

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 73 OF 2017

In the matter of Articles 2 (1) (4), 3, 10(1), 19(1) (2), 20(1) (2) (3), 22 (1),(2) (c), 23, 35, 46 (1) (b), 258, 259 and 231 of the Constitution of Kenya 2010

and

In the matter of charging excessive interest rates on facilities over and above the recommended rate by the Central Bank of Kenya

And

In the matter of contravention of the Banking Act, Chapter 488, Laws of Kenya

And

In the matter of alleged contravention of section 33B of the Banking Amendment Act number 25 of 2016

And

In the matter of contravention of the circular being Banking circular number 4 of 2016 by the Central Bank of Kenya to all Commercial Banks and Mortgage Finance

BETWEEN

Eric Wambua Muli.....1st Petitioner

Topsurv Geosystems Limited.....2nd Petitioner

Versus

Prime Bank Limited.....Respondent

And

The Honourable Attorney General.....1st Interested Party

The Central Bank of Kenya2nd Interested Party

Consumer Federation of Kenya.....2nd Interested Party

RULING

Introduction

It is convenient to begin by stating that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.^[1] In a recent decision of this court rendered in *David Ramogi & Others vs The Cabinet Secretary, Ministry of Energy & Petroleum & 6 Others*,^[2] I observed that *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.*^[3]

Because of the striking relevancy to the preliminary objection now under determination, I will quote extensively from the said ruling in which I seized 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 drew 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. In the said ruling I categorically stated 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.^[4]

As Dr. Willy Mutunga, former Chief Justice of the Republic of Kenya and president of the Supreme Court of Kenya said 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.

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.^[5] 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.^[6]

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.^[7] 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.^[8]

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.

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.^[9]

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.

In the above referred to ruling from which I have heavily borrowed from, I observed that 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.^[10] 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.^[11]

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^[12] 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 I 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*,^[13] 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.**”^[14]*

The preliminary of objection

Counsel for the second interested party raised an objection premised on two grounds, namely, **(a)** the dispute in this case is purely commercial and ought to have been filed in the Commercial Division of this Court, **(b)** that the petitioner has also filed another suit against the Respondents at the Senior Resident Magistrates Court at Mavoko being Civil case number **13** of 2017 in which he has already obtained an injunction expressed in the following terms:-

"a temporary injunction be and is hereby issued restraining the defendant/respondent whether by itself its servants and or agents from repossessing, attaching, selling and or otherwise interfering or dealing with motor vehicle registration NO. KBK 864 T (suit property) pending the inter partes hearing"

Counsel for the Respondent supported the objection while counsel for the first interested party left it to the court to decide. The parties in the said case are the petitioners (as plaintiffs) and the Respondent as the defendant.

The petitioners counsel stated that this court has jurisdiction where fundamental rights have been violated and admitted the existence of the above case at Mavoko but insisted that the lower court has no jurisdiction to determine constitutional issues.

In reply counsel for the second Respondent submitted that if at all a constitutional issue arose in the lower court, it ought to have been raised in the lower court for the lower court to refer the matter to the High

Court and that filing a second case on the same issue amounts to abuse of court process.

Determination

A close look at the reliefs sought in the notice of motion before this court shows clearly that the conservatory orders sought if granted will have similar effect as the injunction obtained in the lower court. The second prayer in the notice of motion seeks to stay the proceedings in the lower court. A look at the petition and the substantive prayers sought in the petition reveals that the dispute relates to interest rates charged on the petitioners account and interpretation of provisions of the banking act. To me, these are purely civil disputes of commercial nature.

In my view there are **no** constitutional issues raised in this dispute. The issues raised in the petition only reveal a commercial dispute, namely, whether or not the interest rates applied by the Respondent is lawful. That is not a dispute that requires the interpretation of the constitution to resolve. It requires the interpretation of the applicable law and contract between the parties. As stated earlier, a constitutional question refers to any legal issue that requires the interpretation of the Constitution to resolve an issue rather than the interpretation of a statute.

Even if I were to find that there are constitutional issues raised, I take the view that the commercial division would be the right forum. Further, I fail to appreciate why the petitioners opted to file this petition citing similar issues they have raised in the lower court. This raises the question whether this petition is an abuse of court process.

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 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".[\[15\]](#)

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[\[16\]](#) The situation 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.*[\[17\]](#)
- (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. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.^[18]

In the words of **Oputa J.SC** (as he then was) in the Nigerian case of *Amaefule & other Vs The State*^[19] he defined abuse of judicial process as:-

“A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”

In yet another Nigerian case of *Agwusin vs Ojichie*. Justice Niki Tobi JSC observed:-

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”

In *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*^[20] I observed that "It's 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." The pursuit of the second process, that is this petition constitutes and amounts to abuse of court/legal process."^[21]

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.^[22] 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 interfere with the administration of justice.^[23] I find no difficulty in concluding that this petition is based on similar grounds as the suit in the lower court referred to above.

The other issue for determination is whether or not the petition raises constitutional issues, and if so is this the right forum. First, as stated above the petition raises a commercial dispute and it ought to have been filed in the commercial division. Even if I were to find that the petition raises constitutional issues, then as stated earlier, a judge in the commercial division has jurisdiction to hear and determine constitutional issues arising from a commercial dispute.

Guidance can be obtained from the court of appeal decision rendered on 19th September 2014 in *Judicial Service Commission vs Gladys Boss Shollei & another*.^[24] 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.

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*,^[25] 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.^[26]

The Privy Council in the *Harrikisson v A.G.*^[27] 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*,^[28] 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.”

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.

In the final analyses, I find that this matter relates to a commercial dispute, that there is an active pending suit in the lower court on the same issues, that the petition does not raise any constitutional issues for determination by the High court whether in this division or the commercial division, hence this petition is misconceived and unsustainable. Consequently, I allow the preliminary objection and dismiss this petition. I make no orders as to costs.

Orders accordingly.

Dated at Nairobi this 20th day March 2017

John M. Mativo

Judge

[1]<http://www.yourdictionary.com/constitutional-question>

[2] Pet No. 53 of 2016

[3] ***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/>***

[4] Supra note 1

[5] Supra note 1

[6] Ibid

[7] Ibid

[8] Ibid

[9] Article 166.

[10] Supra note 1

[11] Ibid

[12] 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.”

[13] Nairobi Petition No. 44 of 2012

[14] 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)).

[15] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[16] Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415

[17] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[18] (2007) 16 NWLR (319) 335.

[19] (1998) 4SCNJ 69 at 87.

[20] Pet No 82 of 2016

[21] Supra note 1

[22] Ibid

[23] Ibid

[24]{2014}eKLR

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

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

[27] {1979} 3 WLR 62

[28] Nairobi, Petition No. 613 of 2006