



REPUBLIC OF KENYA



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Cheruiyot v Amimo - Assistant County Commissioner; Marutegek & 5 others (Interested Parties) (Petition E003 of 2024) [2024] KEHC 13144 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
PETITION E003 OF 2024**

JK SERGON, J

OCTOBER 30, 2024

IN THE MATTER OF: ARTICLE 2(4), 3, 10, 22(1), 23(1)(3)(A)(B)(C)(E)(F), 25(C), 29(A), 31(C), 35(1)(2), 40, 46(1), 47, 48, 50(1), 60(1)(B), 66(1) 73, 75, 186(1), 187(2), 232, 258, & 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: AN UNCONSTITUTIONAL, ILLEGAL, UNLAWFUL, IRRATIONAL, UNREASONABLE, UNFAIR, DISCRIMINATORY AND UNJUST ORDER TO MAINTAIN STATUS QUO ON AN UNSPECIFIED LAND ALLEGED TO BE DISPUTED LAND IN KAPKATET TOWN MADE BY THE ASSISTANT COUNTY COMMISSIONER ON 14TH MAY, 2024

AND

IN THE MATTER OF: MISCHIEVOUS INTENT TO CURTAIL THE APPLICANT'S RIGHT TO PEACEFUL, QUIET POSSESSION AND ENJOYMENT OF HIS THREE PROPERTIES WITHIN KAPKATET TOWN AND LOCATED IN DIFFERENT LOCATIONS

AND

IN THE MATTER OF: SECTION 17 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, THE FOURTH SCHEDULE OF THE CONSTITUTION AND GAZETTE NOTICE NO. 6604

AND

IN THE MATTER OF: ACTS OR OMISSIONS IN CONTRAVENTION OF THE CONSTITUTION BY THE ASSISTANT COUNTY COMMISSIONER

AND

IN THE MATTER OF: OBLIGATION TO RESPECT, UPHOLD AND DEFEND THE CONSTITUTION

AND



**IN THE MATTER OF: ADHERENCE TO NATIONAL VALUES AND PRINCIPLES
OF GOVERNANCE AND VALUES AND PRINCIPLES OF PUBLIC SERVICE**

AND

**IN THE MATTER OF: RIGHT TO INSTITUTE COURT PROCEEDINGS
FOR DENIAL, VIOLATION, INFRINGEMENT, OR THREATENED
RIGHTS OR FUNDAMENTAL FREEDOMS IN THE BILL OF RIGHTS**

AND

**IN THE MATTER OF: APPLICATIONS FOR REDRESS OF DENIAL,
VIOLATION, INFRINGEMENT, OR THREATENED RIGHTS
OR FUNDAMENTAL FREEDOMS IN THE BILL OF RIGHTS**

AND

**IN THE MATTER OF: APPLICATION FOR A DECLARATION
OF RIGHTS; AN INJUNCTION; A CONSERVATORY ORDER;**

AN

ORDER FOR COMPENSATION; AND AN ORDER OF JUDICIAL REVIEW

AND

**IN THE MATTER OF: THE RIGHT TO A FAIR TRIAL, WHICH
RIGHT IS A FUNDAMENTAL RIGHT THAT MAY NOT BE LIMITED**

AND

**IN THE MATTER OF: ACCESS TO INFORMATION HELD AND REQUIRED FOR THE
EXERCISE OR PROTECTION OF ANY RIGHT OR FUNDAMENTAL FREEDOMS AND
IN THE MATTER OF: CONSUMER RIGHTS AND FAIR ADMINISTRATIVE ACTION**

BETWEEN

DAVID KIPLANGAT CHERUIYOT PETITIONER

AND

LEO S AMIMO - ASSISTANT COUNTY COMMISSIONER RESPONDENT

AND

JOEL MARUTEGEK INTERESTED PARTY

CHIEF KAPKATET LOCATION INTERESTED PARTY

OCS-KAPKATET POLICE STATION INTERESTED PARTY

ASSISTANT CHIEF NGANASET SUB-LOCATION INTERESTED PARTY

ASSISTANT CHIEF SOSIT SUB-LOCATION INTERESTED PARTY

**THE ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED
PARTY**



JUDGMENT

1. The petitioner filed a petition dated 25th June, 2024 seeking the following reliefs;
 - a. A Declaration that the Respondent's impugned letter addressed to the Petitioner dated 14th May, 2024 ordering the Petitioner to maintain status quo on an unspecified land alleged to be disputed land in Kapkatet town is null and void, as it egregiously disregards the sacrosanct principles of fair administrative action, as unequivocally stipulated in Article 2(4), 3, 10, 25(c), 35(2), 46(1) (a)(b)(3), 47, 48, 50(1), 60(1) (a)(b)(c)(d)(g), 66(1), 73(1), 75 & 232 of the Constitution of Kenya 2010.
 - b. An order of Judicial Review, to be exercised through the instrument of Certiorari, commanding the immediate quashing of the Respondent's impugned letter addressed to the Petitioner dated 14th May, 2024 ordering the Petitioner to maintain status quo on an unspecified land alleged to be disputed land in Kapkatet Town owing to its wilful negation of the constitutional and legal objects
 - c. An order of Judicial Review, invocable through the potent instrument of Mandamus, compelling the Respondent from acting or continuing to act in breach of duty imposed upon them under the Constitution and the law or from acting or continuing to act in any manner that is prejudicial to the constitutional and legal rights of the Petitioner, in accordance with the provisions of the Constitution, the law and the principles of justice.
 - d. An order of Judicial Review, invocable through the potent instrument of Mandamus, prohibiting the Respondent from proceedings with the orders or directives in the Respondent's impugned letter addressed to the Petitioner dated 14th May, 2024 ordering the Petitioner to maintain status quo on an unspecified land alleged to be disputed land in Kapkatet town.
 - e. An order of Judicial Review, invocable through the potent instrument of Mandamus, compelling the Respondent to compensate the Petitioner for loss arising from defects in services as a result of the unconstitutional and unlawful administrative decision in the Respondent's impugned letter addressed to the Petitioner dated 14th May, 2024 ordering the Petitioner to maintain status quo on an unspecified land alleged to be disputed land in Kapkatet town, as unequivocally stipulated in Article 46(1)(d) of the Constitution of Kenya.
 - f. An order for compensation for infringement of constitutional and legal rights due to the Petitioner against the Respondent.
 - g. An award of costs of this Petition, justly deserved by the Petitioner, to alleviate the financial burden borne in pursuit of constitutional justice.
 - h. Any other order that this Honourable Court may deem fit to achieve the ends of justice and uphold the constitutional values and principles that underpin our democracy.
2. A brief factual background of the petition is as follows; The Respondent issued the Petitioner with an order to maintain status quo on an unspecified land alleged to be disputed land in Kapkatet town dated 14th May, 2024 without any valid rationale. The Respondent's letter ordering the Petitioner to maintain status quo on an unspecified land alleged to be disputed land in Kapkatet town was whimsically decided. Therefore the Respondent's administrative action is a departure from



established constitutional norms, principles, and rule of law. The Petitioner, recognizing this whimsical administrative application by the Respondent therefore sought legal recourse from this Court, vide this petition of a constitutional nature due to violations of both the Fair Administration Act Laws and the provisions of the Constitution of Kenya.

3. The petitioner contends that the respondent's impugned letter addressed to the petitioner dated 14th May, 2024 ordering the petitioner to maintain status quo on an unspecified land alleged to be disputed land in Kapkatet town, represents a blatant violation of the principles of fair administrative action. This contravenes the Constitutional provisions enshrined in Article 47 of the Kenyan Constitution, which explicitly guarantees the right to fair administrative action for every Kenyan citizen.
4. The petitioner faulted the respondent for the act of selectively applying the law which constitutes a clear act of discrimination, which is fundamentally at odds with the principles outlined in article 27 of the Kenyan Constitution. The petitioner argued that article 27 mandates that all individuals are equal before the law and are entitled to equal protection and equal benefit under the law, without discrimination of any kind.
5. The petitioner contends that the Respondent's impugned letter addressed to the Petitioner dated 14th May, 2024 ordering the Petitioner to maintain status quo on an unspecified land alleged to be disputed land in Kapkatet town does not conform to the principles enshrined in Article 10 of the Constitution. The failure to engage the Petitioner in a transparent and inclusive process denies him the opportunity to participate fully in a matter that affects his right to ownership, possession and enjoyment of property and livelihood.
6. David Kiplangat Cheruiyot the petitioner herein filed an affidavit in support of the petition.
7. The 1st respondent filed a preliminary objection dated 14th June, 2024 in response to the instant petition on the following grounds;
 - (i) This Honourable Court is not vested with the power to decide on land matters as this is a preserve of the Environment and Land Court which is a statutory creation by Constitution of Kenya under the provisions of Article 162 (b). The Environment and Land Court is vested with original and unlimited jurisdiction over land matters.
 - (ii) The suit as filed offends the provision of the preamble of the ELC Act which defines the jurisdiction of the Environment and Land Court as " a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes "
 - (iii) The suit as filed further offends the provisions of Sections 4 and 13 (1) of the Environment Land Court Act this which gives the ELC Court the legal mandate to hear any matter related to environment and land including the one filed by the Petitioner herein a position which was bolstered in the case of the ELC (Malindi) in the *Kharisa Kyanggo - Versus- Law Society of Kenya* (2014) eKLR.
 - (iv) Further, in the now famous case of *"Owners of Motor Vessel "Lilian S" - Versus - Caltex Oil (Kenya) Limited* (1989) IKLR dealt with a court, jurisdiction thus: - "Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is



given". It is therefore imperative for the Honourable Court to down its tool by dismissing the incompetent suit with costs to the l" Interested party herein.

8. This Court has considered the instant petition and the preliminary objection and finds that the issue (s) for determination are whether this court has jurisdiction to hear and determine the petition and whether the preliminary objection is merited.
9. On the issue as to whether this court is vested with jurisdiction to hear and determine this petition, the respondent filed a preliminary objection in which they stated that this court is of divested of jurisdiction to hear and determine the petition by dint of the mandatory provisions of Article 162 (2) (b) of the Constitution of Kenya, 2010 as read together with Section 13 of the Environment and Land Court Act. This court, having considered the factual background of the petition, finds that the constitutional petition is founded on a dispute in relation to land administration and management and therefore the issues raised in the petition fall within the ambit of the Environment and Land Court.
10. In compliance with article 162 (2) of the Constitution, Parliament enacted, the Environment and Land Court Act 2011 which provides the jurisdiction of the Environment and Land Act as follows
“Jurisdiction of the Court;
 - 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, chooses in action or other instruments granting any enforceable interests in land; and
 - e) Any other dispute relating to the environment and land.”
11. Jurisdiction is cardinal to every suit, jurisdiction has to be there when the suit is filed and where a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction.
12. In the locus classicus of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989): “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... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”



13. In *Republic v Chengo & 2 others* [2017] KESC 15 (KLR) the Supreme Court observed as follows; “ the *Constitution*, the *Environment and Land Court Act* and the *Employment and Labour Relations Court Act* revealed that a special cadre of courts with sui generis jurisdiction were provided for. Such parity of hierarchical stature did not imply that either the Environment and Land Court or the Employment and Labour Relations Court was the High Court or vice versa. The three were different and autonomous courts and exercised different and distinct jurisdictions. ”
14. In *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling) the Supreme Court held that; “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.”
15. On the issue as to whether the preliminary objection is merited, the answer is in the affirmative. The preliminary objection raises the issue of jurisdiction and it is this court’s finding that it lacks the jurisdiction to entertain the instant petition as the respondent rightly pointed out in the preliminary objection. In *Raytheon Aircraft Credit Corp. & Another v Air Alfaraj Ltd.* CA No. 326 of 1998, the Court of Appeal stated as follows on preliminary objections:

“ A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of a pleading or an application before the court and which, if argued as a preliminary point, may dispose of the suit. Examples clearly are (amongst others):

 - (1) whether or not a court has jurisdiction to try the suit;
 - (2) whether the claim is barred under and by virtue of the *Limitation of Actions Act*;
 - (3) whether or not a condition precedent to refer the dispute to arbitration bars a court from hearing the suit (if proper steps are taken by the applicant);and
 - (4) whether or not parties' choice of law and forum can bar another forum from applying any other law.”
16. It is the finding of this Court that the preliminary objection was properly taken on the issue of jurisdiction.
17. Consequently, it is clear from the foregoing that the claim by the petitioner was filed before a court devoid of jurisdiction. The petition dated 25/06/2024 is hereby ordered struck out. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 30TH DAY OF OCTOBER, 2024

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J. K. SERGON

JUDGE

