



**Tom Ojienda & Associates v County Executive Committee Member, Finance & Economics Affairs, Nairobi City County & 2 others (Judicial Review Application E117 of 2024) [2025] KEHC 3959 (KLR) (Judicial Review) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3959 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION E117 OF 2024  
RE ABURILI, J  
MARCH 26, 2025**

**BETWEEN**

**PROF TOM OJIENDA & ASSOCIATES ..... APPLICANT**

**AND**

**COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE & ECONOMICS AFFAIRS, NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF FINANCE OFFICER COUNTY TREASURER NAIROBI CITY COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Pursuant to leave granted on 16<sup>th</sup> September 2024, the ex parte applicant Prof Tom Ojienda & Associates filed a Notice of Motion dated 19<sup>th</sup> September, 2024 and filed on 20<sup>th</sup> September, 2024 seeking from this Court judicial review orders of mandamus directed at the respondents herein compelling them to settle decree issued in an advocate/ client bill of costs dated 22<sup>nd</sup> July 2021 arising from the proceedings conducted in the primary file being Nairobi ELC Case No. 819 of 2021 Afrison Export Import Limited & another v The city Council of Nairobi & another in which case the applicant provided the respondents with legal representation.
2. The applicant pleads that the bill of costs was taxed by the Deputy Registrar of the High Court. However, the documents filed in this matter show that the bill of costs were taxed and the Certificate of taxation issued by the ELC Deputy Registrar who also issued certificate of order against the government on 3<sup>rd</sup> July 2024 in ELC Milimani Misc. Suit No. E138 of 2021.



3. The respondents were then served with the documents and a demand for settlement of the decree as amended demanding for settlement of Kshs 43,582,145.40 as taxed by I.N. Barasa, Deputy Registrar, Environment and Land Court on 20<sup>th</sup> September, 2023. From the amended decree the judgment on the certificate of taxation was entered on 19<sup>th</sup> February 2024 in the ELC by Justice although the name of the Judge who entered judgment is not disclosed.
4. On 16/9/2024, the applicant filed the chamber summons dated 11<sup>th</sup> September 2024 seeking leave of court to apply for judicial review orders of mandamus compelling the respondents to settle decree for costs taxed before the ELC as above stated. The application was considered ex parte by the presiding Judge who granted leave to apply and directed the applicant to file and serve the substantive notice of motion within 7 days of the date of the order and also gave the respondents 7 days of the date of service to file and serve their responses to the application. The matter was then set for mention on 8/10/2024 for purposes of taking directions on the mode of disposal of the application. On the latter date, the court fixed the hearing for 29/1/2025. In the intervening period, the presiding Judge was transferred and that is how I came into the picture in the matter.
5. The application was argued orally with counsel for both parties adopting their submissions in JR E116 of 2024.

### **Analysis and Determination**

6. I have considered the application and the accompanying documents as stated above. The issue for determination is whether the prayers sought are available to the applicant.
7. First, is that although the respondent did not raise any issue on jurisdiction, I have observed that the legal representation was before the ELC upon which the advocate client bill of costs was filed and taxed before the Deputy Registrar of ELC. Judgment on the certificate of taxation was also entered and decree issued by the ELC Judge. The applicant then filed the application for leave to apply for mandamus in this court and the leave was granted ex parte culminating in the application being filed seeking judicial review orders of mandamus.
8. Jurisdiction is everything and every court of law must first determine whether it has jurisdiction before it can make a merit determination of any matter, whether the issue of jurisdiction is raised by the other party or not. This is because the court is deemed to know the law. This position taken by this Court was upheld by the Court of Appeal in *Anacleth Kalia Musau v Attorney General & 2 Others* [2020] eKLR where the learned Judges Ouko (P) Nambuye & Koome JJA stated as follows:

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the the Supreme Court in the case of *Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

“ 40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent 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 stated thus:

“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied).

9. So, what is the jurisdictional issue here, noting that these are judicial review proceedings which are neither criminal nor civil in nature, and the applicant is seeking execution or enforcement of a decree issued by the Environment and Land Court?

10. Jurisdiction is conferred by the Constitution or statute and not by parties. Neither can any court of law arrogate itself jurisdiction that it is bereft or devoid of. It is also trite that the jurisdiction of a Court can neither be implied nor conferred by agreement of parties, by judicial craft or legal sophistry, it must be expressly provided for in the Constitution or in the statute. The Supreme Court in the case of, Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR stated as follows on jurisdiction of courts:

“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.”

11. The jurisdiction of the High Court is found in Article 165(3) of the Constitution and the High Court Organization and Administration Act among other myriad of statutes.

12. the Constitution also limits the jurisdiction of the High Court, at Article 165 (5) (b), expressly ousting the jurisdiction of the High Court from hearing and determining disputes relating to environment and Land and Employment and Labour Relations (which are reserved for the two specialized courts established under Article 162(2) of the Constitution)- Environment and Land Court and Employment and Labour Relations Court as well as disputes which are in exclusive jurisdiction of and reserved for the Supreme Court under the Constitution.

13. That limit is legal and proper because, by creating the Courts with the status of the High Court to specifically deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

14. Under Article 162(3) of the Constitution, Parliament shall “determine the jurisdiction and functions of the courts contemplated in clause (2)”. Consequently, Parliament did enact The Environment and Land Court Act, 2011 which Act commenced on 30<sup>th</sup> August 2011. Section 13 of the said Act provides for jurisdiction of the Court as follows:



- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
    - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - (e) any other dispute relating to environment and land.
  - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
  - (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
  - (5) Deleted by Act No. 12 of 2012, Sch.
  - (6) Deleted by Act No. 12 of 2012, Sch.
  - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
    - (a) interim or permanent preservation orders including injunctions;
    - (b) prerogative orders;
    - (c) award of damages;
    - (d) compensation;
    - (e) specific performance;
    - (g) restitution;
    - (h) declaration; or
    - (i) costs.
15. On the enforcement of decrees or orders of the Environment and Land Court, section 14 of the ELC Act provides that:
14. Enforcement of Court Orders  
A judgement, award, order or decree of the Court shall be enforceable in accordance with the Civil Procedure Act (Cap. 21)



16. On the Procedures and Powers of the Court, section 19(2) of the Act provides that:

The Court shall be bound by the procedure laid down by the *Civil Procedure Act* (Cap. 21)

17. Essentially, what I have set out above is the jurisdiction of this Court vis avis jurisdiction of the Environment and Land Court, which is a superior Court of record with the same status as the High Court but exercising its exclusive specialized jurisdiction. Under section 13(5) (b) of the Act, the Court has jurisdiction to make orders including prerogative orders. Mandamus is one such traditional prerogative order.

18. It follows that the advocate/ applicant herein having represented the client in the ELC and having filed and had his advocate/ client bill of costs taxed before the Deputy Registrar of the ELC, he cannot transfer that decree on certificate of costs from the ELC to this Court for execution purposes by way of judicial review, since the ELC has judicial review jurisdiction under section 13(5) of the ELC Act and that mandamus order can be sought and obtained in execution of decree against the Government pursuant to section 14, by the same Court that issued the decree.

19. Having said that, it is now clear that the leave granted by this court was without jurisdiction and therefore made "Per incuriam" and must be set aside and vacated.

20. What does Per incuriam mean? According to the Lexis Nexis@2025, a judicial decision is made per incuriam (literally, through lack of care) if it is made in ignorance of a relevant statutory provision or a relevant, binding decision of court, and awareness of that earlier provision or decision would have led to a different result. Thus, where it appears to a later court that an earlier court, by which it is absolutely bound, has made a decision per incuriam, it nevertheless remains bound to follow that decision (because loyalty to the hierarchical nature of the judicial system requires it to assume that the earlier court (a) had in fact been aware of the decision or provision in question but (b) had been able to distinguish or interpret the decision or provision in such a way that it became irrelevant to the decision which it then proceeded to make. However, a later court which has the power to depart from an earlier decision, may rely on the per incuriam doctrine to justify exercising that power.

21. In this case, the leave was granted by my brother Judge of this Court, of concurrent jurisdiction. It follows that whereas this court cannot sit on appeal of a decision of a court of concurrent decision, but that this court is not bound by a decision made by a court of concurrent jurisdiction in circumstances as the one stated above where through inadvertence or lack of care or ignorance of a relevant statutory provision, being section 13(5)(b) and 14 of the *Environment and land Court Act*.

22. I hereby, on the court's own motion and on account of want of jurisdiction vacate and set aside the leave granted by this court on 16/9/2024. Accordingly, there being no leave granted as set aside, the Notice of Motion dated September 19, 2024 and filed on September 20, 2024 is found to have been anchored on no leave granted to apply. I proceed and strike out the said Notice of motion with no orders as to costs.

23. The applicant is at liberty to approach the Court with jurisdiction for appropriate remedy.

24. This file is closed.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MARCH, 2025**

**R.E. ABURILI**

**JUDGE**

