



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 445 OF 2016

In the matter of alleged contravention of Rights and Fundamental Freedoms
under Articles 19, 20, 21, 22, 23, 27, 32, 33 (1) (a), (b), 34 (1) (b),
38, 39 & 40 of the Constitution of Kenya 2010.

and

In the matter of alleged contravention of the constitution
in Articles 2, 3, 10, 33, 73, 75, 79, 249, 258 & 259.

Elasto Kinaro.....1st Petitioner

Kefar Oyugi Kimuomi.....2nd Petitioner

Versus

County Government of Nyamira.....1st Respondent

County Assembly of Nyamira.....2nd Respondent

The Ethics & Anti Corruption Commission.....3rd Respondent

RULING

Introduction

On 8th March 2017, counsel for the third Respondent raised an objection stating that this case ought to have been filed at the Anti-Corruption and Economic Crimes Division of the High court of Kenya since it relates to issues touching on corruption in conformity with clause two of practice directions[1] of the said court. The said provision provides that all new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination.

Alternatively, counsel argued that this case ought to have been filed at the High Court of Kenya at Nyamira, which is the nearest court having jurisdiction at the county where the cause of action arose.

The petitioners counsel opposed the application arguing that this case relates to right to information under Article 35 of the constitution, hence this court has jurisdiction to hear it, and stated that the petitioners opted to file this petition in Nairobi for fear of their safety at their home county.

The petitioners case

The crux of the petitioners case is that concerned with alleged rampant corruption in Nyamira county, they unsuccessfully sought to access to the information detailed in the petition from the first and second Respondents, hence the first and second Respondents have violated Articles 35 (1) (a) and (b) in that they failed to supply the said information. They also accuse the first and second Respondents of violating Articles 10, 73, 75, 27 (1) of the constitution, the Public Procurement and Asset Disposal Act, chapter six of the constitution and abuse of office.

The reliefs sought in the petition include an order compelling the first Respondent to avail documents stipulated in the petition; a declaration that the petitioners right under Article 35 (1) (a) and (b) have been violated; a declaration that the first and second Respondents violated Articles 10, 73, 75, 27 (1) of the constitution; and an order requiring the third Respondent to investigate the first and second Respondents.

Jurisdiction

As Dr. Willy Mutunga, former Chief Justice and President of the Supreme Court once observed, 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.[\[2\]](#)

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*,[\[3\]](#) 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. [\[4\]](#)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). The dispute before me does not fall under the above exceptions.

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. 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. Any High Court judge has jurisdiction to interpret the Constitution and handle any matter touching on the Constitution.

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. As stated above, **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers.

In my view, 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.’ However, courts have on numerous occasions emphatically ruled that where there is a specific mechanism given for resolution of disputes, then that must be followed.^[5]

In the final analyses, having carefully examined the petition, I find that this matter relates to alleged contravention and or enforcement of constitutional rights. The petitioners complaints fall within the jurisdiction of the High Court and can be heard by any High Court Judge including the judge in the Anti-Corruption and economic Crimes Division.

However, having found that any High court Judge can hear this case, I also find that there is no reason why this case was filed in Nairobi when there is a judge at Nyamira High Court who has jurisdiction to hear and determine this case.

Consequently, I allow the preliminary objection and direct that this file be transferred to the High Court of Kenya at Nyamira for hearing and determination. I make no orders as to costs.

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this 13th day of March 2017

John M. Mativo

Judge

[1] Gazette Notice No. 10263 dated 9th December 2016

[2] *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>).*

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

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

[5] 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