



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

JUDICIAL REVIEW CIVIL APPLICATION 516 OF 2015

IN THE MATTER OF ORDER 53 RULES 1, 2, 3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ARTICLES 60 & 67 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE NATIONAL LAND COMMISSION'S DECISION ON LAND
PORTION NO. KAMITI/ANMER 8390 MADE ON 5-10-2015**

AND

**IN THE MATTER OF THE PREROGATIVE WRITS OF CERTIORARI AND PROHIBITION
IN REVIEW OF THE SAID DECISION OF THE NATIONAL LAND COMMISSION BY THIS
COURT**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN,

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EX-PARTE..... PETER NJORE WAKABA & MACHARIA KINYANHUI

RULING

1. The applicants in this application instituted these proceedings judicial review reliefs of certiorari to quash the decision of the **National Land Commission** (hereinafter referred to as “the Commission”) by which the applicants contended that the said Commission validated a flawed

allocation of land which was nullified by the Government 15 years ago and whose effect was to render the applicants' 1200 members landless. They also sought orders prohibiting the said Commission and the government from issuing leases in respect of land parcel no. Kamiti/Anmer No. 8390 in favour of the interested parties.

2. From the affidavit it seems that the applicants are squatters occupying the suit land as labourers working in the neighbourhood farms and internally displaced persons from Rift Valley who were displaced by violence arising from the successive general elections. According to them although the land was earmarked for their settlement, powerful individuals from Kiambu District moved in and grabbed the same to the detriment of genuine squatters for whom the allocation was meant. As a result of an outcry from the squatters, the said irregular allocations were nullified as the forest had not been degazetted before the said allocations were done.
3. According to the applicants although the Commission when it came into existence scheduled public hearing in order to determine the allottees of the said land but the said public hearing were biased in favour of the interested parties. As a result the Commission arrived at a flawed process by which the said powerful clique's interest in the said land was validated by the Commission.
4. It was therefore contended by the applicants that the Commission's decision was arrived at in violation of salient procedural requirements including the rules of natural justice and fairness.
5. It was this turn of events that provoked these proceedings.
6. However, before the application could be heard, the Attorney General, the 3rd Respondent herein notified the Court of its intention to raise the following preliminary objections:

1. **That this Court lacks the jurisdiction to hear and determine the application since it is premised on alleged rights and procedures arising out of the environment and the use and occupation of, and title to, land by virtue of the provisions of Article 165(5) of the Constitution.**
2. **That section 13(1) of the *Environment and Land Act* (hereinafter referred to as "the Act") provides that the Environment and Land Court (hereinafter referred to as "the ELC") shall have the original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and that the ELC has the jurisdiction to hear and determine any dispute relating to environment and land.**
3. **That section 13(7) of the said Act provides that the ELC can issue prerogative orders, which provision read together with Article 162(2) aforesaid ousts the jurisdiction of this Court.**
4. **That there is no order sought against the 3rd Respondent herein.**
7. Relying on **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** and **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1**, it was submitted that this Court derives its jurisdiction from Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution. According to the 3rd Respondent, Article 165(5) of the Constitution expressly limits the jurisdiction of the High Court in certain matters namely those reserved for the exclusive jurisdiction of the Supreme Court or those falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution.
8. In order to give effect to Article 162(2)(b), the Act was enacted in 2011 and in section 13(2) thereof, the jurisdiction of the ELC was outlined. To the 3rd Respondent, the instant dispute revolves around the ownership of the suit land hence is a matter within the exclusive jurisdiction of the ELC before whom the suit should have been filed since it has the power to issue judicial reliefs being sought herein in addition to any other appropriate orders. In support of this position, the 3rd Respondent relied on this Court's decision in **Republic vs. Commissioner of Lands and 5 Others ex parte Samuel Muciri W'Njuguna [2014] eKLR** and **James Davies Njuguna vs. James Chacha (sued as Chairman Parklands Sports Club) and 3 Others [2013] KLR**.
9. Based on the foregoing the 3rd Respondent urged this Court to strike out these proceedings.
10. In response to the said objections, the applicant contended that judicial review is a remedy sui generis donated by Article 165(6) of the Constitution. In the applicant's understanding the Courts established under Article 162(2) are special courts and with respect to the ELC it is concerned with environment, land use, title or ownership of land being matters of substantive justice hence the Constitution does not mention judicial review as one of the reliefs that the said special courts can grant. According to the applicant the restriction placed on the jurisdiction of the High Court

- does not extend to matters not mentioned in Article 162(2) such as judicial review relief.
11. By the enactment of the Act, the applicant contended that Parliament provided in section 13(1)-(4) the core functions of the ELC as derived from the Constitution itself. However, it was submitted that in subsections (6) and (7) Parliament empowered the ELC to hear and determine matters relating to judicial review and constitutional matters relating to rights in the land sector. While not contesting the powers donated by Parliament to the ELC to deal with judicial review matters, the applicant's position was that it is outlandish to suggest that by doing so Parliament was completely taking away the special judicial review jurisdiction of the High Court conferred by the Constitution.
 12. In the applicants' view, whereas the ELC was conferred with jurisdiction to hear prerogative orders, that jurisdiction is not its core business since that is the function of the High Court under Articles 23 and 165(2) of the Constitution. Since this is the Judicial Review Division of the High Court it was submitted that while any Division of the High Court has jurisdiction to entertain matters seeking judicial review reliefs, this is however the proper Division to institute such proceedings. The applicant also urged the Court to consider the fact that the ELC is burdened by land related matters and therefore parties should be able to institute their matters in any Court with jurisdiction to hear and determine the same. In support of this position the applicant relied on **East African Railway Corp vs. Anthony Sefu [1973] EA 237** and urged the Court that the worst that can happen is to transfer the matter to ELC based on **Cabinet Secretary Ministry of Mining & Another vs. NEMA & 3 Others exp Cortex (K) Limited Misc. Appl. No. 298 of 2013.**
 13. According to the applicants, they took deliberate move to file the matter in this Division to the efficiency of the Division as opposed to the ELC which is overloaded.
 14. On the joinder of the Attorney General, it was submitted that these proceedings being in the name of the Republic it was necessary to join the said office. The matter being discretionary it was contended that it cannot be the subject of a preliminary objection.
 15. The applicant urged the Court to dismiss the objection.

Determination

16. The main substratum of the preliminary objections is that this Court has no jurisdiction to entertain these proceedings.
17. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA** expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance 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 the 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of 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 facts exist. Where the 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...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

18. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

19. In this case it is contended that these proceedings ought to have been instituted in the ELC. The respondents’ issue on jurisdiction as I understand it is twofold. The first ground for questioning the jurisdiction of this Court is the existence of the ELC. 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;

.....

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

20. Article 165(5)(6) and (7) thereof on the other hand provides:

(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).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

21. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

22. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

23. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the

- powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.
24. However, the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.
25. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which **fall within the jurisdiction of the courts contemplated in Article 162(2)** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “*determine the jurisdiction and functions of the courts contemplated in clause (2)*”, Parliament did enact **The Environment and Land Court Act, 2011** which Act commenced on 30th August 2011. Section 13 of the said Act provides 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.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(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.

26. The applicants appreciate that these proceedings could have been instituted before the ELC. In My view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. However where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others:**

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

27. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by **Justice Mohammed Ibrahim in Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR:**

“A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court”.

28. In this case, it is clear that the dispute falls squarely within the provisions of section 13(2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant’s contended right to be heard stem from their yet to be determined interest in the suit land.

29. In this case, I am not satisfied that the applicants case is completely removed from the jurisdiction of this Court though I am satisfied that the dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in **Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012**, [para. 29-30] where it was held:

“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with ‘general’ original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only

hear those matters once they reach it through the laid down hierarchical framework”.

30. Similar sentiments were expressed in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

31. Having considered the issues raised herein I associate myself with the sentiments of the Court in **East African Railway Corp vs. Anthony Sefu [1973] EA 237**, where it was held that **“It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”** It is my view that in the circumstances of this case, it would not advance the course of justice to terminate these proceedings.

32. I however decline to strike out these proceedings on the basis of misjoinder of the Attorney General. As was held in **Marwaha vs. Pandit Dwarka Nath Nairobi HCCC No. 599 of 1952 [1952] 25 LRK 45:**

“This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27.”

33. In the premises the order which commends itself to me and which I hereby make is that these proceedings be heard and determined by the ELC since the said Court is a Court of equal status as the High Court.

34. The costs of the preliminary objection will be in the cause.

35. Orders Accordingly.

Dated at Nairobi this 5th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Achoki for Mr Angima for the Applicant

Miss Masinde for the 1st Respondent

Cc Mutisya