



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 3 OF 2016

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 22, 23 (2), 162, 165 (3) (b) AND (d), 169 AND 172 OF THE CONSTITUTION OF THE SOVEREIGN REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OR BREACH OF THE CONSTITUTION OF KENYA TO WIT, ARTICLE 258

AND

IN THE MATTER OF: THE INTERPRETATION, IMPLEMENTATION AND ENFORCEMENT OF THE CONSTITUTION OF KENYA TO WIT ARTICLE 259

AND

IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF: THE INDUSTRIAL COURT ACT, 2011

AND

IN THE MATTER OF: THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 2015

AND

IN THE MATTER OF: THE MAGISTRATES' ACT, 2015

AND

IN THE MATTER OF: THE HIGH COURT (ORGANIZATION AND ADMINISTRATION) ACT, 2015

AND

IN THE MATTER OF: THE LAND ACT, 2012 (ACT NO. 6 OF 2012)

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012 (ACT NO. 3 OF 2012)

AND

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300 (REPEALED)

AND

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT CAP 281 (REPEALED)

AND

IN THE MATTER OF: GAZETTE NOTICE NUMBER 1472 DATED THE 1ST DAY OF MARCH
AND PUBLISHED ON THE 11TH DAY OF MARCH, 2016 BY THE CHIEF JUSTICE AND
PRESIDENT OF THE SUPREME COURT OF KENYA

AND

IN THE MATTER OF: GAZETTE NOTICE NUMBER 1745 DATED THE 14TH DAY OF
MARCH AND PUBLISHED ON THE 18TH DAY OF MARCH, 2016 BY THE CHIEF JUSTICE
AND PRESIDENT OF THE SUPREME COURT OF KENYA

BETWEEN

MALINDI LAW SOCIETY.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE CHIEF JUSTICE AND PRESIDENT OF

THE SUPREME COURT OF KENYA.....2ND RESPONDENT

AND

THE LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

THE NATIONAL LAND COMMISSION.....2ND INTERESTED PARTY

THE NATIONAL ASSEMBLY.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner herein, the Malindi Law Society is established under the Societies Act, Cap 108 of the Laws of Kenya.
2. The 1st Respondent, the Attorney General, is the designated Principal Legal Adviser of the Government of Kenya and in that capacity is vested with legal authority to defend any suit against the Government.
3. The 2nd Respondent, the Chief Justice and the President of the Supreme Court of Kenya is the head of the Judiciary.
4. The 1st Interested Party herein, The Law Society of Kenya is established under the Law Society of

Kenya Act whose mandate is to *inter alia* assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya and to uphold the Constitution of Kenya and advance the rule of law and the administration of justice.

5. The 2nd Interested Party herein, The National Land Commission is established under Article 67 of the Constitution of Kenya 2010.

6. The 3rd Interested Party herein, The National Assembly is one of the two houses of Parliament established under Article 93 of the Constitution of Kenya 2010.

7. On 15th December, 2015 the President of the Republic of Kenya assented to three pieces of legislation. The first legislation is the Statute Law (Miscellaneous Amendments) Act, 2015. The second is the Magistrates' Court Act, 2015 and the third is the High Court (Organization and Administration) Act, 2015. All the above three statutes were to come into force on 2nd January, 2016. In the Petition filed on 13th March, 2016 and amended on 22nd March 2016, the Petitioner contends that the three legislations are in conflict with the Constitution of Kenya 2010.

8. The Respondents oppose the Petition and filed their respective replies thereto. Three Interested Parties were enjoined to this Petition. All parties agreed to dispose of the Petition by way of written submissions.

The Petitioner's Case

9. The Petition is filed by Binyenya Thurania & Co. Advocates and is supported by the affidavit of Lucy Mwangi, the Secretary of the Petitioner. The Petition seeks the following prayers: -

- a) A declaration that Sections 7 (3), 8 (d) and 26 (4) (b) of the Environment and Land Court Act are unconstitutional, null and void.**
- b) A declaration that Sections 9 (a) and (b) and 10 (6) of the Magistrate's Court Act, 2015 are unconstitutional, null and void.**
- c) A declaration that Sections 13 (4) and 36 (3) of the High Court (Organization and Administration) Act are unconstitutional, null and void.**
- d) An order of Certiorari to bring to this Honourable Court for the purposes of being quashed, Gazette Notices Nos. 1472 dated the 1st day of March, 2016 and published on the 11th day of March 2016 and 1745 dated the 14th day of March, 2016 and published on the 18th day of March, 2016.**
- e) Costs of the Petition.**
- f) Any such other Order(s) as this Honourable Court shall deem just.**

10. The Petitioner contends that the three pieces of legislation are unconstitutional and should be declared null and void. Section 2 of the Statutes Law (Miscellaneous Amendments) Act, 2015 (hereinafter referred to as Statute Law 2015) amends the Environment and Land Court Act, 2011 (the ELC Act) as follows: -

“s.7 Insert the following new sub-section immediately, after sub-section (2)-

“(3) the Chief Justice may, on the recommendation of the Judicial Service Commission, transfer a judge who meets the qualifications set out at sub-section (1) to serve in the court”.

s.8 Insert the following paragraph immediately after paragraph (c)

“(d) is transferred from the Court to the High Court or other court with the status of

the High Court”

s.26 Insert the following new sub-sections immediately after sub-section (2) –

“(3) the Chief Justice may, by notice ‘in the Gazette, appoint certain Magistrate to preside over cases involving environment and land in respect to any area of the county.

(4) subject to Article 169 (2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle –

a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction of the Chief Magistrate as set out in the Magistrates’ Courts Act.”

s. 101 insert the words “subordinate courts” immediately after the expression “2011”.

s. 150 of the Land Act 2012, delete the words “is vested with exclusive jurisdiction” and substitute therefor the words “and the subordinate courts as empowered by any written law shall have jurisdiction”.

11. It is submitted that the preamble to the ELC Act provides that it is an Act of Parliament to give effect to Article 162(2)(b) of the Constitution, to establish a Superior Court to determine disputes relating to Land and Environment. Section 2 of the ELC Act defines Court to mean the Environment and Land Court established under section 4 pursuant to Article 162 (2) (b).

12. Prior to the repeal of the Registered Land Act, the Registration of Titles Act, the Land Titles Act, the Government Lands Act and the Indian Transfer of Property Act 1882 (the Repealed Land Acts), the Magistrates Courts had jurisdiction to deal with land cases. The jurisdiction was limited as provided by each Repealed Act. Under section 27 of the Registered Land Act, the Magistrates’ Courts had jurisdiction to deal with land whose value did not exceed Kshs. 500,000/= . With respect to disputes relating to land registered under the Registration of Titles Act, only the High Court had jurisdiction.

13. Section 2 of the Magistrates’ Court Act [Cap. 10 Laws of Kenya] (now repealed) gave jurisdiction to magistrates in civil proceedings involving customary law in any of the following matters -

a) land held under customary tenure;

b) marriage, divorce, maintenance or dowry;

c) seduction or pregnancy of an unmarried woman or girl;

d) enticement of or adultery with a married woman;

e) matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;

f) intestate succession and administration of intestate estates, so far as not governed by any written law;

14. The Petitioner further states that the preamble to the Employment and Labour Relations Act, 2011 provides that it is an Act of Parliament to establish the Employment and Labour Relations Court as a superior court of record, to confer jurisdiction on the court with respect to employment and labour relations and for connected purposes. Section 2 of the same Act defines the “**court**” to mean the

Employment and Labour Relations Court established under section 4 of the Act. This is a superior court of record with the status of the High Court and has jurisdiction throughout Kenya.

15. The Petitioner also submits that Article 162 (2) of the Constitution provides for the establishment of the Environment and Land Court and Employment and Labour Relations Court as superior courts with status equal to that of the High Court. Article 172 (1) of the Constitution mandates the Judicial Service Commission to recommend to the President the appointment of Judges to preside over the two courts. Article 166(2) of the Constitution lists the qualifications for persons to be appointed as a judge of a Superior Court. In addition to these qualifications, section 6 of the Employment and Labour Relations Court Act (the ELRC Act) and section 7 of the ELC Act provide for additional qualifications for persons to be appointed as judges of these two Courts.

16. The Chief Justice published a list of 168 magistrates in Gazette Notice No. 1472 of 1st March, 2016 who were given jurisdiction to deal with cases involving disputes relating to environment and land in areas of their jurisdiction with effect from 14th March, 2016. Some of the appointed magistrates had pending issues before the Judges and Magistrates Vetting Board.

17. It is further stated by the Petitioner that the Third Interested Party, did not give ample time to members of the public to participate in the enactment of the legislation.

18. The Petitioner contends that the issues for determination by the Court include: whether the Court has jurisdiction to handle the Petition, whether the Petitioner has the *locus standi* to bring this Petition, whether the Petition should be struck out for being frivolous and an abuse of the court process, whether the impugned sections contained in the three pieces of legislation should be declared unconstitutional and whether the reliefs sought should be granted.

19. The Petitioner submits that this court has jurisdiction to deal with the Petition and relies on the case of **THE OWNERS OF MOTOR VESSEL “LILLIAN S” vs. CALTEX OIL KENYA LIMITED (1989) KLR 1653 (C.A)** where the Court of Appeal stated as follows: -

“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”.

20. The Petitioners also cited the case of **JOHN KIPNG’ENO KOECH AND 2 OTHERS vs. NAKURU COUNTY ASSEMBLY AND 5 OTHERS [2013] eKLR** where Emukule, J had this to say on jurisdiction -

“Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.”

21. It is submitted that the Chief Justice formed the current bench to handle the Petition in compliance with Article 165 (4) of the Constitution which requires that any matter certified by the court as raising substantial question of law under clause 3 of Article 165 shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.

22. The Petitioner contends that it has *locus standi* to file this Petition and relies on Article 3 of the Constitution which enjoins all persons whether natural or juristic, to respect, uphold and defend the Constitution. Further, Article 22 of the Constitution under which the Petition herein is brought provides: -

1) 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.

2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

- a) a person acting on behalf of another person who cannot act in their own name;**
- b) a person acting as a member of, or in the interest of, a group or class of persons;**
- c) a person acting in the public interest; or**
- d) an association acting in the interest of one or more of its members.**

23. The Petitioner also relies on the case of **MUMO MATEMU vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE AND 5 OTHERS (2013) eKLR** where the court held as follows: -

“(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion or sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the Petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the *locus standi* to file the Petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution.”

24. The Petitioner also submits that the Constitution as provided under Article 2, is the supreme law of Kenya. Article 166 of the Constitution provides for the manner in which the President shall appoint judges of the superior courts. Article 172 of the Constitution calls upon the Judicial Service Commissions (JSC) to promote and facilitate the independence and accountability of the Judiciary. The Judicial Service Act 2011 sets out an elaborate process for the competitive recruitment of Judges upon conclusion of which the JSC recommends to the President persons who are to be appointed as Judges.

25. The Petitioner submits that the jurisdiction of the courts to deal with environment and land and employment and labour matters is conferred given by the Constitution and the two statutes creating those courts. Once a Judge is appointed and sworn to a specific superior court, such a Judge cannot have power to exercise jurisdiction reserved to any other superior court by the Constitution. According to the Petitioner this position was affirmed by the Supreme Court in its ruling of 23rd October, 2012 in **SAMUEL KAMAU MACHARIA vs. KENYA COMMERCIAL BANK LIMITED AND 2 OTHER [2012] eKLR** where it was held: -

“(68) 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 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.”

26. According to the Petitioner, an Act of Parliament cannot broaden or limit a constitutional mandate. The Chief Justice does not have power under the Constitution to transfer a Judge of the High Court to the Environment and Land Court or to the Employment and Labour Relations Court and vice versa. If Parliament wanted to grant the Chief Justice such powers, then the proper procedure would have been to amend Articles 162 (2) (b) and 165 (3) and (5) and 172 (1) of the Constitution. The Petitioner maintains that the amendments seek to amend the Constitution through the back door and give the Chief Justice who is a member of the Judicial Service Commission the authority and function of the President.

27. The Petitioner further relies on the case of **KARISA CHENGO, JEFFERSON KALAMA KENGHA AND KITSAO CHARO NGATI vs. REPUBLIC [2015] eKLR**. In that case the Court of Appeal held that a Judge of the Environment and Land Court or Employment and Labour Relations Court cannot sit over a matter reserved for the High Court. The Court of Appeal went on to state as follows: -

“Given the above definition of a court, there is no doubt that courts are a creature of the Constitution. A court as an institution is an inanimate body that must be activated, run, managed and controlled by animate organs authorized by law. These are judges who must of essence be human beings and according to the Constitution the judges of the High Court, ELRC and ELC must as of necessity in law be of equal rank and standing.

The Constitution has provided for the mode of appointment of judges and their qualifications. It is within the mandate of the Judicial Service Commission as provided for under Article 172 (1) (a) of the Constitution to recommend to the President the appointment of judges to preside over the said courts. In our view it is the court that a judge is appointed to, that determines the kind of jurisdiction that judge is seized of. In the premises we would agree with the submission that a judge appointed to any of the two specialized courts does not have jurisdiction to sit in courts other than the one he/she was specifically appointed to. We say so because section 2 of the Judicature Act has defined ‘judge’ to mean; ‘the Chief Justice or a puisne judge appointed under section 61 of the old Constitution (the equivalent of now Article 166 (5) of the current Constitution) or a judge of the Court of Appeal appointed under section 64 of the old Constitution (the equivalent of now Article 166 (4) of the current Constitution). Notably, both the Constitution and the Act are silent with regard to a judge appointed in the two specialized superior Courts. Article 166 (2) of the Constitution provides for the qualifications that one must have to be appointed a judge of a superior Court by the President. ..”

28. The Petitioner further submits that no person or authority has power under the Constitution of Kenya to assign a Judge jurisdiction not conferred by the Constitution or statutes to a court which he or she was not appointed. The system of the courts is established under Article 162 of the Constitution. Article 162 (2) does not leave room for Parliament to establish any other court without the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of and title to land.

29. On the above grounds, the Petitioner’s counsel urged the court to allow the Petition.

The First Respondent’s (The Attorney General) Case

30. The First Respondent filed grounds of opposition dated 6th June, 2016 as well as written submissions filed on 17th August, 2016. The submissions extensively expound on the grounds of opposition.

31. Mr. Waigi Kamau, learned State Counsel, submitted that the court ought to be guided by the presumption that every Act of Parliament is constitutional as held in the case of **NDYANABO vs. ATTORNEY GENERAL [2001] EA 495**. That Article 259 (1) of the Constitution calls upon the Court to interpret the Constitution so as to give effect to the intent and purposes of the Constitution. Counsel argued that the provisions of the Constitution must be read as an integrated whole without any one

particular provision destroying but sustaining the other. Further that the Court ought to take a liberal approach that promotes the rule of law, has jurisprudential value and takes into account the spirit of the Constitution as held in the case of **TINYEFUZA vs. ATTORNEY GENERAL OF UGANDA, CONSTITUTIONAL PETITION NO. 1 OF 1997 (1997) UGCC 3**).

32. It is submitted further for the Second Respondent that the constitutionality of Statute Law (Miscellaneous Amendment) Act 2015 was conclusively and finally determined in the case of **LAW SOCIETY OF KENYA vs. ATTORNEY GENERAL AND NATIONAL ASSEMBLY [2016] eKLR**. That the Petition herein is therefore *res judicata* and an abuse of the court process. That the Petitioner has abandoned the order seeking a declaration that the entire Statute Law (Miscellaneous Amendments) Act, 2015 is unconstitutional and has now singled out various sections of the Act. Counsel argued that the issues being raised are the same as those raised in the **LAW SOCIETY OF KENYA CASE** (supra) and the parties are the same given that the Petitioner herein is part and parcel of the Law Society of Kenya.

33. Counsel maintains that section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 amends sections 7 (3), 8 (d) and 26 (4) of the Environment and Land Court Act. The new sections give the Chief Justice authority to transfer a judge of the High Court to the Environment and Land Court and vice versa. That this is purely an administrative function given to the Chief Justice and it enables him to perform his duties as the head of the Judiciary. That the spirit of the Constitution is not violated since all the Judges are duly appointed by the President under Article 166 of the Constitution. A transfer of a Judge is not the same thing as an appointment. The Judicial Service Commission evaluates the suitability of eligible candidates for the position of a Judge and that role has not been taken away. It was contended that the jurisdiction of a Court is conferred by the Constitution or Statute and is not determined by the particular Judge presiding over the Court as alleged by the Petitioner. Counsel urged that Article 162 (2) of the Constitution empowers Parliament to determine the jurisdiction and functions of the Environment and Land Court and the Employment and Labour Court.

34. According to Mr. Waigi Kamau, the Statute Law (Miscellaneous Amendment) Act, 2015 only introduces minor changes to the impugned Acts. The issue of public participation was dealt with in the **LAW SOCIETY OF KENYA CASE** (supra) where the Court held that there was public participation in the enactment of the legislation and observed as follows: -

“...the law is not that all persons must express their views or that they must be heard or that the hearing must be oral. Similarly, the law does not require the proposed legislations be brought to each and every person wherever that person might be. What is required is that reasonable steps be taken to facilitate the said participation...”

35. It is further submitted that Article 165 of the Constitution presupposes and preserves the jurisdiction of the subordinate courts to hear certain land and environment cases as well as employment and labour disputes. The two superior Courts are vested with appellate jurisdiction. The changes made to the Magistrates' Court Act are to enable the Chief Justice to designate certain magistrates to hear such matters so as to give effect to the appellate jurisdiction of the superior Courts. It was submitted that Article 162 of the Constitution gives the legislature the discretion to establish the jurisdiction of the two superior courts but does not require the legislature to establish specialized courts with exclusive jurisdiction. It was further contended that the issue of the jurisdiction of magistrates handling environment and land and employment and labour relations matters was dealt with in the case of **EDWARD MWANIKI GATURU & ANOTHER vs. ATTORNEY GENERAL & ANOTHER [2013] eKLR**.

36. It was submitted that the Legislature is empowered under Article 94 of the Constitution to exercise legislative authority. It is therefore within its mandate to confer jurisdiction to various courts as was held in the case of **SAMUEL KAMAU MACHARIA vs. KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR** where the court observed as follows: -

“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 Court or

tribunal by statute law.”

37. According to the First Respondent section 13 (1) of the High Court Organization and Administration Act, 2015 does not confer jurisdiction to the Chief Justice but is merely facilitative so as to enable the Chief Justice carry out his mandate under the Constitution. Section 36 (3) of the same Act only sets out the maximum fine payable for contempt. That the amendments do not contravene the Constitution in any respect.

The Second Respondent’s (The Chief Justice) Case

38. M/s Rachier & Omolo Advocates appeared for the Second Respondent. The Second Respondent filed Grounds of Opposition dated 6th June, 2016 in opposition to the Petition as well as written submissions dated 11th August, 2016.

39. It is submitted that the office of the Chief Justice is established by Article 161 of the Constitution. Section 5 of the Judicial Service Act provides for the functions of the Chief Justice as follows: -

(1) The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of government;

(2) Despite the generality of subsection (1), the Chief Justice shall-

a) Assign duties to the deputy Chief Justice, the President of the Court of Appeal, the Principal Judge of the High Court and the chief registrar of the Judiciary;

b) Give an annual report to the nation on the state of the Judiciary and the administration of justice; and cause the report to be published in the Gazette, and a copy thereof sent, under the hand of the Chief Justice, to each of the two Clerks of the two Houses of Parliament for it to be placed before the respective Houses for debate and adoption;

c) Exercise general direction and control over the Judiciary.

40. It was further submitted that Section 13 of the High Court (Organization and Administration) Act, 2015 provides for the functions of the Chief Justice as follows: -

(1) The Chief Justice may, whenever it is necessary for purposes of promoting effective, prompt and efficient discharge of judicial service-

a) transfer a judge from one station to another: or

b) transfer a judge from one division to another.

(4) The Chief Justice may assign special duties to any judge for the purpose of exercising judicial authority.

41. It was further submitted that Section 25 of the Magistrates Court Act, 2015 and Section 26 (3) of the Environment and Land Court Act similarly provide for functions/powers of the Chief Justice. As follows:-

“The Chief Justice may by notice in the Gazette appoint certain magistrates to preside over cases involving environment and land matters of any area of the country”.

42. It was submitted that the Second Respondent was wrongly included in this suit as he was only implementing the law when he appointed certain magistrates to handle environment and land matters. That there is no evidence that those magistrates were vetted out by the Judges and Magistrates Vetting

Board. The contention by the Petitioner that Magistrates Court can never at any particular time have jurisdiction to entertain matters relating to employment and labour or environment and land is not correct and is contrary to the Constitution. It was argued that Article 23 (2) of the Constitution provides that Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear applications of redress of a denial of a right or threatened violations of the Bill of Rights. Similarly, Article 169 (2) empowers Parliament to enact legislation which confers jurisdiction, functions and powers upon the subordinate courts. Those powers given to Parliament are not limited under the Constitution.

43. It was further submitted that though Article 165 (5) (b) limits and ousts the jurisdiction of the High Court from handling matters preserved for the Environment and Land Court and Employment and Labour Relations Court, the same does not hold for subordinate courts. That in fact, the Constitution contemplates the conferment of jurisdiction upon the subordinate courts to entertain such matters as per Articles 23 (2) and 169 (2). That the Constitution has to be read together as an integrated whole and with no particular provision destroying the other.

44. Counsel further submitted that section 16A (1) of the Environment and Land Court Act provides for appeals from the subordinate court in the following terms: -

“All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13 (2) of the Environment and Land Court Act....”

That given the above provision, it therefore follows that the subordinate courts have jurisdiction to entertain environment and land matters as that is how the Environment and Land Court draws its appellate jurisdiction.

45. It is submitted that section 13 (4) of the High Court (Organization and Administration) Act 2015 only gives the Chief Justice the power to assign special duties to any Judge. By assigning such special duties, the Chief Justice does not confer jurisdiction upon such a Judge or is not appointing the Judge. It is simply meant for the proper administration of the High Court. It is presumed that the Judge would have already been appointed before the Chief Justice can assign the special duties. Such special duties include the appointment of a Judge to be a Presiding Judge of a station. It was argued that the Chief Justice only acts on the recommendation of the Judicial Service Commission to transfer a Judge from the **High Court to the Environment and Land Court or Employment and Labour Relations Court**. Such an exercise will only be done when the particular Judge has the necessary qualifications to sit in the Court where he/she will be transferred. That this cannot hamper the course of justice or infringe the Constitution.

46. With regard to the provisions relating to contempt of court, counsel maintains that there is no violation of the Constitution. That the new provisions only provide for the maximum pecuniary punishment as well as the maximum incarceration punishment of 5 days.

First Interested Party’s (The Law Society of Kenya) Case

47. The Law Society of Kenya appointed the firm of Khatib & Co. Advocates to represent its interest. By a statement filed on 16.8.16, the First Interested Party expressed its support for the Petition.

Second Interested Party’s (The National Land Commission) Case

48. The Second Interested Party through its advocates M/s Apollo Muinde & Ngonze Advocates opposed the Petition by filing a Notice of Preliminary Objection dated 23rd May, 2016 and also filed written submissions. According to the Second Interested Party, the Petition offends the basic rules of procedure and practice, it is fatally defective and seriously incurable, that the deponent of the supporting affidavits has not demonstrated requisite *locus standi* to swear the said affidavit. Based on the above the Second Interested Party urged the Court to strike out the Petition.

49. It is further submitted that the Petitioners are predominantly holding the view that the Magistrates' Courts are constitutionally barred from entertaining matters of environment and land owing to the provisions of Articles 162 (2) (b) and 166 of the Constitution. The Statute Law (Miscellaneous Amendment) Act, 2015 simply donated jurisdiction to the Magistrates Courts to entertain such matters. That Article 162 (2) (b) establishes the Environment and Land Court which has equal status and is parallel to the High Court while Article 169 (2) establishes the subordinate courts and empowers Parliament to enact legislation which confers jurisdiction, functions and powers on those courts.

50. It was submitted that the amendments to the Environment and Land Court Act, the Magistrates' Courts Act and the High Court (Organization and Administration) Act by Section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015, broaden the right of access to justice as prescribed in Article 48 of the Constitution. It was argued that the Petitioner is urging the Court to usurp the role of Parliament and this is contrary to the concept of Parliamentary sovereignty which means that Parliament has the right to make or unmake the law as long as it operates within the purview of Article 2 of the Constitution.

51. Counsel further submitted that section 13 (1) of the Environment and Land Court Act 2011 gives the Environment and Land Court both original and appellate jurisdiction. Section 13 (2) of the same Act allows the Court to exercise the jurisdiction to determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; Section 13 (4) of the same Act gives appellate jurisdiction to the court over the decision of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court. Therefore, the Magistrates' Courts have jurisdiction to handle environment and land matters provided that they fall within their pecuniary jurisdiction. This position was confirmed in the case of **EDWARD MWANIKI GATURO & ANOTHER vs. THE ATTORNEY GENERAL & 3 OTHERS [2013] eKLR**.

The Third Interested Party's (The National Assembly) Case

52. The Third Interested Party opposed the Petition and filed a Replying Affidavit sworn by George Gazemba, a Senior Clerk Assistant on 21st July, 2016.

53. It was submitted by Mr. S.M. Mwendwa, learned Counsel that the Third Interested Party derives its legislative authority from Article 94 (1) of the Constitution. That Parliament exercised its constitutional authority when it enacted the Statute Law (Miscellaneous Amendment) Act, 2015. Article 169 (2) requires the Third Interested Party to enact legislation conferring jurisdiction, powers and functions to subordinate courts. That this mandate is not limited to certain claims or disputes as all the decisions of the courts under Article 169 are appealable and subject to the supervision of the superior courts. Counsel submitted that it is not clear from the Petition which portion of the amendments to the Magistrates' Court Act 2015 offends the Constitution. That the amendments set out the pecuniary limits of the jurisdiction of the various levels of the Magistrates Courts and allows the Chief Justice to revise the limits from time to time. That the Act went through the Departmental Committee on Justice and Legal Affairs.

54. Mr. Mwendwa further submitted that the objects of section 29 of the Employment and Labour Relations Court Act, 2011 is to foster access to justice. That Section 9 of the Magistrates Court Act, 2015 does not curtail the right to appeal the determination of the Magistrates Court to the superior courts. He argued that Sections 7 and 9 of the Magistrates Court Act and section 29 of the Employment and Labour Relations Court Act do not offend the Constitution but foster the right of access to justice guaranteed under Article 48 of the Constitution.

55. It is further contended that the legislations did undergo public participation as required by Article 118 of the Constitution and Standing Order No. 127 (3) of the National Assembly Standing Orders. The Magistrates' Courts Bill was advertised in the Daily Nation and Standard Newspapers of 20th August, 2015. Members of the public were to file their memorandums by 11th November, 2015 when the committee of the whole house considered the amendments. Further in the case of **LAW SOCIETY OF KENYA** (supra), a five Judge bench of the High Court upheld the constitutionality of the Statute Law (Miscellaneous Amendment) Act, 2015.

Analysis and Determination

56. Issues for Determination

- i. Whether this court has jurisdiction to determine the Petition;
- ii. Whether the Petition is fatally defective incurable as per the Preliminary Objection dated 23rd May, 2016;
- iii. Whether the Petitioner lacks *locus standi* to bring the Petition;
- iv. Whether the Petition herein should be struck out for being *res judicata*, frivolous and an abuse of the court process;
- v. Whether there was public participation in the passage of the Statue Law (Miscellaneous Amendment) Act, 2015;
- vi. Whether sections 9 (a) and (b) and 10 (6) of the Magistrates' Court Act, 2015 are unconstitutional, null and void for being in violation of or inconsistent with Articles 2, 162 (2) (a) and (b) and 255 (1) of the Constitution of Kenya, 2010;

Whether this court has jurisdiction to determine the Petition

57. The Petition is brought under Articles 22, 23 and 165 (3) (b) of the Constitution. Article 1 (3) (c) of the Constitution delegates part of the sovereign power of the people of Kenya to the Judiciary and Independent Tribunals. Article 23 (1) of the Constitution states as follows: -

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringements of, or threat to, a right or fundamental freedom in the Bill of Rights.”

58. Article 165 (3) (d) of the Constitution states as hereunder: -

“Subject to clause (5), the High Court shall have -

(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.”

59. The Petitioner herein contend that the amendments introduced by Section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 in relation to the Environment and Land Act, High Court (Organization and Administration) Act, 2015 and Magistrates' Courts Act, 2015 are unconstitutional. This calls for the interpretation of the impugned sections of the law against the constitutional provisions specifically. Article 165 (3) (d) of the Constitution. This Court is mandated to interpret the constitutional provisions *vis a vis* the impugned sections of the legislations. This was the finding in the case of **PETER**

O. NGONGE vs. FRANCIS OLE KAPARO & 4 OTHERS [2007] eKLR where the High Court stated as follows: -

“We must however not miss the chance to state that all organs of state namely the Legislative, Executive and the Judiciary are all subject to the Constitution. The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the Constitution. Nothing is immune from the courts scrutiny, if in conflict with the Constitution.”

60. Article 165 (4) of the Constitution provides: -

“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

This bench was constituted by the Honourable Chief Justice in accordance with the provisions of Article 165 (4). The dispute in the Petition herein, being a question as to whether the impugned amendments are inconsistent with or in contravention of the Constitution, falls within the purview of Article 165 (3) (d) of the Constitution. We therefore find that this Court has jurisdiction to determine the dispute.

Whether the Petitioner lacks the locus standi to file the Petition

61. It is submitted that the Petitioner lacks jurisdiction to file the Petition and that the deponent of the affidavits in support of the Petition has not demonstrated the requisite *locus standi* to swear the affidavits. The Petitioner is established under the Societies Act, [Cap 108 Laws of Kenya]. Copies of the certificate of registration dated 28th November, 2002 and of the Constitution of the Petitioner were annexed to the Supporting Affidavit. There are minutes of the Petitioner’s meeting held on 11th March, 2016 authorising Lucy Mwangi, the Petitioner’s Secretary to swear the affidavits.

62. Article 22 (1) of the Constitution states the following: -

“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.”

The above Article relates to infringement or threat thereof of the rights provided under the Bill of Rights. By extension, the Article applies to any introduction of a legislation which is alleged to be contrary to the Constitution. Article 260 of the Constitution defines a “person” in the following terms: -

“Person” – includes a company, association or other body of persons whether incorporated or unincorporated.”

63. Article 22 (2) of the Constitution allows any person acting as a member of, or in the interest of, a group or class of persons or a person acting in the public interest or an association acting in the interest of its members can institute proceedings under Article 22 (1). Apart from the foregoing, there is Article 258 of the Constitution which provides as follows: -

“258 (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”

64. The provisions of Article 22 (2) are reiterated in Article 258 (2) whereby an association acting in the interest of one or more of its members can institute proceedings whenever there is infringement or threat of infringement of the Constitution. The Petitioner herein is of the view that the provisions of section 2 of the Statute Law (Miscellaneous Amendment) Act, 2015 are unconstitutional. It is within their right either individually or as an association to file the current Petition. Lucy Mwangi was authorized to swear the

supporting affidavits herein. The Petitioners are an association which is duly registered under the laws of Kenya. Given the above provisions, and in view of the provisions of Article 22 and 258 of the Constitution, we do find and hold that the Petitioner is within its rights to file the Petition and has the requisite *locus standi* to do so.

Whether the Petition should be struck out for being res judicata, frivolous and an abuse of the court process

65. The Respondents contend that the issues herein were raised in the High Court at Nairobi in Constitutional Petition Number 3 of 2016, **LAW SOCIETY OF KENYA vs. ATTORNEY GENERAL & NATIONAL ASSEMBLY [2010] eKLR**. That the Petitioner is part and parcel of the Law Society of Kenya, the petitioner in the Nairobi suit and ought not to have filed this Petition.

66. We note from the Judgment in Nairobi Petition (Number 3 of 2016) that the issues for determination were whether the amendments to section 30 (3) of the Judicial Service Commission Act as introduced by the Statute Law (Miscellaneous Amendments) Act, 2015 were inconsistent with the provisions of articles 166 (1) and 259 (1) of the Constitution, whether the Statute Law (Miscellaneous Amendments) Bill, 2015 ought to have been referred to the Senate for consideration and approval and whether there was public participation in the passing of the Statute Law (Miscellaneous Amendment) Act, 2015. The amendments to section 30 (3) of the Judicial Service Commission Act required the Judicial Service Commission to submit three names to the President for appointment of the Chief Justice and Deputy Chief Justice respectively.

67. We do find and hold that the issues being raised in this Petition are totally different and are not subject to the principles *res judicata*.

Of whether there was public participation in the enactment of Statute Law (Miscellaneous Act 2015)

68. According to the Third Interested Party, the Magistrates' Court Bill was advertised in the Daily Nation and Standard Newspapers of 20th August 2015. Amendments to the Bill were considered by the relevant Parliamentary Committee on 11th November, 2015. The Petitioners herein are legal professionals who must or ought to have seen the advertisement. The period was sufficient for any concerned Kenyan to have sent his/her memorandum to Parliament in relation to the Bill.

69. The issue of public participation was considered by in High Court at Nairobi Constitutional Petition Number 3 of 2016 where the Court found that there was adequate public participation before the Statute Law (Miscellaneous Amendments) Act, 2015 was passed. The Court reiterated the principle of public participation does not mean that every person must be heard to establish public participation, or that the hearing must be oral. In paragraph 227 of its Judgment the court states the following -

“227. The law however is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to each and every person wherever the person might be. What is required is that reasonable steps be taken to facilitate the said participation. Once this is done the Court will not interfere simply because due to peculiar circumstances of an individual, he or she failed to get the information. In other words, what is required is that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore, even in cases where there are oral public hearings the mere fact that a particular person has not been so heard does not necessarily warrant the whole process being nullified.”

70. The issue of public participation with regard to the Statue Law (Miscellaneous Amendment) Act, 2015 was therefore resolved by the five Judge bench of the High Court and the Petitioners are estopped from raising it again. In this regard, we are also guided by the case of **ZURICH INSURANCE COMPANY PLC vs. COLIN RICHARD HAYWARD [2011] EWCA CIV 641** where the court stated:

“Estoppel by res judicata, or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct. The Latin word “res judicata” mean simply “a thing judicially determined.” They may apply to the claim as a whole (usually referred to as “cause of action estoppel”), or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on the matter before it (what is generally referred to as “issue estoppel” The fact that an order is made by consent does not in my view prevent it from giving rise to an estoppel by record, provided that the nature of the order is such that it would otherwise have that effect.”

Whether the Petition is fatally defective and incurable as claimed in the Preliminary Objection dated 23rd May, 2016

71. In their Preliminary Objection dated 23rd May, 2016, Second Interested Party through M/s Apollo Muinde & Ngonze Advocates, claimed that the Petition is fatally defective and seriously incurable. However, their submissions do not expound on this contention. Such contention has become an ordinary slogan which is usually raised when there is no meaningful Objection to be made capable of leading to the striking out of a suit. We shall not dwell more on that save to indicate that we do not find anything in the Petition that makes it fatally defective, incurable, or seriously incurable.

72. The remaining issues involve the interpretation of the Constitution against the amendments introduced by the Statute Law (Miscellaneous Amendments) Act, 2015. The issues are: -

- i) Whether sections 13 (4) and 36 (3) of the High Court (Organization and Administration) Act are unconstitutional, null and void.
- ii) Whether sections 9 (a) and (b) and 10 (6) of the Magistrates’ Court Act, 2015 are unconstitutional, null and void for being in violation of or inconsistent with Articles 2, 162 (2) (a) and (b) and 255 (1) of the Constitution of Kenya, 2010.
- iii) Whether the amendments to section 7 (3), 8 (d) and 26 (4) (b) of the Environment and Land Court Act, 2011 by the Statute Law Miscellaneous Amendments) Act, 2015 were properly effected by way of miscellaneous amendments.

Whether amendments to the said Statutes accord with the Constitution

73. To determine whether the amendments to the cited statutes accord with the Constitution calls for consideration of the principles of interpretation or construction of statutes and ultimately the Constitution.

74. A statute ought to be construed in accordance with the intention of Parliament and the meaning given to the words used ought to be the ordinary and natural meaning. This is the plain meaning rule often referred to as the **golden rule**. The Court of Appeal in **COUNTY GOVERNMENT OF NYERI & ANOTHER vs. CECILIA WANGECHI NDUNGU [2015] eKLR** held that:

“The cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself.”

The Court of Appeal relied upon **HALSBURY’S LAWS OF ENGLAND, 4TH EDITION (REISSUE), BUTTERWORTHS, 1995, VOL. 44 (1), paragraph 1372** which provides: -

“the object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context ...”

75. Further it is emphasized in the **HALSBURY'S LAWS OF ENGLAND** (supra) that: -

“It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the act is by implication modified by another provision elsewhere in the Act ...”

76. The Court of Appeal was persuaded by the finding of the Australian High Court in **AMALGAMATED SOCIETY OF ENGINEERS vs. ADELAIDE STEAMSHIP COMPANY LTD & OTHERS (1920) 28 CLR 129** where it was held that: -

“The fundamental rule of interpretation, to which all others are subordinate, is that the statute is to be expounded according to the intent of parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning”

77. According to the Court of Appeal in the **COUNTY GOVERNMENT OF NYERI** case (supra) the intention of a statute can be identified through a number of factors. On this point it adopted the finding in **CUSACK vs. HARROW LONDON BOROUGH COUNCIL [2013] 4 ALL ER 97** which held that: -

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved.”

78. The Court in the **CUSACK (CASE)** cautioned that: -

“However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

79. In interpretation of the statute, if the meaning of the word/phrase used is ambiguous then one ought to consult with two sources. The first being the primary sources i.e. the statute itself, statutory definitions, case law, administrative regulations and when these do not yield much, in that they are insufficient, then one ought to move to the secondary sources i.e. dictionaries, legal encyclopedias, and legislative history documents. Further the word/or phrase if ambiguous must be interpreted in context of that statute. Hence the rules of *Noscitur a Sociis* (“it is known from its associates” applies where the meaning attributed to the word or phrase is narrowed to the terms it is referred in. Also the *Ejusdem Generis* (“of the same kind, class, or nature”) rule is applied whereby the general words in a list of specifics of the same kind, class, or nature are given the same meaning as those specified.

80. We are also guided by the decision in the case of **REPUBLIC vs. EL MANN [1969] E.A. 357 at 359** where Chief Justice Mwendwa sitting as a High Court Judge relied on a passage in **CRAIES ON STATUTE LAW (6th Edition)** which reads as follows: -

“The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. “the tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view.”

81. Similarly, the constitutional court of Uganda in **KIGULA & OTHERS vs. ATTORNEY**

GENERAL; [2005]; 1 E.A. 132 at page 133 summarized the principles of interpretation of the Constitution in the following terms: -

“The principles applicable in the interpretation of the Constitution include the widest construction possible in its context, should be given according to the ordinary meaning of the words used, the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, the Constitution should be given a generous and purposive interpretation to realize the full benefit of the guaranteed rights, the Constitution of Uganda enjoins Courts in the country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people.”

82. The question raised by this Petition is whether the provisions of Sections 13(4) and 36(3) to the High Court (Organization and Administration) Act, 2015 and Section 9(a) and (b) of the Magistrates Court Act 2015, and Sections 7(3), 7(d) and 20(4) of the Environment and Land Court Act 2011 as amended by the Statute Law (Miscellaneous Amendments) Act are consistent with Article 162(2)(a) and (b) and 94 of the Constitution 2010.

83. For the sake of clarity we again set out below the relevant provisions of each of concerned pieces of legislation.

84. The High Court (Organization and Administrative Act) 2015 provides at Section 13:

“S. 13(1) The Chief Justice may whenever it is necessary for purpose of promoting effective, prompt and efficient discharge of judicial service –

(a) transfer a Judge from one Station to another or

(b) deploy a Judge from one Division to another

(2) approves for 3 months’ notice for transfer of Judges from one Station to another

(3) requires the Chief Justice to take into account the expertise and legal specialization in the deployment of Judges [from one Division to another]

(4) “The Chief Justice may assign special duties to any judge for the purposes of exercising judicial authority”.

85. The Petitioner informed the Court that they had no issues with the provisions of Section 13(1)(2) and (3) of the Act. They however found issue with Section 13(4) which empowers the Chief Justice to assign special duties to any judge for the purposes of exercising judicial authority. As these provisions apply to the High Court, we find no objection to the Chief Justice assigning special duties to any Judge thereof. Therefore we do not find anything unconstitutional in this provision.

86. Section 36(3) of the High Court (Organization and Administrative Act) 2015 provides that

“A person who commits an offence under subsection (1) shall on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both”.

87. This provision merely provides for a punishment for a person who commits an act of contempt in the face of the Court like any other penal provision, providing sanction for transgression. We therefore do not find anything inconsistent with the Constitution.

88. With regard to the Environment and Land Act [Cap 12 A], the Statute Law (Miscellaneous Amendment) Act 2015, introduced a new qualification to entry to a court of equal status, and granted the

Chief Justice, power to transfer a Judge of the High Court or a Judge of a Court of equal status, to either court. The added qualification is found in Section 7(3) which says –

“7(3). The Chief Justice may on the recommendation of the Judicial Service Commission, transfer a Judge who meets the qualifications set out in subsection (1) to serve in the court.”

89. In addition, the amendment to Section 8 (Tenure of office of the court) introduced a new provision that a Judge of the Environment and Land Court shall hold office until –

“(a) – (c)

(d) is transferred from the court to the High Court or other court with status of the High Court.”

90. The Statute Law (Miscellaneous Amendments) Act 2015, also introduced into the Environment and Land Act a new Section 16A (1) & (2), and Section 26(3) and Section 26(4) which provide –

(a) for appeals from subordinate courts and local tribunals as the ELC (Section 16A(1) & (2);

(b) the Chief Justice may, by notice in the Gazette appoint certain magistrates to preside over cases involving environment and land in respect of any area of the county (Section 26(2));

(c) subject to Article 169(2) of the Constitution, the magistrate appointed under subsection (3) shall have jurisdiction and power to handle –

(i) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

(ii) matters of civil nature involving occupation, title to land, provided that the value does not exceed the pecuniary jurisdiction as set out in the Magistrates Courts Act;

91. There were similar amendments to Section 101 of the Land Registration Act 2012 (No. 3 of 2012) and Section 150 of the Land Act 2012 (No. 6 of 2012), granting jurisdiction to “the subordinate courts”.

92. Put differently from the question raised in paragraph 82 (supra), the real dispute raised by the Petition herein revolves around two issues one, the jurisdiction of the Environment and Land Court and Employment and Labour Relations Act, vis-à-vis the jurisdiction of the High Court. The second issue is the jurisdiction of the subordinate courts in relation to environment and use, occupation and title to land. We will consider each of these issues in turn, commencing with the question of jurisdiction of the High Court and Courts of equal status, namely the Environment and Land Court and the Employment and Labour Relations Court, taking into account the historical constitutional position prior to the promulgation of the Constitution of Kenya 2010, and the mischief the new Constitution intended to resolve.

93. The repealed Constitution of Kenya provided a three-tier court structure, comprising the High Court as the anchor court with original and unlimited jurisdiction in civil and criminal matters, and such other jurisdiction as may be conferred by the Constitution or any other written law; and also designated the Judges of the High Court as being the Chief Justice, and other Judges, being not less than eleven and other Judges (puisne Judges), as may be prescribed by Parliament and that the Chief Justice would designate where the High Court would sit.

94. The old Constitution also established the Court of Appeal as a superior court of record to hear appeals from the High Court. The Constitution also provided for establishment by Act of Parliament of courts subordinate to the High Court and courts-martial, with jurisdiction conferred upon such courts by Act of Parliament. There was also provision for establishment of Kadhi’s courts.

95. Whereas the High Court had the widest original civil and criminal jurisdiction, it also had the sole jurisdiction on enforcement of fundamental rights. In addition, the High Court had a special jurisdiction under Section 84, of the Constitution. The provision allowed the High Court to entertain applications by any person alleging violation of fundamental rights and freedoms [under SS. 70-83 of the Constitution]. This led to situations where the Judges assigned by Chief Justice to the Constitutional and Judicial Review Division (of the High Court) reviewing decisions not only of cognate jurisdiction, in respect of references or petitions of alleged violation of rights or fundamental freedoms but also of appeal courts. This is part of the **mischief**, the Constitution of Kenya 2010, addressed by the establishment of the new structural architecture of the courts.

96. Apart from this perhaps narrow aspect, the new Constitution also addressed the much wider question of access to justice through the creation of courts of equal **status** to the **High Court**, namely the Environment and Land Court and the Employment and Labour Relations Court, and, but more importantly, the establishment of the Supreme Court as the apex court.

97. The mischief was however not entirely cured though Article 165(5) denies the High Court jurisdiction in respect of matters reserved to the courts of **equal status** because the remnants of the High Court's special jurisdiction is retained in criminal matters under Article 50(6) which provides –

“50(1) a person who is convicted of a criminal offence may petition the High Court for a new trial if –

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed to appeal, and

(b) new and important evidence has become available.

98. Article 162 of the Constitution provides for the system of courts in Kenya.

“162 (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).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.”

99. On the other hand, Article 163 establishes the Supreme Court, its composition and jurisdiction (163(1)) while Article 164 establishes the Court of Appeal and its jurisdiction. Article 165 establishes the High Court in these terms –

“(1) There is established the High Court, which –

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organized and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court who shall be elected by the judges of the High Court from among themselves.

(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 constitution 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.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(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 shall exercise 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) Grants the High Court power to call for records of any proceedings before any subordinate court or person”

100. The Employment and Labour Relations Court, and Environment and Land Court were established by Acts of Parliament pursuant to Article 162(2) which grants those courts, the **status** of the High Court, and confers upon those courts the jurisdiction on matters concerning employment and labour relations, and environment and the use, occupation of and title to land.

101. The provisions of Article 162(2) of the Constitution raises two related issues, the jurisdiction of the

courts of equal status, and the grant of jurisdiction on issues of environment and use, occupation of, and title to land to subordinate courts.

102. It is correct that Article 165(5) of the Constitution prohibits the High Court from exercising jurisdiction on matters of employment and labour relations, and matters of environment, use, occupation and title to land. It is also correct that there is no corresponding provision denying **courts of equal status** jurisdiction on matters **other than “employment and labour relations, and use, occupation of and title to land”**.

103. We think it is obfuscation of issues of jurisdiction to say that because of the absence of, negation or denial of jurisdiction, it follows that **courts of “equal status”** have the jurisdiction reserved to the High Court as envisaged by Article 165(1) – (4) & (6) of the Constitution.

104. This is neither a question of qualification of persons appointed to be Judges of the High Court or Courts of equal status nor of the fact that all Judges are appointed by the President. Both appointment and qualification are prescriptions of the Constitution. It is a question of what the Constitution provides in respect of jurisdiction of the High Court on the one hand and the Courts of equal status on the other. There is no question that persons appointed to courts of equal status have the individual competences to preside over matters reserved to the High court and vice-versa. It is also correct that the **Committee of Experts (the CoE)**, the writers of the current Constitution, agonized over this matter, and at the time, the issue involved the status of the “Industrial Court” whose decisions were subject to judicial review by the High Court. This was CoE recommendation –

“The CoE agreed to delete references to the Constitutional Court in the proposed Constitution following the recommendations of the Public Service Commission (PSC). However, it did not support the PSC’s recommendation that the specialized courts on employment and land and the environment be removed and replaced with a broad grant of authority of Parliament to establish “other courts” with such jurisdiction, functions and status” as Parliament may determine. First, such provisions would give Parliament a blank cheque to establish courts whose level and jurisdiction might supplant the superior courts established in the Constitution.”

Further this would signal establishment of specialized courts on employment and land/environment, and would not solve the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court. Thus, the CoE, reinstated the provision allowing Parliament to establish by legislation, employment and land courts with a status equivalent to the High Court as had been provided in the earlier drafts.”

105. As correctly observed in the earlier pages of this Judgment, interpretation of Statutes (and the Constitution is no ordinary statute but the prime law) where the words used in the Statute are ambiguous, the court will, if it finds no joy in the primary sources, the Constitution or Statute itself, refer to secondary sources, for definition or meaning of the expression used in the Constitution or Statute. The court will refer to dictionaries, legal encyclopedias and as already done, legislative history of the document under scrutiny. The word **“status”** is not defined in the Constitution or the Statutes establishing either the Employment and Labour Relations Court or the Environment and Land Court. This is a sample from Black’s Law Dictionary, 8th Edition:

“By the status or standing of a person is meant the position that he holds with reference to the rights which are recognized and maintained by the law in other words, his capacity for the exercise and enjoyment of legal rights.”

James Hadley, Introduction to Roman Law, 106 [1881] –

“the word “status” itself originally signified nothing more than the position of a person before the law. Therefore every person (except slaves, who were not regarded as persons, for legal purposes) had a status. But, as a result of the modern tendency towards equality formerly

noticed, the differences of status became less and less frequent and the importance of the subject has greatly diminished with the result that the term status is now used, at any rate in English Law, in connection only with those comparatively few classes of persons in the community who, by reason of their conspicuous differences from normal persons, and the fact that by no decision of their own can get rid of these differences, require separate consideration in an account of the law. But political differences do not amount to status; thus peers, physicians, clergymen of the established church, and many other classes of persons, are not regarded as the subjects of status, because the legal differences which distinguish them from other persons though substantial, are not enough to make them legally abnormal. And landowners, merchants, manufacturers, and wage earners are not subject of the Law of Status, though the last named are, as the result of recent legislation, tending to approach that position.” Edward Jenks. *The Book of English Law*, 109, [P.B. Fairest ...6th Edition 1967]

106. On the other hand the Compact Oxford English Dictionary, 3rd Edition Revised (2008) defines “status” as –

- (1) a person’s social or professional standing in relation to other people;
- (2) high rank or social standing.

107. So what does the phrase Parliament shall establish courts of “equal status” mean in Article 162(2)? It must be a court of the same standing as the High Court, and the persons or Judges appointed to those courts as persons of the same social or professional standing as persons appointed to the High Court. This is not the same thing as jurisdiction.

108. “Jurisdiction” according to Black’s Law Dictionary (op.c – supra), is **the court’s power to decide matters presented to it and to enforce its decisions.** And according to the decision of the Court of Appeal in the case of the **OWNERS OF THE MOTOR VESSEL “LILLIAN S” vs. CALTEX OIL (KENYA) LIMITED [1989] 1KLR** referring to WORDS and PHRASES LEGALLY DEFINED – VOL. 3 – Vol. I-N page 113, Nyarangi JA said –

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters that are presented in a formal way for its decision. The limits of this authority are imposed by statute charter, or commission under which the court is constituted, and may be extended or instituted in 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 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 facts exist. Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

109. It is for that reason Nyarangi JA, continued,

“that a question of jurisdiction once raised must be determined forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of the court may not be heard to raise it after the matter is heard and determined.”

110. The essential twin issues raised by the Petition herein are that the provisions of the Statute Law (Miscellaneous Amendments) Act 2015 purporting to confer cross-jurisdiction upon Judges of the High Court and Judges of the equal status, are inconsistent with the clear provisions of Article 162(2) as read with Article 165(5) of the Constitution, which confer and limit the jurisdiction of the High Court, and by

extension the jurisdiction of the courts of equal status to matters assigned to the respective courts. In our considered view jurisdiction is conferred by the Constitution, and the respective establishing statutes and can only be extended likewise. It is not conferred by the administrative acts of the Chief Justice. Consequently we find and hold that Section 2 of the Statute Law (Miscellaneous Amendments) Act 2015 is inconsistent with the clear provisions of the Constitution, and is therefore unconstitutional to the extent of the inconsistency.

111. The other second twin issue concerns the jurisdiction of the subordinate courts in relation to matters environment and the occupation of, use and title to land.

112. The Petitioner's case bluntly put is that the conferment of jurisdiction upon the subordinate courts under Section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015 is equally inconsistent under Article 196(2) of the Constitution, in that subordinate courts are not courts of equal status to the High Court which is denied jurisdiction by the Constitution on matters concerning the environment and land and employment and labour relations. In this regard Article 169(2) which grants Parliament power to enact legislation to generally confer jurisdiction on subordinate courts must be read together with Article 162(2) which restricts and limits jurisdiction on matters environment, use, occupation of and title to land to courts of equal status to the High Courts.

113. This is not to say that subordinate courts should not, or ever exercise jurisdiction on matters employment and labour relations, or environment and the use and occupation of, and title to land, far from such a position. The architectural structure of the Constitution has a certain harmony in the jurisdiction of the superior courts, and the subordinate courts. This harmony commences with the jurisdiction on enforcement of the Bill of Rights (Chapter Four). Whereas Article 23(1) grants the High Court jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement or, threat to, a right or fundamental freedom in the Bill of Rights, however in conformity with the harmony of the jurisdictional provisions between the superior courts and the subordinate courts, Article 23(2) grants Parliament power to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications to redress a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

114. The next incidence of harmony on the question of legislation relates to Fair Administrative Action (Article 47). Article 47(3) grants Parliament power to enact legislation to give effect to the rights to fair administrative action. Similar provision appears in Article 59(4) & (5) with regard to legislation to give full effect to the National Human Rights and Equality Commission. This is also the case with regard to legislation in respect of National Land Commission (Article 68), as well as Article 72, in respect of legislation relating to the environment. The next set of legislation relates to Chapter Six – **Leadership and Integrity**, which provides for legislation to establish the Ethics and Anti-Corruption Commission, (Article 79), and on Leadership (Article 80).

115. The next harmony legislation relates to Chapter Seven – **Representation of the People** – Legislation on elections, Article 82(1), and electoral disputes (Article 87(9), political parties (Article 92), the right of recall (Article 104(2); legislation on validity of elections (Article 105(3), powers of the Director of Public Prosecutions (Article 157(12), systems of courts, establishment of courts of equal status (Article 162(2) legislation to make provision for the operation of the Supreme Court (Article 163(9); for organization of the Court of Appeal (Article 164(1)(b), for organization of the “High Court” (Article 165(1)(b)).

116. Article 169(2) is contained in **Part 5 – Subordinate Courts**, of Chapter Ten – the Judiciary. Article 169(2) confers upon Parliament the power to enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1). Article 169(1) recognized the following subordinate courts –

(a) the Magistrates;

(b) the Kadhi's courts;

(c) the Courts-Marshall and

(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2).

117. Our understanding of sub-article 1(d) of Article 169 is that whereas Parliament could enact legislation conferring jurisdiction on subordinate courts, Parliament could neither establish any other court or local tribunal, similar to courts referred to in Article 162(2) (courts of equal status), **nor** could it purport to confer jurisdiction to a court which is not of equal status with the High Court. That is the conundrum which needs to be resolved by Parliament in line with the Constitution's architectural harmony.

118. There is need to clarify in the Constitution, by way of an amendment thereto, that despite the provisions of Article 165(5) the Chief Justice with approval of the Judicial Service Commission may, in the management of the Judiciary, assign any Judge of the High Court, to preside over any matter in the Environment and Land Court or Employment and Labour Relations Court or vice versa or likewise assign any judge of the Environment and Land Court to preside over any matter in the Employment and Labour Relations Court or vice versa for such period as the Judicial Service Commission may determine.

119. Being of the above mind, we must hold that:

i) Section 2 of the Statute Law (Miscellaneous Amendments) Act 2015:

a) so far as it relates to the transfer of Judges from the High Court to Courts of equal status and vice versa, is inconsistent with both Articles 165(5) and 162(2) of the Constitution and therefore null and void; and

b) in relation to the jurisdiction of the subordinate courts, in respect of matters relating to environment and use, occupation of and title to land is inconsistent with Article 162(2) of the Constitution, and therefore null and void.

ii) Sections 13(4) and 36(3) of the High Court (Organization and Administration) Act, 2015 are not unconstitutional.

iii) Sections 7 (3), 8 (d) and 26 (3) and (4) of the Environment and Land Court Act are unconstitutional and therefore null and void.

iv) Sections 9 (a) and (b) of the Magistrate's Court Act, 2015 are unconstitutional and therefore null and void.

v) Section 10(6) of the Magistrates' Court Act, 2015 (in relation to the Court's power to punish for contempt in the face of the Court) is not unconstitutional.

vi) An order of Certiorari do issue to bring to this Court for the purposes of being quashed, Gazette Notices Nos. 1472 dated the 1st day of March, 2016 and published on the 11th day of March 2016 and 1745 dated the 14th day of March, 2016 and published on the 18th day of March, 2016.

120. In the circumstances, the Petition by the Malindi Law Society succeeds and there shall be orders in terms set out above. This being public interest litigation, we direct that each party shall bear its own costs.

121. There shall be orders accordingly.

Dated, Signed and Delivered at Malindi this 11th day of November 2016.

M. J. ANYARA EMUKULE, MBS

SAID J. CHITEMBWE

JUDGE

JUDGE

MUGURE THANDE

JUDGE

In the presence of:

Mr. Ole Kina and Mr. Binyenya for the Petitioner

Ms. Munyuny..... for 1st Respondent

Ms. Munyuny h/b for Mr. Wakwaya..... for 2nd Respondent

Mr. Ole Kina h/b for Mr. Khatib..... for 1st Interested Party

Mr. Obaga h/b for Apollo Muinde for 2nd Interested Party

Ms. Munyuny h/b for Mr. Mwendwa..... for 3rd Interested Party

Omar and Kaunda.....Court Assistant