REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

PETITION NO. 613 OF 2014

PATRICK MUSIMBA...PETITIONER/APPLICANT

VERSUS

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

THE KENYA RAILWAYS CORPORATION.................................2ND RESPONDENT

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY...3RD RESPONDENT

THE ATTORNEY GENERAL...4TH RESPONDENT

-AND-

CHINA ROAD BRIDGE & CONSTRUCTION COMPANY...........INTERESTED PARTY

RULING

Introduction

1. *Kompetenz – Kompetenz* is a German portmanteau for the court's competence to determine its jurisdiction. It is a fundamental legal principle that allows the court or any judicial tribunal when prompted by either party to determine and rule on its own remit.

2. The doctrine firmly found its way into our domestic court practice when the Court of Appeal in the case of **Rafiki Enterprises Limited v Kingsway Tyres & Another Civil Application No. 375 of 1996 (UR) (Unreported)** held, inter alia , that

> **"Every court has a duty to determine whether or not it has jurisdiction in a particular matter".**

3. When therefore a party takes issue with the court's jurisdiction, the court must immediately interrogate such issue *in limine* and determine whether the court has jurisdiction. Where it holds the opinion that it is without jurisdiction the court must lay "down its tools" and proceed no further: see **"Lillian S" –v- Caltex Oil (K) Ltd [1986-89]1 EA 302, [1989] KLR 1**.

4. So yet again this court is concerned with an issue as to the jurisdiction of the Environment & Land Court *vis-a- vis* the High Court prompted by the 1st Respondent's Notices of Preliminary Objection filed on 5th November, 2014 and on 9th January, 2015.

Factual Background, Parties and Relevant chronology

5. The Petitioner, a Member of Parliament for Kibwezi West Constituency, filed the present petition dated 15th October 2014 before the Environment and Land Court at Machakos. The Petition was expressed to have been brought on behalf of the people of Kibwezi West Constituency, the Petitioner's constituents. The Petition sought the following substantive prayers:

> "
>
> *a. A declaration that the exercise by the Respondents threatens and or has contravened the right to property of the residents of Kibwezi West Constituency under Article 40 of the Constitution.*
>
> *b. A declaration that the exercise by the Respondents threatens and or has contravened the right to just compensation of the residents of Kibwezi West Constituency under Article 40(3) of the Constitution.*
>
> *c. A declaration that the exercise by the Respondents has contravened and* [sic] *the right of the residents of Kibwezi West Constituency to fair administrative action under Article 47 of the Constitution.*
>
> *d. A declaration that the exercise by the Respondents threatens and or has contravened the national principles of transparency, accountability, public participation and the Rule of Law under Article 10 of the Constitution.*
>
> *e. A declaration that the Respondents have contravened and threaten further violation of the dignity of the residents of Kibwezi West Constituency under Article 28 of the Constitution.*
>
> *f. A declaration that the Respondents have contravened and threaten further violation of the right of the Petitioner and the residents of Kibwezi West Constituency to access to, publishing and publication of all information concerning the construction of the Standard Gauge Railway at the National and County level under Article 35 of the Constitution.*
>
> *g. A declaration that the Respondents have violated the rights of the Petitioner and the residents of Kibwezi West Constituency to a clean and healthy environment under Article 42, 60 and 69 of the Constitution.*
>
> *h. A declaration that the Respondents have acted in breach of the rules of Natural justice.*
>
> *i. A declaration that the Respondents have acted in breach of the due process.*
>
> *j. A declaration that the Respondents have breached the Environmental Management and Coordination Act.*
>
> *k. A declaration that the Respondents have breached the*[sic] *Lands Act.*
>
> *l. An order of certiorari to bring to the High court to be quashed all Gazette Notices published by the 1st and 2nd Respondents for Kibwezi West Constituency*
>
> *m. An order of mandamus directed to the 1st and 2nd Respondents to conduct the process and procedure of acquisition of land in Kibwezi West Constituency in accordance with the Constitution, the law, rules of natural justice and good governance.*

*n. An order of mandamus directed to the 1st, 2nd and 3rd Respondents to undertake an Environmental Impact Assessment and issue Environment Assessment Reports of the construction of the Standard Gauge Railway in Kibwezi West Constituency in accordance with the Environmental Management and Coordination Act.***”**

6. Briefly, as may be gathered from the Petition and from the equally prolix verifying affidavit, the exercise being undertaken by the Respondents and complained of by the Petitioner is the construction of a Standard Gauge Railway (‘**SGR’**) line expected to run from Mombasa to Malaba, with a branch line to Kisumu. Each respondent is playing a role in this exercise.

Parties

7. The 1st Respondent, the National Land Commission, is a constitutional commission. It is constituted under Article 67 (2) of the Constitution as read together with the National Land Commission Act, Act No. 5 of 2012. The 1st Respondent’s role in the exercise includes the compulsory acquisition of land, including land within Kibwezi West Constituency, where the SGR rail-line is to be laid.

8. The 2nd Respondent, the Kenya Railways Corporation, is a State Corporation and together with the Government of the Republic of Kenya the SGR project is being undertaken under the 2nd Respondent’s care.

9. The 3rd Respondent, the National Environment Management Authority, is a statutory body enjoined with the responsibility of, inter alia, integrating, supervising and coordinating all matters relating to the environment. The 3rd Respondent as the principal coordinator of the environment is expected to undertake an Environmental Impact Assessment (‘**EIA**’) of, approve of and authorize the SGR project.

10. The 4th Respondent is the Attorney General of the Republic of Kenya and has been impleaded pursuant to the provisions of Article 156 of the Constitution. He is the principal legal adviser to the Government.

11. Simultaneously, with the petition and under a certificate of urgency, the Petitioner filed an application by way of motion dated 15th October, 2014. Besides seeking the costs of the application, the following orders were sought in the application:

1. ...

2. That a conservatory order be issued restraining the 1st, 2nd, 3rd and 4th Respondents by themselves or their agents or servants from continuing the process of compulsorily acquiring, from paying compensation and from taking possession or otherwise howsoever dealing with private [land] *in Kibwezi West Constituency pending hearing and determination of this application.*

3. That a conservatory order be issued restraining the 1st, 2nd, 3rd and 4th Respondents by themselves or their agents or servants from continuing the process of compulsory acquiring, from paying compensation and from taking possession or otherwise howsoever dealing with private [land] *in Kibwezi West Constituency pending hearing and determination of the Petition.*

4. That a conservatory order be and is hereby issued restraining the 1st, 2nd, 3rd and 4th Respondents by themselves or their agents or servants from undertaking any project or development or plan in Kibwezi West Constituency for or in furtherance of the construction of the Standard Gauge Railway pending hearing and determination of the Petition.

5. That a conservatory order be issued restraining the 1st, 2nd, 3rd and 4th Respondents by themselves or their agents or servants from undertaking any project or development or plan in Kibwezi West Constituency for or in furtherance of the construction of the Standard Gauge

Railway pending hearing and determination of the Petition.

6. That the status quo be maintained pending hearing of this application.

7. That the status quo be maintained pending the hearing of the Petition filed herein.

8. That a certificate be issued by this Honourable Court for the substantive hearing of this matter under Article 165(4) and Article 165(3) (b) and (d) (ii).

9. ...

12. Then on 6th November 2014, the 1st Respondent filed a Notice of Preliminary Objection dated 5th November, 2014. The 1st Respondent indicated its intention to raise objections *in limine* to both the Petition as well as the Notice of Motion on grounds that:-

i. The Honourable court lacked the jurisdiction to grant the reliefs sought by the Petitioner.

ii. The Petition sought to challenge the process of compulsory acquisition in a manner other than that provided by the Land Act, 2012.

iii. The petition was an abuse of the process.

13. The Petitioner appeared before Hon. Mr. Justice C. M. Kariuki, sitting in the Environment and Land Court at Machakos on 15th October, 2015. The judge certified the application of 15th October, 2015 as urgent and directed its service upon the Respondents. Service was duly effected and when the parties appeared before the honorable judge, the Petitioner's counsel Ms. Kethi Kilonzo sought temporary conservatory orders in terms of prayer No. 5 of the application. An order for maintenance of the status quo was duly issued by the Judge who also directed that service of both the Petition and the application be effected upon the Interested Party.

14. On 6th November 2014, *inter partes*, the Judge heard the Petitioner's urgings on the question whether the Petition raised substantial question(s) of law to warrant the empanelling of a bench of not less than three Judges by the Chief Justice. The 1st Respondent supported the Petitioner's plea for the empanelling of a bench as did both the 3rd Respondent and the 4th Respondent as well as the Interested Party. The 2nd Respondent however opposed the empanelling of a bench arguing that the threshold for such empanelling had not been met. All the Respondents as well as the Interested Party opposed the extension of the status quo orders.

15. In a reserved ruling delivered on 12th November 2014, Hon. Kariuki J certified the Petition as raising a substantial question of law under Article 165(3) (b) & (d) of the Constitution and referred the matter to the Hon. Chief Justice. The judge also discharged the interim status quo orders which had been issued on 21st October, 2014.

16. The current bench of five judges was duly empanelled by Hon. Chief Justice on 3rd December 2014 and thereafter the 1st Respondent filed the Notice of Preliminary Objection dated 9th January, 2015.

17. The court file was then immediately domiciled in the High Court's Constitutional and Human Rights Division where it was assigned a new serial number.

18. Unperturbed with the questions as to jurisdiction, the Petitioner on 26th January, 2015 filed another Notice of Motion. The second application sought :(i) a conservatory order to restrain the 3rd Respondent from renewing the Environment Impact Assessment License of the 2nd Respondent pending hearing and determination of the Petition, and (ii) an order for production of copies of statutory reports of compliance with the **EIA** license for the period between February, 2013 and February, 2015. The Petitioner also

sought to consolidate the two applications.

19. In response, the 3rd Respondent filed a Notice of Preliminary Objection dated 28th January, 2015. The 3rd Respondent's Notice read as follows:

> *"(i). ...*
>
> *(ii) That this application has been presented before the wrong court. This court lacks jurisdiction to hear and determine this matter pursuant to Article 165(5) (b) of the Constitution. That the title to this application reads a different court from the one its presented to and expected to be heard before.*
>
> *(iii)That the application is res judicata and an abuse of the court process vis-à-vis the orders of the Machakos Environment and Land Court case No. 126 of 2014 where the judge certified it as urgent for empanelment by the Chief Justice.*
>
> *(iv)That the application seeks orders that cannot issue under any existing law. There are no provisions.*
>
> *(v) ..."*

20. It is the 3rd Respondent's grounds of preliminary objection and the 1st Respondent's Notice of Preliminary Objection dated 9th January, 2014 which both questioned the jurisdiction of this court together with the Petitioner's Notice of Motion dated 26th January, 2015 which are the subject of this ruling.

Submissions

21. The two Notices of Preliminary Objection as well as the Notice of Motion dated 26th January, 2015 were prosecuted before us on 5th March, 2015. The written submissions filed by the parties were duly highlighted.

22. Pursuant to the court's directions, the arguments were not simultaneously made but rather the objections *in limine* were heard first followed by the submissions on the Notice of Motion. We will consequently also determine the objections as to jurisdiction and consider the Notice of Motion next.

The 1st Respondent's arguments on the Preliminary Objection

23. The objection as to jurisdiction was first raised by the 1stRespondent on 5th November, 2014. When the 1st Respondent filed its submissions on 5th March, 2015 it indicated that it had withdrawn the November, 5th objection and would instead pursue the objection as to jurisdiction filed on 9th January, 2015. The 1st Respondent's sole objection now read as follows.

> ***"TAKE NOTICE that the 1st Respondent herein will raise a Preliminary Objection on the ground that the court as presently constituted has no jurisdiction to hear and determine this matter".***

24. The 1st Respondent's counsel, Mr. Nyamodi essentially argued that the Petition had been commenced firstly to challenge the manner in which compulsory acquisition of land had been conducted in Kibwezi Constituency and then secondly to challenge the process of the EIA . Counsel submitted further that the court empowered to hear such matters was the Environment and Land Court (" **the ELC**") established under the Environment and Land Court Act (Cap 12A) ("**the ELC Act**") as read together with Article 162 of the Constitution. Counsel added that both Articles 162 and 165 of the Constitution limited the jurisdiction of the High Court.

25. That aside, continued counsel, the presiding judicial officers empanelled by the Chief Justice were not qualified to handle the Petition as they had not been appointed as ELC Judges. Counsel epitomized his submissions by stating that the jurisdiction of the court could only flow from the appointment of the judge. Making reference to the Gazette notices which appointed the five presiding judges, counsel submitted that none of them was an ELC appointed judge and that the only persons (judges) competent to hear the Petition were any five of the sixteen ELC Judges appointed and gazetted as such on 5th October, 2012. Counsel then argued that under the ELC Act the Chief Justice could not appoint or assign a judge not appointed by the President as an ELC Judge to sit in the ELC. Reference was, at that point, made by counsel to the 2012 amendments to Section 7 of the ELC Act. To counsel, the bench as constituted was not constitutionally compliant.

26. Reference was also made by counsel to various case law. In particular, counsel lay emphasis on the case of **Samuel Kamau Macharia -v- Kenya Commercial Bank Ltd & Others [2012] eKLR** for the proposition that jurisdiction flows from the Constitution and the Hon. Chief Justice could not confer the same through the empanelling of an unconstitutionally compliant bench. Reference was also made to the case of the **Africa Centre for Open Governance (AFRICOG) –v- Ahmed Issack Hassan & Another [2013] eKLR** to illustrate the point that the High Court's jurisdiction was restricted. Both decisions emanated from the Supreme Court of Kenya.

27. Counsel further relied on the High Court decision of **Benson Ndwiga Njue & 108 others -v- Central Glass Industries Ltd [2014] eKLR**(*Benson Ndwiga's case*) and this court's decision in **Coalition for Reform and Democracy & 2 Others –v- The Republic of Kenya & Another [2015] eKLR** to illustrate the point that the court was basically the judge and there could be no "judge at large".

28. Referring to the decision of **Kenya Medical Research Institute -v- the Attorney General & 2 Others [2013] eKLR**(*Kemri's case*) which had held that the empanelling of a bench is not a purely administrative matter, counsel submitted that the decision had been made *per incuriam*. Finally, counsel referred the court to the case of **United States International University -v- Attorney General [2012]eKLR** which had held that the Industrial Court (now known as the Employment and Labour Relations Court) ("**the ELRC**") had the jurisdiction to determine constitutional disputes concerning matters under its jurisdiction. According to counsel, the effect of the **United States International University -v- Attorney General (supra)** was that as the ELC had been established under the same Article of the Constitution as the ELRC, the ELC also had a similar jurisdiction to handle and determine constitutional matters.

29. Mr. Agwara, Counsel for the 2nd Respondent and Mr. Kuria for the 4th Respondent supported the objections *in limine* and associated themselves fully with the submissions of the 1st Respondent's counsel.

30. Mr. Gitonga for the 3rd Respondent also supported the objections as to jurisdiction. Whilst also associating himself with the submissions made by counsel for the 1st Respondent, Mr. Gitonga added that Section 7 (1) of the ELC Act provided for specialized qualification for appointment of judges of the ELC. Mr. Gitonga reiterated the submission that the jurisdiction of the High Court and of the Environment and Land Court were distinct. Counsel was emphatic that the jurisdiction of the High Court was limited by the provisions of Article 165 (5) of the Constitution.

31. Mr. Kimani, for the Interested Party, left the entire question as to jurisdiction to the better judgment of the Court.

The Petitioner's submissions

32. Ms. Kilonzo for the Petitioner opposed the Preliminary objection as to jurisdiction. Ms. Kilonzo submitted that the court had jurisdiction under Article 165(3) (b) and (d) which was a special jurisdiction created by the Constitution itself. In the instant case the Petition which was commenced under Article 165(3) (d) had been certified to be heard under Articles 165 (4) and 165 (3) (b) and (d). Ms. Kilonzo's primary submission was that the High Court or any court with a status of the High Court could deal with

and determine constitutional matters. Further, as the High Court's jurisdiction to deal with constitutional matters had been conferred through the Constitution it was not possible for a statute promulgated through Parliament to limit the same and that only the Constitution could limit the High Court's jurisdiction. Ms. Kilonzo further submitted that the ELC found its jurisdiction through legislation and the same legislation could limit the jurisdiction. Further, under Article 23 of the Constitution, the High Court had the jurisdiction to hear and determine applications and petitions for redress of rights and fundamental freedoms.

33. Finally, Ms. Kilonzo added that under Article 165 (4) of the Constitution, the Chief Justice exercises a special constitutional jurisdiction to assign judges and confer upon them temporal jurisdiction limited both in time and scope. Such judges could be any judge, appointed under the Constitution, so wrapped up counsel for the Petitioner.

34. Ms. Kilonzo referred the court to the court's decision in the ***Kemri case*** where the court held that a bench empanelled by the Chief Justice could have both High Court judges as well as ELRC judges. The court in the *Kemri* case also found and held that a bench constituted by the Chief Justice could not be upset by the court but only through a reference back to the Chief Justice and further that what constituted and determined jurisdiction was not the judge but rather the court. Counsel then made reference to and relied upon the decision of **Samson Matende -v- Republic [2013] eKLR** (*Matende's case*) which held that judges appointed as ELC Judges could sit in the Criminal Division of the High Court and that by the ratio decidendi of that decision nothing stopped judges appointed as High Court judges from sitting in the ELC.

35. In a brief rejoinder, Mr. Nyamodi submitted that the court envisaged under Article 165(5) of the Constitution is the ELC and further that the court is a judicial officer rather than "the open space". Mr. Nyamodi urged the court to uphold the objection notwithstanding the profound possible ramifications.

36. Mr. Nyamodi's case was an invitation to the court to ignore the decisions in *theKemri* ,*Matende* and *Benson Ndwiga* cases and hold that High court Judges could not be assigned duties exclusive to the ELC.

Issues

37. At this point, two issues call for our determination. Firstly, has this court the requisite jurisdiction to entertain and determine the Petition? Secondly, is the court properly and validly constituted ?

Discussion

Epistemology of 'jurisdiction'

38. When an issue is raised as to whether or not a court has jurisdiction to deal with a particular matter before it, it is crucial to be clear about what is meant by "jurisdiction".

39. Several treatises as well as judicial pronouncements have defined what 'jurisdiction' ought to be understood to mean. We briefly make reference to some of the meanings.

40. Pickford LJ in **Guaranty Trust Co. of New York –v- Hannay & Co. [1915]2 KB 536** at **563** opted to reject the nuance between the word "jurisdiction" and the expression "the court has no jurisdiction", to help achieve a meaning when he said:

> **"The word "jurisdiction" and the expression "the court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first and in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e. that, although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances**"

41. These statements were duly approved a half a century later by Diplock L. J (as he then was) in **Garthwaite –v- Garthwaite [1964] 2 All ER 233**. In affirmation, he referred to what Pickford L. J had said and continued at page 241 of the law report:

> "**In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense), or as to circumstances in which it will grant a particular kind of relief which it has jurisdiction (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances**".

42. John Beecroft Saunders in his treatise **Words and Phrases Legally Defined Vol. 3,** at page **113** says of 'jurisdiction'

> "**By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to 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 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 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**".

43. The above definition was cited with approval by Nyarangi JA in **"Lillian S" –v- Caltex Oil (K) Ltd [1989] KLR 1, [1986-89] 1 E A 302** and also recently by Nzioki wa Makau J in **Seven Seas Technologies Ltd –v- Eric Chege IC Misc. Appl. No. 29 of 2013 [2014] eKLR.** Justice Nzioki wa Makau applied John Beecroft Saunder's definition in holding that the ELRC has jurisdiction to not only determine whether it has jurisdiction but also to deal with and determine "all aspects of disputes that relate to labour and employment matters" including constitutional matters.

44. Jurisdiction is once again defined in **Mullah the Code of Civil Procedure 12th ed** at page 225 as follows:

> "**By jurisdiction is meant authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in [a] formal way, for its decision. The limits of this authority are imposed by statute charter or commission under which the court is constituted and may be exercised or restricted by the like means. If no restriction or limit is imposed the jurisdiction is unlimited**".

45. Finally, Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350, not being left behind, has the following appearing as the definition of "jurisdiction".

> "**[By] Jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision**"

46. The temptation to cite more definitions is there, in which case the likelihood of concluding that the word "jurisdiction" has no legal meaning as the Court of Appeal did in **Wachira –v- Ndanjeru [1986-**

1989] 1 EA 577 becomes real.

47. If however we pause there, it is clear enough what is meant by the term “jurisdiction” or its converse appellation “the court has no jurisdiction”. Put very shortly and reading from the above definitions, it is apparent that in its strict sense the “jurisdiction” of a court refers to the matters the court as an organ not an individual is competent to deal with and reliefs it is capable of granting. Courts are competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowers them to deal with. Such jurisdiction may be limited expressly or impliedly by the instrument creating the court.

48. In the present case, the 1st and 3rd Respondents pleas of no jurisdiction has, in our respectful opinion, some lack of clarity as to whether it is said that the High Court lacks competence to deal with the petition or whether it is said that it is the court as now constituted which is the issue. All the five judges currently presiding are High Court Judges just like the Judge (Kariuki J) who first handled the Petition in Machakos and where no objection was taken to his presiding over the court. Indeed, the 1st and 3rd Respondents urged and nudged the Judge on. However, for the avoidance of doubts as we also understood counsel to submit that the petition ought to be heard before the ELC and by “Environment and Land Court Judges” only, we will lay out the jurisdictions of both the High Court as well as of the ELC.

Jurisdiction of the High Court

49. The High Court is a creature of the Constitution. Article 165 of the Constitution states that the High Court is to consist of such number of judges as may be prescribed by an Act of Parliament and further that the High Court is to be administered in the manner prescribed by an Act of Parliament. We are aware that the Judicature Act (Cap 8) Laws of Kenya has currently, under Section 8,set the maximum number of High Court judges at one hundred and fifty. The High Court also obtains its jurisdiction from the Constitution and in this respect Article 165(3) of the Constitution reads as follows:

> *“165. (1) ….*
>
> *(2) ….*
>
> *(3) Subject to clause (5), the High Court shall have:-*
>
> > *a. unlimited original jurisdiction in criminal and civil matters;*
> >
> > *b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened;*
> >
> > *c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144*
> >
> > *(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –*
> >
> > > *i. the question whether any law is inconsistent with or in contravention of this Constitution;*
> > >
> > > *ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution;*
> > >
> > > *iii. any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

iv. a question relating to conflict of laws under Article 191; and

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

(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 of the 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."

50. In summary, the jurisdiction of the High Court is unlimited save only as provided by the Constitution. The High Court has express jurisdiction to deal with and determine matters of a constitutional nature under Article 165(3) of the Constitution. Indeed, while the constitutional clawback is found under Article 165(5) it is to be noted that Article 165(3) (e) of the Constitution further confirms that the High Court's jurisdiction may be extended further pursuant to any statutory provision. One immediate example is the Judicature Act (Cap 8) Laws of Kenya which confers the specialized admiralty jurisdiction. The Constitution however does not provide for any other written law to limit the jurisdiction of the High Court.

51. Context is important. For purposes of the Respondents' Preliminary Objection, the jurisdictional limit of the High Court is discerned from Article 165(5) (b) which is explicit that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution.

52. The relevant clauses of Article 162 of the Constitution are (2) and (3) which read as follows: -

(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).

Jurisdiction of the ELC

53. While the High Court's jurisdiction is founded under Article 165 of the Constitution, it is certainly not erroneous to argue that the jurisdictions of the courts established pursuant to Article 162(2) are mainly statutory. Likewise, the courts contemplated by Article 162(2) unlike the High Court are statutory creatures even though their status is equivalent to that of the High Court which is itself a creature of the

Constitution. The courts established under Article 162(2) by Parliament are the ELRC pursuant to the Industrial Court Act (Cap 234B) and the ELC pursuant to Section 4 of the ELC Act (Cap 12A) Laws of Kenya.

54. The jurisdiction of these two courts, as directed by Article 162(3) of the Constitution was to be determined by Parliament. Indeed, as regards the ELC, which is the court of relevance to the instant petition, the jurisdiction was set out under Section 13 of the ELC Act.

55. In extenso, we wish to set out the provisions of the original Section 13 as enacted on 27th August, 2011. The section then read as follows:

‘’ 13.

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 written law 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 relating to environment and land, including disputes :

a. relating to environmental planning and protection, trade, 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 environment and land 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. The court shall have supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the constitution.

6. For the proposes of subsection (7) (v) the court may call for the record of any proceedings before ay subordinate court, body, authority or local tribunal exercising judicial or quasi-judicial functions, or a decision of any person exercising executive authority referred to in subsection 7(b) and may make any order or give any directions it considers appropriate to ensure the fair administration of justice.

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

f. Restitution

g. Declaration or

h. Costs".

56. The ELC Act was however amended via Act No. 12 of 2012. One of the amendments effected was on Section 13 as to the jurisdiction and power of the court. Section 13 of the ELC Act now reads as follows:

''13.

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. 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

f. Restitution

g. Declaration or

h. Costs".

57. By the amendments of 2012, Parliament took away the supervisory jurisdiction of the ELC over subordinate, judicial and quasi-judicial tribunals under Article 165(6) and also the jurisdiction to determine matters of a constitutional nature involving environment and land generally. Parliament clothed the ELC with jurisdiction to deal with constitutional matters touching on a clean and healthy environment only but not other constitutional matters, including matters touching on other fundamental rights.

58. We however hasten to add that the jurisdiction of the ELC is founded not just under Section 13 of the ELC Act but also under Article 162 (2) of the Constitution and Section 150 of the Land Act No. 6 of 2012 which vests exclusive jurisdiction upon the ELC Court to hear and determine disputes, actions and proceedings concerning land under the Land Act. The ELC's jurisdiction is certainly not donated through Article 165.

59. The ELC court is a superior court of record. Under both Section 4(2) of the ELC Act and Article 162(2) of the Constitution it has the same status as both the ELRC and the High Court. They are one indivisible whole save for their respective jurisdictions, in our view. While the jurisdiction of the High Court is clear and unlimited under both the Constitution and the Judicature Act (Cap 8) – save as provided for under Article 165(5) of the Constitution, the jurisdiction of the ELC as well as the ELRC as apparently limited by both establishing statutes and the Constitution, have been the subject of dispute.

60. The novelty of these two courts in the judicial system as well as the fact that their jurisdictions are conferred by statute in re specific areas of the law must have contributed to or led to the discourse. With regard to matters constitution it is now settled that the ELRC and, a fortiori, the ELC can adjudicate and determine matters constitution. As was stated by Majanja J in the case of **United States International University –v- Attorney General HCCP 170 of 2012 [2012] eKLR** : -

> "**The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3) Section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 <u>and the jurisdiction to interpret the constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain</u>. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the constitution within the matter before it**". (*emphasis ours)*

61. In so rendering himself,Majanja J adopted the position of the Constitutional Court of South Africa in the case of **Gcaba -v- Minister of Safety & Security CCT 64/08 (2009) ZACC 26**. Majanja J's approach and rendition received the Court of Appeal's approval in **Daniel N. Mugendi -v- Kenyatta University & 3 Others CACA No. 6/2012[2013] eKLR,** where the Court of Appeal's dicta read as follows:

> "**In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, <u>the same should go for the Environment & Land Court,</u> <u>when dealing with disputes involving environment and land with any claims of breaches of fundamentals rights associated with two subjects</u>**". (*emphasis ours*)

62. It is to be noted that in both **United States International University –v- Attorney General** (supra)

and **Daniel Mugendi –v- Kenyatta University** (supra) the question was whether the High Court could continue to deal with and determine matters in light of the establishment of the ELRC where a purely labour and industrial dispute also had constitutional issues arising. The two courts returned the verdict that the High Court could not.

63. It is also to be noted that the Court of Appeal's dicta in re the ELC was pronounced after the 2012 legislative amendments to the ELC Act, which seemed to limit the jurisdiction of the ELC as far as constitutional matters or questions are concerned to only those relating to a clean and healthy environment rather than to the environment and land generally. We take note that the Court of Appeal in *Mugendi* did not address itself to this particular amendment. Finally, we also note that neither the High Court nor the Court of Appeal in the preceding decisions held that the High Court could not deal with any *constitutional disputes* touching on land or land rights if the same arose as the High Court was dealing with matters within its jurisdiction under Article 165 of the Constitution and especially the special jurisdiction conferred upon the High Court under Article 165(3) of the Constitution.

63. In view of the 2012 amendments to the ELC Act one would be tempted to conclude that on a true construction of section 13 (3) of the ELC Act the jurisdiction of the ELC in so far as enforcement of constitutional rights was concerned, was limited and restricted by Parliament to matters relating to a clean and healthy environment under Articles 42, 69 and 70 and not environment and land generally under Article 40 of the Constitution. The Court of Appeal's decision in *Mugendi* as read together with Section 13 of the ELC Act however lead to the plausible conclusion that the ELC has jurisdiction to determine matters of a constitutional nature as well. We also say so as it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationalistic 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.

Concurrent and coordinate jurisdictions

65. The above analysis lead us to the conclusion that both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limit the High Court's jurisdiction in this respects while a closer reading of the ELC Act reveals that the ELC Court's jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in *Mugendi* expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.

66. A closer reading of the Petition especially the complaints and the reliefs sought would reveal that the petition is simply not about the environment and land. Substantial questions, as found and determined by Kariuki J, have been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions have been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions have also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents. As was stated by Kariuki J: -

> "(23) **The totality of the allegations, complaints** [sic] **raised in the petition and the reliefs sought raised substantial questions of law envisaged by the provisions of Article 165 (3) (b) (d) and 165(4). Thus warranting the court in the instant case to certify the matter for referral to the Chief Justice for assigning of an uneven number being not less than three judges for hearing the matter**".

67. The learned Judge was confirming that substantial questions had been raised touching on and concerning Articles 10, 28, 35, and 47 of the Constitution as well. These Articles have nothing to do with land and environment.

68. We are satisfied that although the jurisdiction in constitutional matters conferred by Section 13(3) of the ELC Act upon the ELC appears limited to questions on and application for redress of a denial violation or infringement or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42,69 and 70 of the Constitution, the section did not purport to confer exclusive jurisdiction in such cases upon the ELC so as to impinge upon the provisions of Article 165(3) (b) & (d) of the Constitution. We are also satisfied that it could not have been the intendment of the draftsmen of the Constitution that when the court is faced with a mixture of causes of action touching on the Constitution, especially on fundamental rights, a separationalistic approach is to be adopted by the court and half the claim dispatched to one court as the other half is retained.

69. We would say no more.

Of ELC Judges and High Court Judges

70. Before returning to the question of what would be the best course of action for the court having found that this Court and the ELC Court have concurrent and coordinate jurisdiction to hear and dispose of the current Petition, it would be appropriate to address the second limb of the Respondents' objection *in limine*. During oral argument it emerged that the Respondents were not only submitting that the High Court lacked jurisdiction but that even if the court was deemed as sitting *qua* the ELC Court, it was not properly constituted.

71. The 1st Respondent was particularly critical of the Chief Justice's approach whilst exercising the jurisdiction under Article 165(4) of the Constitution. In this respects, the word jurisdiction for the avoidance of doubts has been used in the narrow sense of powers donated to an individual to do something rather than to an institution or organ.

72. In his submissions, Mr. Nyamodi for the 1st Respondent distinguished those whom he called 'ELC Judges' from those whom he called 'High Court Judges'. He stated that only ELC Judges could hear the instant petition. He tabled a list of the said ELC Judges. They numbered 16, and were appointed by His Excellency Mwai Kibaki the then President of the Republic of Kenya on 5th October 2012, though only 15 took up the appointment. He concluded that the High Court judges could not hear the Petition. The 2nd, 3rd and 4th Respondents rode on Mr. Nyamodi's submissions.

73. Ms. Kilonzo held a contrary view and stated that what mattered was that the court had jurisdiction and not the officer.

74. While we agree with Ms. Kilonzo that what ideally matters is whether or not a court or tribunal as an institution or organ has jurisdiction in the strict sense, we must put the rider that such jurisdiction is only exercisable when the court or tribunal is properly constituted. It is not that any judicial officer can sit in any court and claim jurisdiction. One must be competent to exercise and execute the court's jurisdiction. True, the jurisdiction exists but it must be executed by competent persons duly appointed.

75. The question of whether ELC Judges and ELRC judges can sit where High court judges sit and vice versa, is not virgin territory in judicial discourse. The question has been considered previously by the High Court as well as the ELRC. Very recently, but after we had heard submissions in this petition, it was considered by the Court of Appeal in the case of **Jefferson Kalama Kengha & 2 Others v Republic [2015]eKLR**, and Mr. Nyamodi perhaps unaware of the maxim *jura novit curia* quickly availed a copy of the decision to us.

76. Before we consider and comment on the Court of Appeal's decision rendered just under four weeks ago, we would want to make reference to previous High Court decisions.

Kemri, Ndwiga and Matende cases

77. The question arose in the case of **Kenya Medical Research Institute –v- the Attorney General**

[2014] eKLR.("***Kemri case***"). The Chief Justice had empanelled a bench of three judges under Article 165(4) of the Constitution, two from the High court and one from the ELRC, to hear a constitutional petition filed in the ELRC. An interested party to the petition raised an objection to the bench as empanelled with arguments that the mixed bench was itself unconstitutional and could not hear the constitutional petition. The Court unanimously dismissed the objection and held that the bench was properly constituted and that to hold otherwise would not promote the purposes, values and principles of the Constitution.

78. Benson Ndwiga & 108 others –v- Central Glass Ltd [2014] eKLR(***Benson Ndwiga's case***) involved yet another three judge bench empanelled by the Chief Justice to hear a constitutional matter. The bench was once again a mixed bench of two ELRC judges and a High Court Judge. The court held in a majority decision following an objection to the composition of the bench that there was no different cadre of judges. The court stated that

> " [……] **there are no categories of puisne judges who serve the various courts and in particular the High Court, the Industrial Court and the** [sic] **land and Environment court**".

In a dissenting minority, the only judge of the High court floated the view that even though the three courts were of similar status they each had separate and distinct jurisdictions and that :

> **"without commonality of jurisdiction …. [a] mixed bench of High court and Industrial Court judges has no constitutional foundation and is an aberration**".

79. Slightly earlier, the question had also been considered by the High Court in **Samson Matende –v- Republic [2013] eKLR**. The Honorable Chief Justice had constituted a two judge bench to hear an appeal against a conviction of the offence of robbery with violence. The appellant had been sentenced to death. A High Court judge and an ELC judge sat on the appellate bench. They met objection from the appellant's counsel who questioned their jurisdiction and distinguished between High Court judges and ELC Judges with the submission that the latter could not sit and determine criminal matters or criminal appeals. The court returned the same verdict as was to be later returned in the ***Kemri*** and ***Benson Ndwiga*** in holding that judges of the ELC and ELRC have the same status as High Court judges and could hear and determine matters presented for the High Court's determination. To the court, the promotion of the values and principles of the Constitution was of paramount import when determining whether an ELC Judge could sit and determine a criminal appeal in the High Court.

80. The central thread and ratio in all the three cases was that in determining whether a High Court judge could sit in the ELC and the ELC or ELRC judge could sit in the High Court, the court was duty bound to take into account Articles 159 and 259 of the Constitution which, in short, propound the promotion of values and principles of the Constitution including the advancement of the rule of law, expeditious disposal of cases, social justice and enforcement of fundamental freedoms and human rights in the Bill of Rights.

Effect of Court of Appeal's decision on the Kemri, Benson Ndwiga & Matende Cases

81. The Court of Appeal deliberated on the issue in **Jefferson Kalama Kengha & 2 others –v- Republic (C.A. Crim. Appeals No. 43, 44 & 76 of 2014) [2015] eKLR** (*Jefferson kengha kalama's case*). The facts were similar to those in **Samson Matende –v- Republic (supra)**. The appellants sought to overturn their convictions, which the High Court had upheld, on the basis inter alia that an ELC Judge who had heard and determined the appeals, in a bench wherein also sat a High Court Judge, had no jurisdiction to preside over the appeals. The Court of Appeal returned a unanimous verdict that the appeal was well founded.

82. Making reference to comparative and persuasive jurisprudence from South Africa, the Court held that the ELC, the ELRC and the High Court are all courts of equal status but autonomous of each other with peculiar jurisdictions. The court further held that in view of the express provisions of Section 359 of the Criminal Procedure Code, only the High Court presided by High Court Judge(s) could hear criminal

appeals. To the Court, justice would not be served to an appellant when a judge of the ELC or ELRC was "suddenly empanelled by the Chief Justice to hear a criminal appeal". Taking the confined view that a judge appointed to the High Court or the ELC or the ELRC had only qualifications for that court, the Court of Appeal then concluded its holdings by decreeing that judges of the respective courts were marooned to the specific courts to which they were appointed. Consequently, judges of the ELC or of the ELRC could not swop places, and neither could judges of the High Court sit in either of the two courts which held an equal status as that of the High Court. The Court of Appeal had seemingly buried the line of authority established in the *Matende* case but not the *Kemri* and *Benson Ndwiga* cases which dealt with Article 165(4) of the Constitution.

83. We are bound by the Court of Appeal's decision in *Jefferson Kalama Kengha* pursuant to the well known curial hierarchical principle of precedent, even if we were to hold the view that the Court of Appeal's decision is erroneous: see **Dodhia -v- National & Grindlays Bank Limited [1970] 1 EA 195, Mohammed -v- Bahati& Others [2005]2 EA 213, Miliangos -v- George Frank (Textiles) Ltd [1976] AC 443** and **Actavis UK Ltd -v- Merck & Co Inc [2009]1 WLR 186**

84. We can however point out (see :**Barclays Bank of Kenya Limited v Njau 2006 2 EA 15**), and we do so with unfeigned respect for the Court of Appeal, that in arriving at a the decision, even though the court made reference to South African jurisprudence with a view to locating the best interpretation of the issue, the Court did not allude to the fact that South Africa also has a specialized land court in the Land Claims Court. The Land Claims Court of South Africa was established under the Restitution of Land Rights Act, 22 of 1994 pursuant to Article 169 of the S.A Constitution which is pari materia our Constitution's Article 162(2). High Court Judges in South Africa can actually sit in both the specialized Labour Courts as well as the Land Claims Court. That ought to demystify the theory that judges of the specialized courts are special and different from High Court Judges and vice versa. That too ought to reign in the point that jurisdiction is conferred upon an institution or organ and not an individual: see also **Masaba -v- Republic [1975] 1 E A 488.**

85. We now ask ourselves the question whether the restrictive effect of the Court of Appeal's decision in ***Jefferson Kalama Kengha's case*** affects this Petition and the preliminary objections before us?

86. We are of the view that the facts of ***Jefferson Kalama Kengha*** are of course distinguishable from those of the present case. First, in *Jefferson Kalama Kengha*, the jurisdiction in question involved the exercise of Criminal jurisdiction which is exclusive to the High Court and not the exercise of constitutional jurisdiction which is coordinate and or concurrent amongst the three courts namely the ELC, the ELRC and the High Court. Secondly, *Jefferson Kalama Kengha* involved constitution of a bench under Section 359 of the Criminal Procedure Code; herein we have empanelment of a bench under Article 165(4) of the Constitution. We must consequently approach the issue with the provisions of Article 165(4) of the Constitution in mind.

Of Article 165(4) of the Constitution

87. In **Evangelical Mission for Africa & Another –v- Kimani Gachihi & Another [2014] eKLR**, Mwongo J on the powers of the Chief Justice under Article 165(4) of the Constitution stated as follows:

> "…**empanelment of a bench under Article 165(4) arises when circumstances are special and jurisdiction to be exercised is not ordinary**".

88. The same drift of thought seems to have run through the Court in *Kemri's case* when the court stated as follows:

> **"[37] The power to empanel a Bench composed of not less than 3 judges is provided for under Article 165(4) of the constitution. Therefore by empanelling this bench, the Chief Justice was carrying out his Constitutional mandate as opposed to a similar function under the former constitution which were not hinged on the constitutional provisions and were merely administrative … we hold this view… since it is in our view not just a legal process but a**

constitutionally mandated process".

89. It is clear to us that the powers donated to the Chief Justice under Article 165(4) are not merely administrative. We would reject any submission to the contrary effect. The Chief Justice must be quasi-judicious in approaching and exercising his powers under Article 165(4) of the Constitution. He must consider, in line with the Constitution and especially Articles 159 and 259 thereof, what in any given circumstances, is appropriate. He then decides whether to have three, five or seven judges. The weight of the case, the jurisdiction of the court as well as the circumstances of the case are all relevant factors. He simply should not just cast lots. He could assign any judge, appointed under the Constitution, to hear the matter.

90. For purposes of Article 165(4) judges appointed under the Constitution are those appointed to the High Court and courts of even status. That Article of the Constitution does not distinguish between judges. Indeed, Article 161(1) of the Constitution makes a case for the collectivity of judges of the superior court. Flowing from the reasoning in *Jefferson Kalama Kengha's* case that judges as recruited are specialized in various fields, the Chief Justice may be constrained to consider a judge's special field before assigning him or her to the special bench so certified to consider a substantial question of law.

91. Article 165(4) of the Constitution in our view does create two circumstances. First is the certification by the Court that the matter raises a substantial question of law under clause 3(b) or (d) of the Constitution. Thereafter the matter moves to the next level where the Chief Justice assigns the hearing of the matter to an uneven number of Judges. The clause does not state that the judges are restricted to High Court Judges. The Constitution clearly empowers the Chief Justice to assign Judges to hear the matter not to assign the Court to hear the matter and he is at liberty to assign any Judge, as he finds appropriate, that duty.

92. We already found, at the risk of repeating ourselves, that the ELC and the High Court have a concurrent and or coordinate jurisdiction on the matters raised in this petition. The Chief Justice could thus have appointed either ELC Judges or High Court Judges or a mixture of both. He could have appointed three or seven. He settled for five. All from the High Court. Nothing indeed stops the Chief Justice from creating a triangular jurisdictional relationship in constitutional matters when he acts under Article 165 (4). We can fault him not.

93. We also answer the question as to whether the High Court has jurisdiction in the instant matter in the affirmative

Decision on forum

94. We now return to this question: where both courts have jurisdiction which court then exercises it? Flowing from the courts' decisions in *Daniel Mugendi* and *USIU*, neither the High court nor the ELC could be viewed to have exclusive jurisdiction in this petition. Jurisdiction is concurrent and coordinate. Guidance, in such an eventuality, may be obtained from the century old case of **Sim –v- Robinow [1892]19 L R 665** where Lord Kinnear, with regard to a plea of *forum non conveniens* and in the face of a coordinate jurisdiction, said:

> **"the plea can never be sustained unless the court is satisfied that there is some other tribunal, <u>having competent jurisdiction</u> in which the case may be tried more suitably for <u>the interests of all parties and for the ends of justice</u>".** (emphasis)

95. We have emphasized the two important phrases in Lord Kinnear's speech. Lord Kinnear's words led to the principle of 'appropriateness' plainly later explained and outlined in the English case of **Spiliada Maritime Corp –v- Consulex Ltd, *The Spiliada* [1987] AC 460.** In ***The Spiliada***, it was held that where there are two courts or tribunals with concurrent or coordinate jurisdiction, the court then seized with the dispute and with jurisdiction may decline to exercise jurisdiction if the alternative tribunal is more appropriate for deciding the dispute in question.

96. The principles in both ***Sim –v- Robinow*** and ***The Spiliada*** are sound. It is the interest of both parties, not those of the claimant only or of the Respondent only, and the ends of justice as premeditated by the court on the basis of the facts which dominate and influence the court's decision as to which court is more appropriate to determine the suit.

97. In applying the above principle we are satisfied that besides this court, the ELC with only ELC Judges, is also competent to determine the Petition.

98. Taking all the factors into consideration, we find that due to the need to have the Petition expeditiously disposed of it would be more appropriate to determine the Petition before this court. The public interest that the SGR project has generated would dictate a more expeditious determination. We also do not think that it would be a small price to pay if the Petitioner who already yearns for justice has to wait any longer as the court is being reconstituted to consist of only ELC judges, noting that the ELC judges are already stretched to the limit. We do also take cognizance of the fact that there should always exist in the court a sense of undesirability to adjourn or delay constitutional matters: see Sir Udo Udoma CJ in **Masaba v Republic [1967] 1 EA 488**. Further, in the present circumstances, we would also invite the sentiments of Odunga J in **Coalition for Reform and Democracy & 2 Others –v- The Republic of Kenya & Another (No.1) [2015] eKLR** where he stated:

> **"Judicial resources in terms of judicial officers in this country are very scarce. Empanelling such a bench usually has the consequence of delaying the cases which are already on the queue hence worsening the problem of backlogs in this country."**

We associate ourselves with those sentiments entirely.

99. In conclusion and with the provisions of Article 159(2)(b) of the Constitution in mind, we hold that the appropriate forum for determination of this Petition is this Court.

The Application for Conservatory Orders

100. Against the foregoing background and with the comfort that our jurisdiction to hear and determine the Petition has not been obtained through imagination or craft but through binding precedent and express constitutional provisions, we now turn to consider the Petitioner's application dated 26th January 2015.

101. The application sought orders directed to the 3rd Respondent restraining the 3rd Respondent from renewing the EIA license until determination of the Petition and further an order for the production of copies of the statutory reports of compliance with the EIA license for the period ending February 2015.

102. The grounds on which the application was built are set out on the face of the application. The Petitioner also swore an affidavit in support of the application. The Petitioner questioned the validity of the EIA study which apparently led to the issuance of two EIA licenses. One license was issued to the 2nd Respondent on 5th February 2013 and another one issued on 12th February 2014. They were license numbers 0014338 and 0021216 respectively. The former license was received by the 2nd Respondent on 16th October 2014, just a day after the filing of this Petition. Both licenses were however for the same SGR project.

Submissions II

The Petitioner's arguments

103. Ms. Kilonzo, for the Petitioner, submitted that the EIA Licenses was obtained in contravention of the Constitution and of the Environmental Management and Coordination Act (Cap 287) ("**EMCA**"). To the Petitioner the 1st, 2nd and 3rd Respondents had all acted in breach of Articles 10, 40, 42, 47, 60, 69 and 70 of the Constitution and of the EMCA and that there was still a threat of violation or further violation of

the said Articles of the Constitution. The Petitioner further submitted that, in view of the existence of two EIA licenses, the SGR project was not in compliance with the law or with the Constitution and as there was no explanation for the inconsistency the SGR project ought to be brought to a halt by an order prohibiting any further renewal of the EIA License. While conceding that the parties may ultimately be compensated, counsel however submitted that the damage to the environment may be beyond measure. For completeness, Ms. Kilonzo added that when the license was issued the statutory process was not followed and that the 2nd Respondent did not meet all the set conditions to be entitled to an EIA License, which conditions had been set out by the 3rd Respondent in a letter dated 13th January 2013 and could not be waived.

104. The Petitioner's counsel closed her arguments by submitting that the purpose of the conservatory order would be to ensure that concerns about the preservation and substantial use of the environment are addressed first.

105. Reference was made by Counsel to the case of **Centre for Rights Education and Awareness & Others –V- The Attorney General** in concluding that the threshold for the grant of a conservatory order had been made out, that is to say; a prima facie case with chances of success had been established.

Respondents'arguments

106. The 2nd Respondent, through Mr. Agwara, opposed the application through a Replying Affidavit filed on 30/10/2014 and Grounds of opposition filed on 9/3/2015. Counsel submitted that the EIA license was regularly obtained after an Environment and Social Impact Assessment Study (**ESIA Study**) undertaken by the 2nd Respondent in 2012. The study was all inclusive and incorporated public participation, besides being wholly compliant with the EMCA.

107. The ESIA study appears as annexture '**AM-01'** to the Replying Affidavit sworn on behalf of the 2nd Respondent by A.K. Maina. According to Mr. Agwara, the ESIA study was extensive, detailed and in full compliance with both the relevant statutes as well as the Constitution. Counsel submitted that through advertisements and Gazette Notices, the public had been invited prior to the EIA License being issued and the public positively responded to such invitations by attending the public meetings. Counsel referred the court to the advertisements, the minutes of the public meetings as well as the attendance registers complete with names and telephone contacts. Counsel submitted that the issue of two licenses was irrelevant as in any event one had expired and there was now only one valid license in possession of the 2nd Respondent.

108. In conclusion, Counsel submitted that there was no evidence of breach or infringement of any provision of the Constitution or statute and further that the Petitioner had not demonstrated that he had sought any information or reports from the Respondents to warrant any mandatory orders being issued adding that the Petitioners complaints ought to be laid before the National Environmental Tribunal rather than before this Court.

109. Counsel relied on the cases of **Anarita Karimi Njeru -v- R (No. 1) [1979] KLR 154, Mumo Matemu -v- Trusted Society of Human Rights Alliance and 5 Others [2013] eKLR**as well as **Nairobi Law Monthly - v- Kenya Electricity Generation Co. Ltd & 8 Others HCCP No 278 of 2011 (unreported)** to illustrate the point that the Petitioner had not made out a case for conservatory orders.

110. Mr. Gitonga for the 3rdRespondent also resisted the application. The 3rd Respondent, flatly unable to explain the existence of two EIA Licenses contended that if both existed then one had already expired and the court could not act in vain as it is the expired EIA License that the Petitioner sought a conservatory order on. The 3rd Respondent further submitted that the SGR project had already commenced in 2014 after the EIA license had been issued and further that periodically, the 3rd Respondent, would avail all the information sought. Counsel explained that the conditions set out by the 3rd Respondent in the letter of 13th January 2013 were only "jump started"once the project commenced and not earlier. Counsel also

submitted that the EMCA does not provide for renewal of EIA Licenses and that it was a fallacy to state or assume that they expire.

111. On the part of the 1st Respondent, Ms. Saidi urged the court to look at the "larger Kenya and not just Kibwezi Constituency"in relation to the SGR project. To the 1st Respondent, all concerned departments should work together and ensure that all the constitutional and statutory conditions or requirements are met and/ or adhered to.

112. The 4th Respondent made no representations on the application.

113. Mr. Ondieki, advocating for the Interested Party also opposed the application. Counsel submitted that the issue of the two licenses was of no relevance as the application had sought to restrain the renewal of a license which had already expired. Counsel also submitted that the application was before the wrong forum as the Petitioners ought to have filed a challenge before the National Environment Tribunal. Counsel finally submitted that the application had been made in a vacuum and was an abuse of the process as no equivalent orders had been prayed for in the Petition. For this proposition counsel relied on the case of **Morris & Co Ltd v Kenya Commercial Bank Ltd [2003] 2 E.A. 605**

114. In a brief rejoinder, Ms. Kilonzo for the Petitioner stated that under the EMCA only one EIA License could be issued and the existence of two licenses raised serious doubts on the ESIA study itself. Counsel also submitted that the court had the requisite jurisdiction to entertain the application pursuant to the provisions of Articles 23 and 70 of the Constitution as well as Section 18 of the ELC Act. Counsel urged the court not to pay undue regard to the technicality of prayers in the application having to be repeated as prayers in the Petition, noting that the Petition itself challenged the manner the ESIA study had been undertaken.

Relevant Law

115. We warn ourselves that at this interlocutory stage, we cannot and must not make definitive findings of fact or law but must be satisfied that the circumstances warrant the issuance of a conservatory order.

116. The circumstances under which a court will grant conservatory orders were laid out in the case of **Gaitirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others [2014]eKLR** where the Supreme Court of Kenya (Ojwang &Wanjala JJSC)observed, at para 86, that:

> **"Conservatory Orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes".**

117. We gratefully adopt the Supreme Court's pertinent observations and take the same as the starting point for the brief discussion which follows.

118. There is also no doubt that to be entitled to a conservatory order, at this stage the Petitioner need only establish a prima facie case with a likelihood of success: see Ngugi J in **Jimaldin Adan Ahmed & 10 Others-v- Ali Ibrahim Roba& 2 Others [2015] eKLR** and also Muriithi J in **Micro & Small Enterprises Association of Kenya (Mombasa Branch) -v- Mombasa County Government [2014] eKLR.** Once a prima facie case is established the court is then to consider whether denial of conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of Rights: see Musinga J (as he then was) in **Satrose Ayuma & 11 Others -v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011]eKLR**

Analysis

119. The Petitioner contends that the entire process of the ESIA Study leading to the issuance of the license(s) was flawed. That contrary to constitutional values and statutory requirements, the public, in particular the people of Kibwezi were not involved in the process. To the Petitioner the whole purported exercise was a farce leading to two adulterated EIA licenses. The 2nd and 3rd Respondents as well as the interested party all contend otherwise that the entire process of an ESIA Study was conducted in an open and transparent manner before the EIA license was issued.

120. We have perused carefully the documents availed by the parties and arrive at the brief conclusion as follows.

121. An ESIA study, in our view, foremost is connected with the effects of man-made developments on the environment. The effects may be positive as well as adverse. It is important that both effects, if substantial are identified with the participation of all the stakeholders. Public participation is therefore a critical ingredient in the process of the ESIA study. The Constitution as well as the EMCA both recognize the importance of public participation.

122. A cursory look at the ESIA study availed by the 2nd Respondent as well as the documents annexed to the Replying Affidavit of A.K.Maina sworn on 30th October 2014 would seem to suggest that substantial effects were taken into account. The documents availed by the 2nd Respondent also suggest that there was some public participation in one way or the other. As to whether there was a complete and proper screening of the significant positive and negative effects, the court at the hearing of the Petition will have to determine. Likewise as to whether public participation met the Constitutional threshold laid out in the cases of **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others -v- County of Nairobi Government and 3 others, Petition No 486 of 2013,Moses Munyendo and 908 Others -v- Attorney General and Another, Petition Number 16 of 2013** and more recently, **Coalition for Reform and Democracy & 2 Others –v- The Republic of Kenya & Another (No.2) [2015] eKLR** the court at the hearing of the Petition will also have to interrogate and determine.

123. Suffice to state for now that all the allegations of breach will have to be reviewed and looked at in the context of the whole process and any evidential vacuum filled up by the parties.

124. The Petitioner raised issue over the existence of two EIA licenses. This fact troubled us. A venture of the magnitude of the SGR project ought not be clouded with inexplicable hiccups on routine looking steps. The 3rd Respondent’s inability to explain the existence of two licenses was even more worrying. We do understand the Petitioner’s concern in this regard.

125. While we indeed also agree that this is an issue which ought to be interrogated sooner than later, we hasten to add that this is not a case where an ESIA study has not been carried out. Even though the centre of the Petitioner’s complaint now appears to be the two EIA licenses , our prima facie view is that an EIA License is not part of an obstacle race but is intended to be the end product of an efficient and inclusive decision making process. It is issued after the process. It has not been demonstrated to us that the process itself was flawed. Neither was it even suggested that both licenses are forgeries. As we have held that on a prima facie basis the process seems to have been proper, we see no reason to fault the process now merely due to the existence of two EIA licenses.

126. We started our discussion by reference to the Supreme Court’s observations on the importance of considering conservatory orders vis-à-vis public interest. We would like to end there too but not before we point out that in such matters as this, the court must take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice: see **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

127. The SGR project has no doubt generated extensive public interest. It has ushered in positive praise and commendation on one hand as well as negative habits in the form of allegations of corrupt practices on the other. In it there is a ray of hope to many sectors of the society. We note that the SGR project is not confined to the Petitioner's constituency. It literally traverses the entire countryside of the Republic of Kenya. The public interest would be better served if the orders now sought are not granted. Granting the orders would mean that even areas not affected by the Petition would grind to a halt as far as the SGR project is concerned. The public interest principle set out in **Gatirau Peter Munya - V- Dickson Mwenda Githinji (*Supra*)** and the balance of prejudice militate against the grant of the conservatory orders sought.

128. Finally, is the mandatory order sought for the release of information. We would wish to be thrifty on this aspect of the application. The information sought as to compliance with the EIA license, we have been informed, is filed with the 3rd Respondent. We have not been told that attempts have been made to access the same and the public body in the 3rd Respondent has either resisted or scowled at such attempts. It is incumbent on any citizen seeking to access information resident in a public body or institution to first make an attempt at accessing the same. Such first attempt should however not be through the court. Let the Petitioner directly seek the information from the 3rd Respondent, formally or informally.

129. Before making our final disposal orders, we would like extend our gratitude to Counsel representing various parties as they sensibly consumed their time and competently argued the Preliminary Objection as well as the application for conservatory orders. We must also add that in an ideal world, the Petition ought to have been disposed of on its merits by now. Sadly this is not an ideal world and nearly one year later a determination is yet to be made even on an important matter as the ESIA Study. We hope the determination will be sooner.

Disposition

130. For the reasons set out above, we find and hold that this court has the jurisdiction to hear and determine the Petition. The Preliminary objections by both the 1st and 3rd Respondents fail. Secondly, the Petitioner's application dated 26th January 2015 also fails and is hereby dismissed.

131. The costs of both the Preliminary Objections as well as the Notice of Motion of 26th January 2015 shall abide the orders as to costs as may be made in the Petition.

Delivered, dated and signed at Nairobi this 5th day of June 2015

I. LENAOLA	**M. NGUGI**	**G. V. ODUNGA**	**L. ACHODE**	**J. L. ONGUTO**
JUDGE	**JUDGE**	**JUDGE**	**JUDGE**	**JUDGE**