



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILINMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 527 OF 2016**

**In the matter of Articles 2, 3, 10, 22, 23, 27, 29, 40, 42, 43, 47, 50, 64, 69, 70, 159, 165, 174, 258 and 259 of the Constitution of the Republic of Kenya**

**and**

**In the matter of the County Governments Act**

**And**

**In the matter of The Transaction to Devolved Government Act**

**And**

**In the matter of Fair Administration Action Act (No. 4 of 2015)**

**And**

**In the matter of the National Government Constituencies Development Fund Act**

**BETWEEN**

**Kenya Builders & Concrete Company Limited.....Petitioner**

**Versus**

**National Government Constituency**

**Development Fund Committee-Embakasi South.....1<sup>st</sup> Respondent**

**Nairobi City County Government.....2<sup>nd</sup> Respondent**

**RULING**

**Introduction**

The second Respondents' counsel has raised a preliminary objection citing three grounds, namely, that

this court lacks jurisdiction to hear and determine this matter, that the petitioner ought to have followed the procedure laid down under section 13 (1) of the Physical Planning Acts<sup>[1]</sup> and that the second petitioner ought not to have been enjoined in this case.

I will only deal with the issue of jurisdiction because without jurisdiction, the court cannot move and secondly, I do not think the other two grounds are sustainable because the dispute relates to alleged construction of unauthorized structures along the petitioners fence, but do not challenge approval or refusal to approve plans under the Physical Planning Law and further the third ground is in my view not a pure ground of law and since allegations have been made in the petition, these cannot be dismissed at this stage without hearing both parties.

**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.’

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.<sup>[2]</sup>

**Article 22** and **258** gives any one a right of access to the court on allegations of breach or threatened breach of the bill of rights.<sup>[3]</sup> Article 165 give the High Court unlimited jurisdiction. However, 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*,<sup>[4]</sup> 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.**”<sup>[5]</sup>*

Article 162 (2) & (3) of the constitution talks of the Environment and Land Court as a court of equal status. Article 165 (5) (b) on the court's jurisdiction ousts this court's jurisdiction in matters touching on Environment and Land. Section 13 of the Environment and Land Act<sup>[6]</sup> provides for the jurisdiction of the Environment and Land Court.

In *Prof. Daniel N. Mugendi vs Prof. Olive M. Mugenda*<sup>[7]</sup> 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.

In *Ernest Kevin Luchido vs The Hon A.G & 2 Others*<sup>[8]</sup> the court held that the High Court lacks jurisdiction to in any manner deal with matters that fall under the Environment and Land Court.

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 that this petition relates to a complaint relating to alleged construction of structures which would interfere with access, use and value of the petitioners land.

The *locus classicus* on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*<sup>[9]</sup> 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.<sup>[10]</sup>

In *Judicial Service Commission vs Gladys Boss Shollei & another*<sup>[11]</sup> which 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*,<sup>[12]</sup> 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. [13]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,[14]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.[\[15\]](#)

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*<sup>[16]</sup> 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*<sup>[17]</sup> where 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.*<sup>[18]</sup> 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*,<sup>[19]</sup> 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.

In *David Ramogi & Others vs The Cabinet Secretary, Ministry of Energy & Petroleum & 6 Others*<sup>[20]</sup> I observed that 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.'<sup>[21]</sup> 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. 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![\[22\]](#)

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.[\[23\]](#) 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).[\[24\]](#)

In the final analyses, I find that this matter relates to question of planning, alleged illegal construction of structures on land, 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 7<sup>th</sup> day of **March**, 2017

**John M. Mativo**

**Judge**

---

[\[1\]](#) Cap 286, Laws of Kenya

[\[2\]](#) 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

[\[3\]](#) 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.”

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

[5] 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)).

[6] *Ibid*

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

[8] Con Pet No 15 of 2015-Kakamega

[9] {1989} KLR 1

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

[11]{2014}eKLR

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

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

[14] Act No. 19 of 2011

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

[16] {2012} eKLR

[17] *Supra*

[18] {1979} 3 WLR 62

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

[20]Constitutional Reference NO. 531 of 2016

[21]*Supra* note 1

[22] *Supra* note 20

[23] *Ibid*

[24] *Ibid*