of Rights by dint of Article 23(1) as read with Article 165 of the Constitution.

Second, a High court may not determine matters falling squarely under the jurisdiction of the ‘*status courts*’ namely the Employment and Labour Relations Court(read Industrial Court) and the Land and Environment Court. These are the courts established under **Article 162(2)** and whose jurisdiction is spelt out in the respective constitutive statutes. But even with that clear-cut jurisdictional demarcation on paper, this, in my view is not in practical terms, always black and white as it may sound. Sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issue 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!

Third is the verdict that while the Constitution guarantees right to access courts, the same Constitution neither operates in a vacuum nor does it automatically oust other statutory provisions brought to life by the legislative arm of government; a delegate and trustee of the sovereign power of the people of Kenya under **Article 1** as read with **Article 94** of our constitution. As such, where alternative forum lies such as enforcement mechanism under statute, say enforcement of a simple contract, a constitutional petition will most likely not be admitted. Similarly, where particular institutions are tasked under the Constitution or statute to deal with specific grievances, then these channels need to be first explored and exhausted before the intervention of the court is sought unless these are shown to be ineffective or unwilling to discharge their mandate in which case the court may flex its supervisory muscle under Article 165(6) and possibly issue the necessary prerogative writs against the impugned quasi-judicial body or other appropriate relief under Article 23(3).[\[40\]](#)

Fourth is the rule of thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those of courts higher than themselves and that matters falling under the exclusive jurisdiction of the Supreme Court under Article 163(3) cannot be dealt with by the High Court.

The sum total to the above equation, to my mind equals or at least rounds off to the nearest jurisdictional precincts of the High Court. Having established that divisions of the High Court are administrative, perhaps Practice notes/ directions would go a long way in assisting settle the jurisdictional confusion among litigants and hopefully nip off some of the unnecessary litigation in their buds thus ridding the daily cause lists of superfluous matters the cumulative effect of which is saving the one precious yet fixed resource in our court rooms; judicial time.[\[41\]](#)

More importantly, every party involved needs to play their respective roles even as the arbiters continue to work tirelessly in balancing the scales of justice. Litigants need to take responsibility as they exercise their undoubted constitutional right to access justice; where Parties are represented, counsels will need to candidly advise their clients on filing their suits in the appropriate court.

In the final analyses, I find that this matter relates to question of illegal occupation of land which constitutes an act of trespass and or interference with the petitioners right to peaceful use and enjoyment of land. The constitutionality or otherwise of the petitioners complaints falls within the jurisdiction of the Environment and Land Court which in my view has jurisdiction to determine the issues raised as clearly stipulated in the provisions of the law cited above. Consequently, I allow the preliminary objection and direct that this file be transferred to the Environment and Land Court for hearing and determination. I make no orders as to costs.

Orders accordingly. Right of appeal 30 days

Dated at Nairobi this 15th day of February 2017

John M. Mativo

[1] *Petronella Mukaindo, A case of mistaken identity? Demystifying the “Constitutional Court” in Kenya, MAY 2, 2013, <http://kenyalaw.org/kenyalawblog/a-case-of-mistaken-identity-demystifying-the-constitutional-court-in-kenya-2/>*

[2] *Article 10(1)(b)*

[3] *Speech entitled ‘Elements of Progressive Jurisprudence In Kenya: A Reflection’ delivered by Hon. Dr. Willy Mutunga, Chief Justice and President of the Supreme Court of Kenya, Nairobi, 31st May, 2012. (Available at <http://www.kenyalaw.org/Forum/?p=498>).*

[4] *Supra note 1*

[5] *Ibid*

[6] *Ibid*

[7] *Ibid*

[8] *See cases of Dickson Mukweluine v Attorney General & 4 others, Petition No. 390 of 2012, Thande v Montgomery and Others [1970] EA 341, The Speaker of The National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported), Kipkalya Kiprono Kones v Republic and Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291, Wanyoike v Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43, Bernard Samuel Kasingav Attorney General and Others, Nairobi Petition No. 402 of 2012 (Unreported), Michael Wachira Nderitu and Others v Mary Wambui Munene and Others[2013]eKLR*

[9] *See for instance case of Violet Kedogo Kiharangwa v Preston Ngira Obadiah, Petition No. 339 of 2011 as per Lenaola J. and John Githongo and Another v Harun Mwau and Others Nairobi Petition No. 44 of 2012 (Unreported) as per Majanja J.*

[10] *Article 166.*

[11] *Article 137 (1) provides that, “Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.” When sitting as a constitutional court, the court of appeal is to consist of a bench of five members.*

[12] *Supra note 1*

[13] *Ibid*

[14] *Article 22(1) states that, “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”*

[15] *Nairobi Petition No. 44 of 2012*

[16] *Similar sentiments were expressed in the case of Fleur Investment Limited v Permanent Secretary, Ministry of Roads and others, Nairobi Petition No. 173 of 2011 and Peter Kaluma v Attorney General Nairobi Petition No. 79 of 2011(Unreported).*

[17] *Act No. 19 of 2011*

[18] Ibid

[19] Civ App No. 6 of 2012-NBI

[20] Con Pet No 15 of 2015-Kakamega

[21] {2015}eKLR

[22] {2016}eKLR

[23] {2014}eKLR

[24] {1989} KLR 1

[25] John Beecroft, Words and Phrases Legally Defined, Volume 3:1-N, at Page 113

[26] Supra

[27] R. v. Nor. Elec. Co., [1955] O.R. 431; R. v. Groves (1977), 17 O.R. (2d) 65.

[28] Ibid

[29] Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011

[30]{2014}eKLR

[31] Constitutional Application No. 2 of 2011 (unreported)

[32] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[33] Act No. 19 of 2011

[34] Mabeya, J in Capital Fish Kenya Limited vs. Monnatz Limited & 2 others (2014) eKLR

[35] {2012} eKLR

[36] Supra

[37] {1979} 3 WLR 62

[38]**Nairobi, Petition No. 613 of 2006**

[39]Supra note 1

[40] Ibid

[41] Ibid