



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 167 OF 2014**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF PROHIBITION**

**AND**

**IN THE MATTER OF MALINDI LAND AND ENVIRONMENT COURT LAND CASE NO. 27  
OF 2014**

**AND**

**IN THE MATTER OF THE COMPLAINT TO THE HON. CHIEF JUSTICE OF THE MARCH  
2014**

**AND**

**IN THE MATTER OF THE COMPLAINT TO THE JUDICIAL SERVICE COMMISSION OF  
THE MARCH 2014**

**AND**

**IN THE MATTER OF LAND PORTION NUMBERS 14035 AND 10866 MALINDI**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**AND**

**JAPHETH NOTI CHARO.....EX PARTE APPLICANT**

**VERSUS**

**MALINDI LAND AND ENVIRONMENT COURT**

**JUSTICE ANGOTE..... RESPONDENT**

**AND**

**REUBEN MUWA KIOKO.....INTERESTED PARTY**

## RULING

1. By a Chamber Summons dated 2<sup>nd</sup> May, 2014, expressed to be brought under the provisions of Order 53 rule 1(2) & (4) of the Civil Procedure Rules and All Other Enabling Provisions of the Law, the applicant herein **Japheth Noti Charo** seeks leave of this Court to apply for judicial review orders of prohibition to prohibit the Respondent herein Malindi Land and Environment Court **Justice Angote** from taking any further proceedings or action in relation to Malindi Land and Environment Case No. 27 of 2014 (hereinafter referred to as the said Case) before the complaint to **Hon. Chief Justice** and the Judicial Service Commission to have a different Judge assigned to hear and determine the said case is settled. As is the usual practice in these matters, the applicant further seeks that the grant of the said leave do operate as stay of any further proceedings in the said case and any other dealings and/or construction on land parcel known as portion no. 14035 and 10866 pending the hearing and determination of the substantive application for Judicial Review. There is of course also a prayer for provision for costs.

2. Before the Court proceeds to determine the application on merits, it is important for the Court to be satisfied that it has the jurisdiction to entertain the application. In Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

**"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

3. In the same vein the same Court in Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 expressed itself as follows:

**"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided 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 a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado." [Underlining mine].**

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

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

5. It is therefore clear that even where jurisdiction is not raised that does not necessarily confer jurisdiction on the Court if it has none. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises.

6. It is not in doubt that Hon. Mr **Justice Angote** is a Judge of the Environment and Land Court (hereinafter referred to as the ELC) established under Article 162(2)(b) of the Constitution of Kenya.

7. By virtue of Article 162(1) of the Constitution, the ELC is a superior Court just like the Supreme Court, the Court of Appeal, the High Court and the Industrial Court set up under Article 162(2)(a) of the Constitution.

8. The matter before me is a judicial review application and the Constitutional underpinning for applications for judicial review is Article 165(6) of the Constitution which provide as follows:

***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.***

9. It is therefore clear that the High Court does not have supervisory powers over the ELC. Under Article 162(2) the ELC is a Court with the same status as the High Court. Under Article 160(1) of the Constitution the judiciary is subject to the Constitution. In other words the powers of the judiciary must be exercised within the Constitution. It would therefore follow that where the Constitution expressly divests or limits the powers of the judiciary or any Court for that matter, the Court has no power to embark on such unconstitutional voyage.

10. In this particular case Article 165(6) of the Constitution expressly forbids this Court from supervising the superior courts of which the Respondent is one. In my view where the Court is expressly barred from entering into an investigation it would be absurd for the Court to grant leave to commence proceedings whose effect is to make the very same investigation the undertaking of which the Court is barred.

11. In making my determination in this matter I am cognisant of the fact that mine is not a lone voice shouting in the wilderness. In **Robert Mwangi vs. Shepherd Catering Limited & Another[2012] eKLR**, Mumbi, J dealing with a similar matter relied on **Peter Nganga Muiruri vs. Credit Bank Limited & 2 Others Court of Appeal Civil Appeal No. 203 of 2006** and **Philip Kipchirchir Moi vs. Attorney General & Another Petition No. 65 of 2012** and expressed herself as follows:

**“It is therefore made manifestly clear by the Constitution, from which judicial authority is derived, that the High Court has no jurisdiction to supervise the Supreme Court, the Court of Appeal, the Industrial Court or the Environment and Land Court established under Article 162(2) of the Constitution, or any Division of the High Court...If I understand Mr. Odera correctly, his contention is that this Court as a Court in the Constitutional and Human Rights Division, in exercising the original jurisdiction conferred on the High Court under Article 165, can supervise even the Supreme Court and the Court of Appeal on matters of procedure. Even without reference to the existing judicial authorities on this point, this is not only an argument that flies in the face of clear constitutional provisions but is a totally fallacious argument that, taken to its logical conclusion, would lead to complete absurdities and reduce our judicial system into a comical farce..... If a party is dissatisfied with a decision or conduct of a judge sitting in any Division or station of the High Court, and alleges that there has been a violation of his or her constitutional rights, the alleged violation must be raised before the judge of the High Court seized of the matter. If the party is still not happy with the decision of that Court, then his or her remedy lies in the Court of Appeal, and from there, the Supreme Court, as provided in the Constitution and the relevant legislation. These are the Courts in our system of courts to which appellate jurisdiction is vested....A judge sitting in the Constitutional and Human Rights Division has the same jurisdiction as any other judge sitting in any other Division of the High Court. To ask such a judge to adjudicate in a matter that is before another judge of the High Court is to ask the judge to act in a matter that he or she has no jurisdiction over, and for the judge to do that is to engage in a nullity..... I think I need say no more in this matter save that I will not engage in a nullity and purport to supervise the functioning and conduct or decision making by a court of competent and concurrent jurisdiction. The petitioner’s application and the entire petition is an abuse of the court process and is hereby struck out with costs to the respondents.”**

12. I associate myself with the decision of the learned Judge and I similarly am of the view and so hold that this application is an abuse of the process of the Court. Where a party has an issue with a Judge or any judicial officer for that matter the well settled practice was set out by the East African Court of Justice in **Attorney General vs. Anyang’ Nyong’o and Others [2007] 1 EA 12** as follows:

**The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the Judge or the Judges in the presence of the opponent. The grounds for the recusal are put to the Judge or Judges who would then be given an opportunity, if sought, to respond to them. In the event of the recusal being refused by the Judge, the applicant would, if so advised, move the application in open court.**

13. A party aggrieved by the decision arising therefrom is thereafter at liberty to appeal to the appellate Court.

14. It is my view, however that leave to commence judicial review application cannot be granted where to do so would amount to the Court abetting abuse of its own process since the decision whether or not to grant leave is an exercise of judicial discretion. It follows that both on jurisdiction and the competency of the application, the chamber summons dated 2<sup>nd</sup> May 2014 ought to be and is hereby disallowed.

15. Where leave is declined stay cannot be granted since stay follows leave as night follows day since it is the grant of leave which operates as a stay.

16. In the result the order which commends itself which I hereby grant is that the chamber summons dated 2<sup>nd</sup> May 2014 is struck out but with no order as to costs.

**Dated at Nairobi this 6<sup>th</sup> day of May 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of Mr Otara for the applicant**

**Cc Kevin**