

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CONSTITUTIONAL PETITION NO. E009 OF 2021

JOYCE WAMBUI MACHARIA1ST
PETITIONER

JOHN GITHIRA GITEI.....2ND
PETITIONER

VERSUS

ORIGINAL

ATTORNEY GENERAL.....	1ST
RESPONDENT	
INSPECTOR GENERAL OF POLICE	2ND
RESPONDENT	
DIRECTOR OF PUBLIC PROSECUTIONS	3RD
RESPONDENT	
NATOA COMPANY LIMITED.....	4TH
RESPONDENT	
BRAVINE NATALE.....	5TH
RESPONDENT	
VENTUROSO ANTONIO.....	6TH
RESPONDENT	
SALVADOR ADRINO.....	7TH
RESPONDENT	
ROMANO FILIPI.....	8TH
RESPONDENT	
DAVID MUTAHI.....	9TH
RESPONDENT	
PETER MUTURI MWANGI.....	10TH
RESPONDENT	

JUDGMENT

1. The Petition dated 3.8.2021 sought the following reliefs:
 - (i) A declaration that the 5th Respondent as noncitizen cannot hold land on freehold in Kenya and such holding is unconstitutional.
 - (ii) A declaration that the 4th Respondent as body corporate and noncitizen cannot hold land on

freehold in Kenya and such holding is unconstitutional.

- (iii) A declaration that the 4th Respondent has no constitutional capacity to make criminal complaint for trespass to land.
- (iv) A declaration that making of criminal complaint by 4th-10th Respondent was gross abuse of the criminal process.
- (v) A declaration that the arrest and prosecution of 2nd Petitioner was unconstitutional.
- (vi) An order of certiorari to quash proceedings in Nyeri CMCRC No. 2227 of 2021.
- (vii) An order of prohibition to stop 2nd and 3rd Respondents from further arresting, detaining or prosecuting the Petitioner.
- (viii) Award of compensation for breach of constitutional rights and freedoms of the Petitioners.
- (ix) Costs.

2. The Petition is premised on the grounds on its face and the supporting affidavit of the 1st Petitioner as follows:

- (i) The 1st Petitioner had been residing on and using the suit premises before the civil proceedings.
- (ii) Police officer arrested the 2nd Petitioner, scuttled the tractor ploughing works on the suit premises and detained him.
- (iii) He was arraigned on 23.7.2021 and charged with trespass.

(iv) The alienation of the 1st Petitioner's land was fraudulent.

(v) There was no justification for the unlawful arrest.

3. The Petitioners averred that the acts of the Respondents infringed their right to property in the suit premises.

4. The Respondents did not file responses to the petition.

5. The court has perused the submissions dated 9.3.2022 and they allude to the application dated 3.8.2021.

Analysis

6. The petition is raised from issues that pertain Nyeri ELC Suit No. 49 of 2014. The Amended Plaintiff is annexed to the supporting affidavit to the petition. This court has to determine, *ab initio*, whether it has jurisdiction to entertain the petition.

7. Fundamentally, the High Court had no jurisdiction to hear and determine this matter that arose from a claim under Section 13(20)(a) of the Environment and Land Court Act.

8. By dint of Article 165 (5) of the Constitution, this court has no jurisdiction to hear this case. Under Article 165 (5)2 of the Constitution, it is provided as doth:

The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162.

9. It is my understanding that jurisdiction is everything. The court is bound to take jurisdiction where it has and down its tools where it does not have jurisdiction. My senior brother

Nyarangi JA, as then he was, immortalized these words, in **Owners of the Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd** [1989] eKLR as follows: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

By jurisdiction is meant the authority which a court as 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 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to

determine conclusively whether the facts exist. Where a court takes 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.

10. This means that the court cannot assume jurisdiction that it does not have nor eschew jurisdiction it has. In the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the supreme court stated as doth: -

This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

11. The court cannot deal with the petition relating to the prayer on the land question. This is an imperative in relation to Article 162(2). The court can only deal with the matter as it relates to a criminal complaint, or if the land

question is not a predominant matter. In the case of **Baadi & others v Attorney General & 7 others; National Land Commission & 2 others (Interested Parties); Global Initiative for Economic, Social and Cultural Rights & another (Amicus Curiae) [2018] KEHC 5397 (KLR)**, the High Court stated as doth:

103. After a wide-ranging analysis and consideration of the applicable provisions of the Constitution and in particular, Articles 165(3), 162(2) and (3), and section 13 of the Environment and Land Court Act, and the amendments thereto, the five Judge Bench of the High Court held as follows: -

In its strict sense the jurisdiction of a Court refers to the matters the Court as an organ not an individual was competent to deal with and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the Court.

The jurisdiction of the High Court was unlimited save only as provided by the Constitution. The High Court had express jurisdiction to deal with and determine matters of a Constitutional nature under article 165(3) of the Constitution. Indeed, while the Constitutional claw back was found under article 165(5), article 165(3) (e) of the Constitution further confirmed that the High Court's jurisdiction could be extended further pursuant to any statutory provision. For

example the Judicature Act which conferred the specialized admiralty jurisdiction. The Constitution however did not provide for any other written law to limit the jurisdiction of the High Court.

Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine Constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limited the High Court's jurisdiction in that respect

A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents.

..... It could not have been the intention of the draftsmen of the Constitution that when the Court was faced with a mixture of causes of action touching on the Constitution, especially on fundamental rights, a separationistic approach was to be adopted by the Court and half the claim dispatched to one Court as the other half was retained.

104. A similar position was held by a three-judge bench in *Leisure Lodges Ltd v Commissioner of Lands & 767 others*[51] citing the above decisions.

105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in *Suzanne Butler & 4 Others v Redhill Investments & Another* [52] the Court stated the test in the following words:

When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the predominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other

services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

12. The prayers on ownership of land are thus not properly before the court. The second question concerns the locus for making a complaint. The Constitution defends the right of any person to approach the court to enforce their rights. The Constitution does not guarantee rights only to Kenyans but to non-Kenyans equally. The Applicant seeks an order barring certain persons from making a complaint. This is untenable. The question whether a party can make a complaint is not justiciable.
13. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The condition was that the Petitioner raises constitutional questions as anticipated in the *locus classicus* case of **Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR)**.
14. Once the court is satisfied that there was a justiciable case, based on a real and substantial controversy which unequivocally calls for adjudication of the rights asserted, then the court can assert its jurisdiction. In the case of **Patrick Ouma Onyango & 12 others v The Attorney General & 2 others, Misc Appl No 677 of 2005**, the Court endorsed the doctrine of justiciability, as stated by Lawrence H Tribe in his book *American Constitutional Law*, 2nd Edition, p 92 that:

In order for a claim to be justiciable as an article III, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also a part of the controversy itself-an aspect of the appropriateness of the issues for judicial decision....and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.

15. The Petitioners had the burden to prove violations of the Constitution and the Bill of Rights. They must state and

specifically so, and establish the manner in which the alleged constitutional provisions were threatened or violated. In the current matter, I cannot see the basis for the alleged violations. In the circumstances, I find no merit in the petition, which is accordingly dismissed.

16. In the circumstances, the petition is dismissed together with the Notice of Motion dated 26.10.2021.

17. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

18. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the

party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

19. The petition and application were not opposed. Each party will bear their own costs.

Determination

20. The upshot of the foregoing is that I make the following orders: -

a) The Petition dated 3.8.2021 lacks merit and is dismissed.

b) Each party to bear own costs.

c) The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 16th day of December, 2025. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Ms. Matata for the Petitioners

No appearance for the Respondents

Court Assistant - Michael