



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.72 OF 2013

BETWEEN

EDWARD MWANIKI GATURU.....1ST APPLICANT

HELLEN NYAMBURA MWANIKI.....2ND APPLICANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE HON. CHIEF JUSTICE.....2ND RESPONDENT

**HON. CHIEF MAGISTRATE IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI,
MILIMANI COMMERCIAL COURT.....3RD RESPONDENT**

AND

SHANIF DEWANY.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Applicants have invoked this Court's jurisdiction under **Article 165(2) (d) (ii)** of the **Constitution** seeking *inter alia* to determine the constitutionality of the directive issued in Gazette Notice No.16268 of November 2012 by the 2nd Respondent, the Hon. Chief Justice. The Gazette Notice in issue is titled; '**Practice Directions on proceedings relating to the Environment and the use and occupation of, and title to land**'. It allegedly granted, *inter alia*, the Magistrate's Courts jurisdiction to hear and determine new cases relating to the environment, use and occupation of, and title to land in which those Courts have the requisite pecuniary jurisdiction.

The Originating Notice of Motion

2. The Applicants, **Edward Mwaniki Gaturu** and **Hellen Nyambura Mwaniki** in their Originating Notice of Motion dated 4th February 2013 and premised on **Articles 165(3) (d) (ii)** and **165(6)** of the **Constitution** and seek the following declaratory orders;

“(a) The directive by the 2nd Respondent contained in Kenya Gazette Notice No. 16268 of 9th November 2012 conferring jurisdiction upon Magistrate's Courts to hear and determine new

cases relating to the environment and use and occupation of, and title to land in which the Courts have the requisite pecuniary jurisdiction is unconstitutional, null and void.

(b) The jurisdiction to hear and determine new cases relating to the environment and use and occupation of, and title to land is vested exclusively on the Environment and Land Court which is an independent Court and not a division of the High Court.

(c) The Chief Magistrate's Court at Nairobi has no jurisdiction to hear and determine Milimani CMCC No. 6592 of 2012 between the Interested Party and the Applicants.

3. The 1st and 3rd Respondents did not file any response to the Motion. The Interested Party filed a Replying Affidavit sworn on 28th February 2013 and submissions dated 15th March 2013. The 2nd Respondent did not file a response but filed submissions on points of law dated 20th March 2013.

Facts

4. The facts relating to this Motion are undisputed because the genesis of it is to Milimani Chief Magistrate's Court Civil Case No. 6592 of 2012 between the Applicants and the Interested Party. The background of that case is that, sometime in 2010, the Interested Party granted the Applicants a loan of Kshs.2,000,000.00 and they offered their land as security and later a caution was registered in favour of the Interested Party. Both parties executed a loan agreement dated 27th October 2010 but the Applicants were unable to pay the loan and the Interested Party instituted a civil claim by way of a Plaint against the Applicants in **Chief Magistrates Court, Milimani CMCC No. 6592 of 2012** to recover the loan amount and the cause of action was stated to be the breach of the loan agreement aforesaid and the Interested Party sought judgment against the Applicants for failure to pay the loan amount and in the alternative that the Court does order Interested Party to exercise his right of lien over the property placed as security in the event that they failed to pay the loan balance.
5. The 3rd Respondent, the Chief Magistrate, Milimani Commercial Court, on his own motion, determined that the court did not have jurisdiction to determine the suit since it related to land and directed that it ought to have been filed at the Environment and Land Court. Subsequently, the Interested Party filed **Nrb HC ELC Misc. Applic. No. 651 of 2012** under **Section 13(1) (6) (7) and 19(1) (2) (3g)** of the **Environment and Land Court Act**. Upon hearing an Application in that suit Mutungi J on 20th November 2012 made a ruling that **Milimani CMCC 6592 of 2012** was not a land matter and that, the Magistrate's Court had jurisdiction to determine the same. He ordered the suit to be transferred back to the Chief Magistrates Court for hearing and determination.

Applicants' Submissions

6. The Applicants submitted that the Chief Justice issued Gazette Number 1617 of 9th February 2012 wherein he directed that;

"all proceedings relating to the environment and the use and occupation of, and title to land pending before subordinate courts shall continue to be heard and determined by the same court,....Any proceedings which shall not have been concluded by the time the Environment and Land Court is established shall be moved to the Court upon establishment."

Thereafter, he issued Gazette Notice No. 13573 of September 2012 which directed that;

"All new cases relating to the environment and use and occupation of, and title to land shall be filed in the nearest Environment and Land Court for hearing and determination by the said Court."

The Applicants contend that it is on the basis of this Gazette Notice that Magistrates were declining to hear cases relating to the environment and use of and occupation of, and title to land and CMCC No.6592 of 2012 was one such case.

7. They further take issue with Gazette Notice No.16268 of November 2012, issued by the Chief Justice with the directive that;

“Magistrates Court's shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the Courts have the requisite pecuniary jurisdiction.”

They contend that it was on the basis of this particular Practice Note that the **Milimani CMCC No. 6592 of 2012** was referred back to the Chief Magistrate's Court by Mutungi J. hence the present Petition.

8. The Applicants also contend that the Constitution has not mandated the Chief Justice to determine jurisdiction of Courts established under the said Constitution. That the jurisdiction of courts is expressly provided for by the Constitution and in the instances where it has not been provided, the Constitution has established that the jurisdiction shall be provided by a legislation to be enacted by Parliament (i.e. for Subordinate Courts under **Articles 23 and 169** and other superior Courts under **Article 162 of the Constitution**).
9. It is also the position of the Applicants that in issuing Gazette Notice number 16268 of 9th November 2012, the Chief Justice sought to extend the purview of the directions to cover new matters arising after the establishment of the Environment and Land Court and claim that the inclusion of new matters displaces the intended transitional nature of directions and instead makes them permanent and in effect removing them from the ambit of **Section 22, Part 3 of the 6th Schedule to the Constitution**. They also contend that the directive does not meet the language, intent and tenor of **Section 30 of the Environment and Land Court Act**.
10. The Applicants further claim that **Article 162 (2) (b) of the Constitution** established set up a Court to hear and determine disputes relating to the environment and the use and occupation and title to land and that Court's jurisdiction is to be determined by an Act of Parliament and not the 2nd Respondent. That the Chief Justice can only act within the context of the Constitution and established legislation and not outside either of them.
11. It is their position that the framers of the Constitution could not have given prominence to land and environment under it by having a whole chapter on the same and even establishing a Court parallel to the High Court to determine land matters, only for that jurisdiction to be whittled down by donating the jurisdiction to the subordinate courts where such jurisdiction does not exist at all. They claim that given the enormous pecuniary jurisdiction enjoyed by the Magistrates Court, the Environment and Land Court would be reduced to a largely appellate Court which was not the intention of the framers of the Constitution.
12. It is also their submission that the Environment and Land Court and the High Court, have the same status but the Environment and Land Court is not the High Court and it cannot exercise jurisdiction as the High Court does nor can the High Court exercise jurisdiction reserved for the Environment and Land Court. These Courts, in their view, exercise separate and distinct jurisdictions and they contend that a Judge of latter the Court is not a Judge of the High Court and *vis-a-vis*. They also allege that the Environment and Land Court is an independent Court and not a Division of the High Court as has been wrongly suggested by recent nomenclature.
13. Further, that the Environment and Land Court has exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning **Land Act 2012** and they opine that the exclusive jurisdiction conferred on the Land and Environment Court established under **Article 162(2) of the Constitution** excluded all other Courts from adjudicating disputes under that Act.

14. They claim that Magistrates do not have jurisdiction over land and environment disputes and to find otherwise would amount to assuming jurisdiction. They referred the Court to the case of **Paul Mburu Njoroge v Joseph Waweru Gitumbi Nrb Civil Appeal No. 115 of 2002** in support of that proposition.
15. They also claim that the gazette notice subject of this Application was issued under **Section 30** of the **Environment and Land Court** and not under **Section 24** as argued by the 2nd Respondent.
16. They also claim that what used to be termed as commercial disputes including mortgages, charges, liens and leases are now disputes over use, occupation and title to land and therefore exclusively reserved for the Environment and Land Court. That since the dispute between the Applicants and the Interested Party is over an alleged lien, then it falls within the jurisdiction of the Environment and Land Court and the Magistrates Court does not have jurisdiction over the same. They now seek orders as set out above for these reasons.

2nd Respondent's Submissions

17. The 2nd Respondent, the Hon. Chief Justice, contends that the Constitution does not exclude any disputes from the jurisdiction of the subordinate courts' to be established since that has been left to the legislation to be enacted by Parliament. And that the limit of the subordinate courts jurisdiction to hear and determine new cases relating to the environment and use and occupation of land is determined from the legislation contemplated by **Article 162(2)** of the **Constitution**. It was his submission that the legislation enacted under that Article is constitutional and the burden of proving otherwise is on the person who alleges the unconstitutionality of that statute. He relies on the decision in **The Law Society of Kenya v Attorney General & 2 Others, Petition No. 318 of 2012** in support of that argument.
18. Further, that the Environment and Land Court Act came into effect on 30th August 2011 and its general object is to give effect to **Article 162(2) (b)** of the Constitution and he claims that **Section 13(1)** of that Act provides that the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with **Article 162(2) (b)** of the Constitution. **Section 13(4)** provides that in addition the Court shall exercise supervisory jurisdiction over the decisions of subordinate courts or local tribunals in respect to matters falling within the jurisdiction of the Court. And further that **Section 13 (5)** grants the Court supervisory jurisdiction over the subordinate Courts, local tribunals, persons or authorities in accordance with **Article 165(6)** of the **Constitution** in the same way that the High Court does.
19. He also argues that **Section 24(2)** of the Act confers jurisdiction on him to make rules to regulate the practice and procedure in tribunals and Subordinate Courts in matters relating to land and environment and he claims that Parliament must have intended that subordinate courts would have jurisdiction to handle environment and land matters within their pecuniary and territorial jurisdictions with the right of appeal to the Environment and Land Court which has the same status as the High Court. That he was only discharging his statutory mandate conferred by **Section 24(2)** of the Act in publishing Gazette Notice No. 16268 of 9th November 2012 and he has given the analogy of an existing situation where the National Environment Tribunal still retains jurisdiction to hear and determine appeals arising from matters governed by **Section 129** of the **Environmental Management and Coordination Act (EMCA) Act No. 8 of 1999** to reinforce that argument.
20. It is also his position that a wholesome reading of the Act would confirm that the jurisdiction of the subordinate Courts to hear and determine disputes relating to the environment, and use and occupation of, and title to land is implied and has not been expressly ousted. He argues therefore that the Environment and Land Court can only have appellate and supervisory jurisdiction where the subordinate Court has original jurisdiction in the first instance.
21. It is his further contention that the dispute which forms the subject of the suit before the Chief

Magistrate's Court does not involve 'use and occupation of land title to land' within the meaning of the Act as it involves a civil claim over an unpaid loan of Kshs.2,000,00.00 and agrees with the position of the Interested Party that Mutungi J. has correctly held that the Magistrates courts has jurisdiction in that case. In any event, that the Petitioners herein are circumventing that order and are seeking a review of a decision of a Court of concurrent jurisdiction which is irregular.

22.He claims that the Petitioners have failed to disclose any violation of the Constitution or any section of the Environment and Land Court that is said to be unconstitutional and how the provisions of the Act that empower the 2nd Respondent to make regulations are in conflict with the Constitution. He therefore urges to dismiss me the Origination Notice of Motion for adopting a narrow interpretation which does not advance the rule of law or promote the purposes of the Constitution in securing access to justice by all.

Interested Party's submission

23.It is the submission of the Interested Party that the issue of jurisdiction had already been addressed by Mutungi J. who the High Court which ordered that the Chief Magistrate's Court has jurisdiction to hear and determine CMCC No. 6592/2012. That in the event, this Court has no jurisdiction to hear and determine the Originating Notice of Motion since the Constitutional and Human Rights Division of the High Court has no jurisdiction to review, set aside or vary a decision made in another High Court Division or a Court established under **Article 162(2)** of the **Constitution**. He relied on the case of *Robert Mwangi v Shepherd Catering Ltd & Another (2012) e KLR* where the court reiterated and agreed with an earlier decision in *Philip Kipchirchir Moi v Attorney General & Anor (2012) e KLR*, that this Court has no jurisdiction to supervise other High Court Judges or Divisions.

24.He further claims that Parliament has the mandate to enact legislation establishing the Courts contemplated under **Article 162(2)** of the **Constitution** and under **Article 162(3)** has a specific mandate to determine the jurisdiction and functions of those Courts.

25.It is also his contention that the drafters of the Constitution did not use the word 'exclusive' in **Article 162(2)** and it would be right to conclude that the matters to be handled by Courts established therein are not limited to them only and can be handled by any other Court or tribunal exercising judicial authority so long as parliament has given such mandate to the Court pursuant to **Article 162(3)** of the Constitution.

26.He claims that whole the **Environment and Land Court Act** enacted under **Article 162(2) (b)** of the **Constitution** has the jurisdiction to hear and determine disputes relating to the environment and the use and occupation of/and title to land, **Section 13(1)** of the **Environment and Land Court Act** vests the Environment and Land Court with both original and appellate jurisdiction to hear and determine all disputes in accordance with **Article 162(2) (b)** and it follows that in his view the the magistrates Courts can hear cases relating to environment and use and occupation of, and title to, land such that an appeal would then properly lie to the Environment and Land Court.

27.He also contends that under **Section 24(2)** of the **Environment and Land Court Act**, the Chief Justice has powers to make rules to regulate the practice and procedure, in tribunals and subordinate courts on matters related to land and environment and therefore it is his position that the Environment and Land Court has not been vested with exclusive jurisdiction to deal with matters involving land and the Environment.

28.Further, under **Section 24(3)** of the **Environment and Land Court Act**, the Chief Justice is obligated to make rules for the determination of admissibility by the Court of proceedings pending before any Court or tribunal and he claims that the import of this provision is that not all matters pending before any Court or Tribunal relating to land and environment are to be automatically transferred to the Environment and Land Court Act upon the establishment of that Court and that Gazette Notice No. 16268 of 9th November 2012 contains rules to operationalise that Section. It

is his contention therefore that the said Gazette Notice did not confer any extra jurisdiction to the subordinate courts than what has already been outlined by Acts of Parliament, and that the Practice Directions contained in that Gazette Notice are within the confines of the law and are not unconstitutional. He seeks that the Motion be dismissed with costs.

Determination

29. Having set out the respective parties arguments as above, I am of the view that there are three issues for determination in this matter viz;

(a) *Whether the Chief Magistrate's Court at Nairobi has jurisdiction to hear and determine Milimani CMCC No. 6592 of 2012 between the Interested Party and the Applicant.*

(b) *Whether the jurisdiction to hear and determine new cases relating to the environment and use and occupation of, and title to land is vested exclusively on the Environment and Land Court established under **Article 162(2)** of the Constitution.*

(c) *Whether the directive by the 2nd Respondent contained in the Gazette Notice No. 16286 of 9th November 2012 conferring jurisdiction upon Magistrates Court to hear and determine new cases relating to the environment and use and occupation of, and title to land in which the court have pecuniary jurisdiction is unconstitutional, null and void.*

I have deliberately framed the questions in that order for reasons to be seen shortly

30. However, before I consider the issues for determination as framed above, I must first say something about the contention that this court has no jurisdiction to determine this matter as it does not have jurisdiction to set aside or vary orders of another Judge of the High Court. I will also deal with the issue raised by the 2nd Respondent that the Originating Notice of motion has not stated or disclosed any alleged violation of the Constitution. I will then juxtapose my findings with the issues framed above.

31. On the question of this Court's jurisdiction or otherwise, I agree that it is a core issue because jurisdiction is the beginning and the end of any matter. This is why Nyarangi JA in **The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited (1989) KLR** stated that;

"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"

32. I also agree with the Interested Party that **Article 165 (5)** of the Constitution limits the jurisdiction of this Court in two aspects. Firstly, where the dispute relates to a question reserved exclusively for the jurisdiction of the Supreme Court and secondly, in respect of disputes falling within the exclusive jurisdiction of the Courts contemplated in **Article 162 (2)** of the Constitution. This position has been aptly captured by this Court in various decisions including **Robert Mwangi v Shepherd Catering Ltd & Another (supra)** and **Philip Kipchirchir Moi v Attorney General & Another (supra)** where in the latter case I stated that;

"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"

33. For the same reason, it follows that this Court has no jurisdiction to determine the first issue as framed for determination and what forms prayer three of the Motion because Mutungi J. has already determined that the Chief Magistrate Court has jurisdiction to hear and determine **Milimani CMCC No. 6992**. If the Applicants are aggrieved by the decision of Mutungi J, then the only remedy available to them is to appeal against the decision or make an Application to the same Judge for him to consider a review of his decision. To come to this Court and ask it to proceed further with that issue would be irregular which I refuse to take.

34. That being the case, I now turn to consider whether this Court can invoke its interpretative jurisdiction as prayed. I am in agreement with the decision in the case of **Ssemwogerere and Others vs. Attorney General (3) [2004] 2 EA 247**, where the Supreme Court of Uganda held that the Constitutional Court's jurisdiction to declare an Act of Parliament inconsistent with or in contravention of the Constitution goes altogether with the one for interpreting the Constitution and is unlimited since the Constitutionality or otherwise of an Act of Parliament must be construed *vis-à-vis* the Constitution and for the purposes of exercising these jurisdictions by the Constitutional Court there can be no distinction between an Act passed to amend the Constitution or an Act passed for other purposes.

35. In that regard, it is not in doubt that the High Court is the right forum for cases challenging the constitutionality of actions done under the authority of the Constitution to be determined.

36. Further, the jurisdiction of this court to interpret the Constitution is found under **Article 165 (3) (d)** which states as follows;

“Subject to clause (5), the High Court shall have—

(a)

(b)

(c)

(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”

37. **Article 259(1)** of the Constitution has then dealt with what in my view are principles to be adopted in interpreting the provisions of the Constitution. This Article provides that;

“(1) This Constitution shall be interpreted in a manner Construing this Constitution that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.”

Sub **Article 3** provides that:

“...every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and

Precedents from this Court have also espoused on the principles to consider while interpreting the Constitution. In *Centre For Rights Education And Awareness (Creaw) & 7 others v Attorney General [2011] eKLR*, the Court stated that;

“In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get a proper interpretation.”

In the Ugandan case of *Tinyefuza v Attorney General Constitutional Appeal NO. 1 of 1997*, the Court held as follows;

“The entire Constitution has be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy of the written Constitution.”

38. Moreover, in *Kigula and Others vs. Attorney-General [2005] 1 EA 132* the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows;

“(1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (4) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed; (5) that in determining constitutionality both purpose and the effect are relevant; and (6) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people.”

I am in agreement with the above erudite expression of the law and will adopt it as if it were my own.

39. In the above context, it has been alleged that the Motion before me has not set out the constitutional provisions that have been violated and the manner in which they have been violated. I am aware that this Court has consistently held that where a violation of the Constitution has been alleged, an aggrieved party must set out with some degree of precision the manner in which the provisions of the Constitution have been violated. See *Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272* . That position has now been clarified by this Court in *Trusted Society of Human Rights Alliance v Attorney General and 2 Others, Petition No. 229 of 2012* where the Judges expressed themselves as follows;

*“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate*

remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

40. I wholly agree and I am clear in my mind that the Motion before me has been defined with some reasonable precision and is concrete. The Applicants seek an interpretation whether the 2nd Respondent has violated **Article 162(2)** of the Constitution and in my view that has appeared to be clear to the Respondents as they have both proceeded from that understanding and addressed the issues raised by the Applicants. I will say no more on that issue.

41. I now turn to determine the two other issues framed for determination. **Article 162(2)** of the Constitution provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. **Article 162(3)** then provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in **Article 162(2)**. It was on the basis of this provision that Parliament enacted the Environment and Land Court Act, No. 19 of 2011 which came into effect on 30th August 2011. The object of the Act states as follows;

“An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes”

42. In my view, **Article 162(3)** is clear and requires no more than a literal interpretation. It empowers Parliament to determine the **jurisdiction and functions of the Environmental and Land Court**. For one to determine whether the Environmental and Land Court has exclusive jurisdiction to hear and determine matters related to environment, and the use and occupation of, and title to land, one must turn to the provisions of the **Environmental and Land Court Act** to determine what jurisdiction Parliament granted this Court as stipulated by **Article 162(3)**.

43. One of the canons of statutory interpretation as stated elsewhere above is that provisions of a statute ought to be read as a whole in order to ascertain the intention the legislature. Further, words used in a particular provision may be used to clarify the meaning of the words of phrases used in the same context in other provisions within the Act. According to Halsbury’s Laws of England, 4th edition, Butterworths 1995, Vol 44(1), Para 1484;

“It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act...”

44. In that context, looking at **Section 13 (1) of the Act** it is clear that Parliament did not intend that the Environmental and Land Court should have exclusive jurisdiction to hear and determine matters related to the environment, and the use and occupation of, and title to land. This section provides that;

“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.” (Emphasis mine)

45. The simple and plain meaning of this provision is clear to my mind; that the Environmental and

Land Court has appellate jurisdiction and the question then is, where and how can the Environmental Land Court exercise that appellate jurisdiction?

46. To answer that question, I will turn to the provisions of **Section 13(4)** of the Environmental Land Court Act which provides that;

“In addition to the matters referred to in subsection (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.”(Emphasis mine)

A casual reading of **Article 169(1)** of the Constitution, reveals that subordinate courts include *inter alia* the Magistrates' Courts. It therefore follows that the Magistrates' Courts have jurisdiction to determine matters falling within the jurisdiction of the **Environment and Land Court Act** and their decisions will be subject to appeals preferred to the Land and Environment Court. I would not attribute any other meaning to the above provisions. Sadly therefore I do not think that the Applicants can sustain the argument that the Environment and Land Court has exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land and the environment because the law does not bear them out.

47. Further, my position with regard to that argument is simple. Had that been the intention of the drafters of the Constitution, then I believe that nothing would have been easier than for them to say so, than leave the matter to Parliament to determine the jurisdiction and functions of both Courts contemplated under **Article 162(2)** of the **Constitution**. This is what was with the High Court under **Article 165** of the **Constitution**.

48. Having said so, I am in agreement with the submission by the Applicants that the Constitution has not mandated the Chief Justice to determine jurisdiction of courts established under **Article 162(2)** because that action has been left to the exclusive mandate of parliament. In my view Parliament has played its role as obligated by the Constitution and in that regard **Article 2(3)** of the **Constitution** is clear that ***“the validity or legality of the Constitution is not subject to challenge before any Court or other State organ”***. The action by Parliament can only be challenged on the ground of unconstitutionality and not by fact of the constitutional obligation to enact law. It is also my view that the 2nd Respondent has performed his function as stipulated by **Section 24(2)** of the Environment and Land Court Act which has conferred jurisdiction on him to make rules to regulate the practice and procedure in tribunals and subordinate courts for matters related to land and environment. This section is clearly worded and it reads thus;

“(1) The Chief Justice shall make rules to regulate the practice and procedure of the Court.

(2) The Chief Justice shall make rules to regulate the practice and procedure, in tribunals and subordinate courts, on matters relating to land and environment.

(3) The Chief Justice shall in consultation with the Court make rules for the determination of admissibility by the Court of proceedings pending before any Court or local Tribunal.”

He has acted within the law and any complaint to the contrary is misguided.

49. I am also alive to the provisions of **Sections 2 and 5 of the Judicial Service Act, No. 1 of 2011** which provides for the functions of the Chief Justice. **Section (2)(c)** in particular grants the Chief Justice powers to exercise general control over the judiciary and that includes powers to issue practice directions in control of the running of Courts. That Section provides as follows;

“Despite the generality of subsection (1), the Chief Justice shall-

(a).....

(b)...

(c) *Exercise general direction and control over the Judiciary*”

Gazette Notice No. 16268 of 9th November 2012 was a Practice direction titled; “***Practice Directions on proceedings relating to the Environment and the use and occupation of, and title to land***”.

I do not see how the 2nd Respondent violated the Constitution or acted unconstitutionally by issuing the said Gazette Notice. He was in my view performing his duties as stipulated under the Environment and Land Court Act and in furtherance of his duties under the Judicial Service Act. I see no inconsistencies between the Constitution and the **Environmental and Land Court Act in any event**.

50. It must also be remembered that one of the cardinal principles of statutory interpretation is the presumption that statutes enacted by Parliament are constitutional unless otherwise proved. (See ***Ndyanabo vs. Attorney General [2001] 2 EA 48, In the Commission for the Implementation of the Constitution v Parliament of Kenya and Anor, Nairobi Petition No. 454 of 2012*** where in the latter case, the Court cited with approval the statement made in ***Re Application by Bahadur [1986] LRC 545*** (Const.), where the learned judge stated thus;

“I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown.....”

The Court then concluded.

“In the same vein I will reiterate that this court will start from the presumption that a statute as enacted by Parliament is constitutional and is fair unless the contrary is proven.”

51. I agree and having answered the question on whether the jurisdiction to hear and determine new cases relating to the environment and use and occupation of, and title to land is vested exclusively on the Environment and Land Court as framed for interpretation, as above, and looking at it again, I am of the view that the same has answered the last question for determination on whether the directive contained in Gazette Notice number 16268 of 9th November 2012 is unconstitutional. I need say no more.

A number of other issues were raised in Submissions including whether the Land and Environment Court is or is not a Division of the High Court. All of them have been answered by my findings above and I need not repeat those findings.

52. Turning to the issue of the costs the Applicants sought *inter alia* an order that the costs of the Originating Motion be borne by the Respondents and they may well argue that they were involved in public interest litigation. However, they have also sought an order to have this Court declare that the Chief Magistrate's Court has no jurisdiction to hear and determine ***Milimani CMCC No. 6592 of 2012***, a matter in which personal interest was paramount. It is therefore obvious to me that they filed the present Motion to advance their interests in the guise of interpreting the Constitution in the public interest. It is for this reason that I find that they brought the Motion in bad faith and this is therefore a clear case which would not pain the court to penalize them with costs.

Conclusion

53. In the end, the Originating Notice of Motion is dismissed and costs thereof will be borne by the Applicants.

54.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF JULY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Alex – Court clerk

Mrs. Mungai for Applicant

Miss Ibrahim holding brief for Mr. Wilson for 2nd Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE