



Cami Graphics Limited v Chief Registrar of the Judiciary & 2 others; Commissioner of Lands & 4 others (Interested Parties) (Constitutional Petition 543 of 2022) [2024] KEHC 2999 (KLR) (Constitutional and Human Rights) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 543 OF 2022**

EC MWITA, J

MARCH 15, 2024

BETWEEN

CAMI GRAPHICS LIMITED PETITIONER

AND

CHIEF REGISTRAR OF THE JUDICIARY 1ST RESPONDENT

REGISTRAR JUDICIAL REVIEW DIVISION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

COMMISSIONER OF LANDS INTERESTED PARTY

DIRECTOR OF SURVEY INTERESTED PARTY

CITY COUNTY OF NAIROBI INTERESTED PARTY

NTEMI LIMITED INTERESTED PARTY

ASSOCIATED STEEL LIMITED INTERESTED PARTY

RULING

1. Two preliminary objections have been raised against this petition. They are dated 17th January 2023 by the 5th interested party and 17th February 2023 by the 2nd respondent.
2. Both preliminary objections contest the jurisdiction of this Court to hear the application and petition. According to the 5th interested party, the petition is incompetent on account of section 22 of the Sixth



- Schedule to the Constitution as read with Gazette Notice issued by the Chief Justice on 9th February 2012.
3. The 5th interested party also states that the petition is res judicata and offends the doctrine of estoppel since the petitioner participated in the proceedings leading to the impugned judgment.
 4. The 5th interested party argues, therefore, that the petition is an abuse of the process of the court and should be dismissed.
 5. The 2nd respondent raises the same issue of jurisdiction stating that the Court lacks jurisdiction under Article 164(3)(a) of the Constitution to hear this petition since it is not an appellate court. According to the 2nd respondent, this Court cannot call for the record in Misc. Civil Suit no 273 of 2007 and give any orders in that file as the petitioner prays.
 6. The 2nd respondent also cites Article 165(6) of the Constitution to argue that this court cannot supervise a superior court as the orders sought in the petition call on this Court to supervise another superior court.
 7. The 2nd respondent, just like the 5th interested party, also argues that the matter is res judicata as the issue in contention was finally determined by a court of competent jurisdiction.
 8. Both the 2nd respondent and 5th interested party have relied on their written submissions and several decisions to support their arguments that this Court should decline jurisdiction and dismiss the petition.
 9. The petitioner has opposed the preliminary objections arguing that the Court has jurisdiction to hear the petition. It is the petitioner's argument that the issue before the Court is on violation of rights and fundamental freedoms and, therefore, this Court has jurisdiction under Article 165(3) to hear the petition.
 10. The petitioner further argues that the petition was filed pursuant to Article 22(1) of the Constitution and for that reason the Court has jurisdiction over the matter. The petitioner also cites Article 25 of the Constitution to argue that this Court has superior jurisdiction when dealing with fundamental rights, thus this Court elevated over all other courts.
 11. It is the petitioner's position that the issue is whether this Court has jurisdiction to hear this petition not whether the petition will succeed, since the petition raises an issue of fair trial.
 12. The petitioner also argues that the issues that were raised in Misc. Case No. 273 of 2007 were different from those in the petition. The petitioner further argues that when the judges took over conduct of the matter leading to the impugned judgment, Directions in legal Gazette Notice No. 13573 of 20th September 2012 had already been issued directing that fresh matter be heard by Environment and Land Court.
 13. The petitioner relies on several decisions and takes the view, that the decisions relied on in support of the preliminary objections are distinguishable, and urges the Court to dismiss the objections.
 14. I have considered the arguments by parties for and against the preliminary objections, perused the pleadings in this matter and the decisions relied on.
 15. The petition seeks two main reliefs, first: a declaration that Hon. Lady Justices Pauline Nyamweya and Rose Ougo were not appointed under the Environment and Land Court Act No. 19 of 2012 and had no jurisdiction to hear, determine and render judgment in Misc. Suit No. 273 of 2007.



16. Second, that an order be issued nullifying, reviewing, cancelling, revoking and or setting aside the judgement delivered by Hon. Lady Justice Pauline Nyamweya, Hon Lady Justice Rose Ougo and Hon. Mr. Justice John Mutungi.
17. The 2nd respondent and 5th Interested party argue that this Court has no jurisdiction to hear and determine this petition. Further, that the petition is res judicata.
18. On res judicata, the short answer is that to establish res judicata, it would call for evidence, thus res judicata is an issue that can only be determined upon evidence being placed before the court to prove such fact. Res judicata cannot be taken as a preliminary objection where the facts are not clear or are disputed.
19. The law is settled that a preliminary objection must be based on a pure point of law which has been pleaded, or which arises by clear implication out of pleadings and if argued as a preliminary point, may dispose of the suit. Examples include objection to the Jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. (*Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] 1 EA 696.)
20. The main objection is on jurisdiction. The petition has been brought under the provisions of the Constitution. Articles 22(1) of the Constitution states that every person has the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or threatened.
21. Similarly, Article 23(1) states that this Court (High Court) has jurisdiction, in accordance with Article 165 to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
22. Where a party moves this Court under Article 22 of the Constitution, the Court has jurisdiction in terms of Article 23(1) as read with Article 165(3)(d) to determine the petition. However, the claim must be that the action complained of violates or threatens a right or fundamental freedoms and the relief sought must be aimed at redressing that violation.
23. As the petitioner's counsel correctly submitted, it is not a must that a petition has to succeed. Rather a petitioner should be accorded an opportunity to be heard so that the Court can make an informed decision rather than shut a petitioner out at the preliminary stage unless it is an open and shut case.
24. In this petition, the core relief sought is an order nullifying, reviewing, cancelling, revoking and or setting aside the judgment delivered by Hon. Lady Justice Pauline Nyamweya, Hon Lady Justice Rose Ougo and Hon. Mr. Justice John Mutungi, judges of superior courts.
25. Article 165(6) of the Constitution confers on the High Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Under the Constitution, superior courts are the Supreme Court, the Court of Appeal, the High Court and Courts of equal status, that is; the Employment and Labour relations Court and the Environment and Land Court (Article 162(1)).
26. The Constitution places a caveat on the High Court not to supervise a superior court. That means, this Court cannot question, review, set aside decisions of the Supreme Court, Court of Appeal, Employment and Labour Relations Court or Environment and Land Court. The High Court cannot also supervise these courts as superior courts.



27. The petitioner has argued that this court is placed at a superior or higher level than other courts when exercising its jurisdiction under the Bill of Rights. This argument is not correct. This Court is only a division of the High Court and exercises jurisdiction as donated by Article 165 of the Constitution. It has no special jurisdiction and, therefore, is not above any other Division of the High Court or superior courts a position that has been explained in many decisions.
28. In *Philip Kipchirchir Moi v The Hon. Attorney General & Another* (Nairobi Petition No. 65 of 2012) [2013] eKLR, Lenaola J (as he then was) stated:
- I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction.
29. In *Peter Ng'ang'a Muiruri v Credit Bank Ltd & 2 others* (Nairobi Civil Appeal No. 203 of 2006); [2008] eKLR, the Court of Appeal rendered itself thus:
- There is no provision in the Constitution which establishes what Nyamu J. referred to as the Constitutional Court. In Kenya we have a Division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division. It is not an independent Court but merely a Division of the High Court. The wording of Section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of Sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court.
30. It is worth noting that even though the above decision arose from the provisions of the repealed Constitution and the court was rendering itself on that Constitution, Article 165 of the current Constitution still talks about the High Court and not the Constitutional Court.
31. In *Kenya Hotel Properties Limited v Attorney General & others* [2018] eKLR, the petitioner urged the court to nullify a judgment of the Court of Appeal, a superior court, for violating its constitutional rights. This Court dismissed the petition holding that it had no jurisdiction. The court stated:
- (47) Article 165(6) states in plain language that this 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. Superior courts in terms of Article 162 (1) of the Constitution are the Supreme Court, the Court of Appeal, the High Court and courts of equal status namely; the Employment and Labour Relations Court and the Environment and Land Court. The edict in Article 165(6) is in form of a constitutional limitation imposed on this court not to do anything that would amount to supervising or superintending other superior courts.
32. On appeal, the Court of appeal agreed that this Court has no jurisdiction to supervise a superior court, let alone annulling a decision of the Court of Appeal.
33. On further appeal to the Supreme Court, (*Kenya Hotel Properties Limited v Attorney General & 5 others* (Petition No. 16 of 2020); [2022] KESC62 (KLR)), the Supreme Court upheld the decisions of both this Court and the Court of Appeal, and stated:



- (55) As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.
34. The above holding settled the issue so that this court has no jurisdiction to review, set aside or annul a decision of another superior court.
35. The fact that the present petition urges this Court to annul a decision rendered by Judges of superior courts, whether they were properly constituted or not, is a matter that is outside the purview of this Court as it is expressly prohibited by the *Constitution*.
36. It is a requirement of law that as much as possible, a party should be allowed to have the dispute presented to court heard and determined on merit. However, it is the view of this Court, that given the nature of the petitioner's case, even if the petitioner was allowed to have his day in court so that the court could determine the issues after hearing the parties, the Court would still come to no other determination, than that it has no jurisdiction to annul the judgment delivered in Misc. Suit No. 273 of 2007, a decision of Judges of superior courts. The Court would therefore be acting in vain- a waste of judicial time.
37. Consequently, and for the above reasons, the preliminary objections are well founded and are upheld. The petition is struck out with no order as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024

E C MWITA

JUDGE

