



REPUBLIC OF KENYA



Mariba & 4 others (All Suing on their behalf and as the legal Representatives of Michael Mariba Merengo Mwita alias Mariba Merengo (Deceased)) v Cabinet Secretary, Ministry Of Lands and Physical Planning & 3 others (Constitutional Petition 9 of 2021) [2022] KEHC 11424 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CONSTITUTIONAL PETITION 9 OF 2021**

RPV WENDOH, J

MAY 26, 2022

BETWEEN

JACKSON MAGOIGA MARIBA 1ST PETITIONER

LUCAS TABU MARIBA 2ND PETITIONER

JOHN WANKURU MARIBA 3RD PETITIONER

TOBIAS MARENKO MARIBA 4TH PETITIONER

ANTHONY CHACHA MWITA 5TH PETITIONER

**ALL SUING ON THEIR BEHALF AND AS THE LEGAL REPRESENTATIVES
OF MICHAEL MARIBA MERENGO MWITA ALIAS MARIBA MERENGO
(DECEASED)**

AND

**CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 1ST RESPONDENT**

**CABINET SECRETARY, MINISTRY OF FOREIGN AFFAIRS 2ND
RESPONDENT**

HEAD, KENYA INTERNATIONAL BOUNDARIES OFFICE . 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT



RULING

1. This ruling is in respect to the notice of preliminary objection (the “objection”) dated November 18, 2021 filed by the 4th respondent on behalf of the 1st - 3rd respondents, through Learned Counsel Mwise Robi. The respondents preferred the following grounds:-
 - a. The court lacks jurisdiction to hear and determine the petition dated 8/11/2021 since it is a dispute relating to the use and occupation of, and title to land by virtue of the provisions of article 165 (5) of *the Constitution* which provides that “the High Court shall not have jurisdiction in respect of matters (b) falling within the jurisdiction of the courts contemplated in Article 162 (2)”
 - b. That Section 13 of the *Environment and Land Court Act* provides that the Environment and Land Court shall have original and appellate jurisdiction to hear and determine disputes in accordance with Article 162 (2) (b) of *the Constitution* and shall have powers to hear and determine disputes relating to environmental planning and protection, land use, planning, title, tenure, boundaries, rates, valuations, mining, minerals and other natural resources; disputes relating to public, private and community and contracts, choses in action or instruments granting any enforceable interests in land and any other dispute relating to environment and land;
 - c. That section 13 (7) of the *Environmental and Land Court* provides that the Environment and Land Court can issue prerogative orders which provisions if read together with the provisions of article 162 (2) of *the Constitution* ousts the jurisdiction of this Court to hear and determine this case.
2. Further, to the above grounds, the respondents relied on the findings in the decisions of *Joyce Mutindi Muthama & Another vs Josephat Kyololo Wambua & 2 others* (2018) eKLR and *Mohammed Said v County Council of Nandi* (2013) eKLR.
3. In opposing the objection, the petitioners filed a list of authorities dated November 22, 2021 and submissions dated 8/2/2022. I have duly considered the arguments by both parties.
4. A preliminary objection is one which raises a pure point of law which has been pleaded or which arises by clear implications out of pleadings and which when argued, may dispose of the suit. An example is the objection to the jurisdiction of the court or a plea of limitation of time. Nyarangi J in *Owners of the Motor Vessel “Lilian s” vs Caltex Oil (K) Ltd* (1989) KLR held;

“Where the 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 ... Jurisdiction is everything. Without it, a court has no power to make one more step. Where the 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.”
5. In the instant case, the objection is premised on the jurisdiction of this court. The respondent’s contention is that this court is divested of jurisdiction to hear and determine the instant petition by virtue of the provisions of articles 165 (5), 162 (2) (b) of *the Constitution* and section 13 (7) of the *Environment and Land Court Act*.



6. The petitioners' position is that the petition does not raise questions concerning loss of land only but also the alleged unconstitutional exercise between the Governments of Kenya and Tanzania, issues concerning territorial sovereignty of Kenya. The unconstitutionality of Kenya to cede land which allegedly belongs to the petitioners to the territory of Tanzania and violation of the petitioners' right to fair administrative action under article 47 of *the Constitution*. The petitioner relied on the following decisions. *Patrick Musimba vs. National Land Commission and 4 others* (2015) eKLR; *Leisure Lodges Ltd vs. Commissioner of Lands & 767 others* (2016) eKLR .
7. I have considered the body and the prayers in the petition. The petitioners' claim is that sometimes between March and September 2018, the Kenyan Government through the 1st and 2nd respondents embarked on a joint exercise with the Government of Tanzania to freshly demarcate the International Boundary shared between the two countries. In the process of demarcation, it is alleged that it resulted in the unlawful extension of the Tanzanian Border into parts of Kenyan territory that previously formed parts of parcels of land known as Nyabasi/Busonga/531 and Nyabasi/Busonga/719 the suit properties herein. As a result of the above, the petitioners contend that they lost their land prior to compensation as required by law thereby their rights were violated.
8. The jurisdiction of courts or any competent dispute resolution fora, arises from *the Constitution*, Statute law or both. The Supreme Court in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* (2012) eKLR expressed itself as follows:-

"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 on it by law."
9. Article 162 of *the Constitution* provides for systems of courts. It provides that Parliament shall establish courts with the status of the High Court. In particular, article 162 (b) provides that the court shall hear and determine disputes relating to:- "the environment and the use of and occupation of, and title to, land."
10. Article 165 (3) of *the Constitution*, outlines the matters reserved for determination by the High Court. Generally, the High Court has jurisdiction to hear and determine matters concerning interpretation of *the Constitution*, questions on contravention of *the Constitution*, questions of whether anything done under the law is contrary to *the Constitution* of Kenya among others. There is an exception to the rule, under the aforementioned article in sub-section 5. The High Court is precluded from hearing and determining matters concerned with the jurisdiction of the courts contemplated under article 162 (2). The courts therein are the Environment and Land Court (ELC) and the Employment and Labour Relations Court (ELRC).
11. Parliament was required under article 162 (3) of *the Constitution* to determine the jurisdiction of and functions of the ELC and ELRC Courts. In exercise of its legislative powers, it enacted the *Environment and Land Court Act*, 2012. Section 13 of the Act provides for jurisdiction of the court as follows:-
 - (2) In exercise of its jurisdiction under article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

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. (emphasis)

Sub - section 7 provides:-

- (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. (emphasis)

12. The Constitution}} as read together with the ELC Court Act, confers specific jurisdiction to the ELC Court. The jurisdiction is to hear and determine any matters relating to the land and environment. The dispute before this court relates to their alleged parcels of land having been ceded to the Tanzania after demarcation of boundaries. If at all this court was to take it upon itself to hear and determine the alleged infringement of rights, it would not gloss over the pleadings and identify the alleged infringements. Rather, the court would be required to look into the title of the land, call for independent surveyor's report, valuation reports and perhaps make site visits. That in itself touches on the issue of boundaries, ownership of land the instruments which give interests in land and any other disputes arising therefrom which is the jurisdiction of the ELC Court.

13. The petitioners are also seeking declaratory orders and also an order for compensation for their land. These are reliefs which the ELC Court can also grant. According to the Petitioners, this is a matter where both the High Court and ELC have concurrent and/or coordinate jurisdiction and hence it can be heard by this court. They relied on the decision of Patrick Musimba case (supra) where a bench of five (5) judges said as follows:-

"Concurrent and coordinate jurisdictions

65. The above analysis lead us to the conclusion that both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither *the Constitution* nor the ELC Act limit the High Court's jurisdiction in this respects while a closer reading of the ELC Act reveals that the ELC Court's jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in Mugendi expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We



hold that in matters constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.

68. We are satisfied that although the jurisdiction in constitutional matters conferred by Section 13(3) of the ELC Act upon the ELC appears limited to questions on and application for redress of a denial violation or infringement or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42,69 and 70 of *the Constitution*, the section did not purport to confer exclusive jurisdiction in such cases upon the ELC so as to impinge upon the provisions of Article 165(3)(b) & (d) of *the Constitution*. We are also satisfied that it could not have been the intendment of the draftsmen of *the Constitution* that when the court is faced with a mixture of causes of action touching on *the Constitution*, especially on fundamental rights, a separationistic approach is to be adopted by the court and half the claim dispatched to one court as the other half is retained.

14. It was further held in the Supreme Court Case of *Samuel Kamau Macharia & 2 Others* (supra) that:-

"Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court operates 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."

15. The Court of Appeal in *Daniel N. Mugendi vs Kenyatta University & 3 others* (2013) eKLR stated:-

"In the same token, we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamentals rights associated with the two subjects."

16. I find that this case falls more under the ELC jurisdiction than the High Court and the 'Patrick Musimba' case does not really apply. The ELC Court can deal with both the land issue and give declarations for violation of rights while the High Court can only deal with the alleged violation of rights in this petition.

17. I am of the view that the High Court is therefore bereft of jurisdiction in matters falling within the jurisdiction of the courts contemplated under article 165 (2) of *the Constitution*. The ELC Court is a court of equal status as the High Court and it is empowered to grant all the reliefs sought in this petition. The objection, therefore, succeeds.

18. The respondents did not ask this court to make any further orders in regard to the petition. Having found that this court is devoid of jurisdiction, I hereby order that this petition be and is hereby transferred to the ELC Court in Migori for hearing and determination.

Orders accordingly.

DATED, DELIVERED AND SINGED AT MIGORI THIS 26TH DAY OF MAY, 2022.

R. WENDOH

JUDGE



Ruling delivered in presence of;-

Mr. Amuga for the Petitioners

No appearance for the Respondents

Nyauke - Court Assistant

