



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Munguti & 12 others v Kenya National Highways Authority & another
(Petition 11 of 2016) [2022] KEHC 12658 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

PETITION 11 OF 2016

MW MUIGAI, J

AUGUST 3, 2022

BETWEEN

ANTHONY NGILI MUNGUTI 1ST APPLICANT
NICHOLAS MUTHINI MUTISO 2ND APPLICANT
JOSHUA KASINGIU INGOOTI 3RD APPLICANT
MUNANIE MWANZIA 4TH APPLICANT
DOMINIC MUTIE KATOO 5TH APPLICANT
ALICE KYEE KILUNGU 6TH APPLICANT
ALI-HAJI ISA MAWEU MWANZA 7TH APPLICANT
JOHN MUSAU KILONZO 8TH APPLICANT
SYLVESTER MWINZI MWANZA 9TH APPLICANT
MWENDE NDUVA 10TH APPLICANT
ZAINAB SAID 11TH APPLICANT
MONICA NTHAMBI MUSAU 12TH APPLICANT
JACKSON MAKAU MUTUNE 13TH APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT



RULING

1. The Petitioners filed their Petition dated September 9, stating that the Respondents violated their Constitutional Rights & Fundamental Freedoms infringed and occasioned injury as follows;

Right to equal protection of the law;

- (a) By their actions, the Respondent have discriminated against the Petitioners by isolating them and marking their properties for demolition. This action has not been taken in other properties within the shopping/town centres, area or other roads in the County.

Right to information

- (b) The Respondents have failed to disclose to the Petitioners whether they are undertaking compulsory acquisition since the report on the results of the surveys has been withheld by the Respondents.

Right to fair administration action

- (c) The short notice of 30 days is unreasonable and cannot be said to be a fair administration decision. Further, failure to involve the Petitioners is unjust.

Right to property

- (d) The Petitioners acquired the properties lawfully and were issued with title documents. Private property being sacrosanct, the Respondent cannot take away the properties without due process and compensation.

Right to accessible and adequate housing

- (e) Some of the Petitioners have constructed residential houses which have equally been marked for demolition.

2. The Petitioners sought the following reliefs;

- (a) A declaration that the Petitioners rights under Articles 27, 28, 29, 35, 40, 43, 47 and 50 of the Constitution have been violated by the Respondents.
- (b) A declaration that the letters dated April 28, 2015 from the 1st Respondent which were dropped at the Petitioners' properties are unlawful and in violation of the Constitution.
- (c) An order for the Respondents to provide the petitioners with reports on all the survey work undertaken on Kangonde – Embu road in respect of the reserve.
- (d) An order that the Respondents undertake compensation to the petitioners for any acquisition, removal or demolition of the properties of the Petitioners.
- (e) An order of permanent injunction to restrain the Respondent from acquiring, evicting, demolishing or removing any of the Petitioners' properties along the Kangonde – Embu road.
- (f) Costs of the Petition.



Replying Affidavit

3. The 1st Respondent filed a Replying affidavit sworn on May 18, 2017 deposed as follows: -
- 1) That the allegation by the Petitioners that the Respondents have marked their building for the construction of the Kangonde – Embu road is misleading and inaccurate as the said road was constructed in 1986 by KIMCO Construction Company with the road corridor being 60 meters wide.
 - 2) That the 1st Respondent is currently undertaking periodic maintenance of the existing surface of the said road which maintenance does not interfere with the outside corridor as the road is not earmarked for expansion.
 - 3) That in undertaking the said periodic maintenance the structures that were found to be within the 60 meters corridor were marked with an X notice the intention being that the relevant persons would remove the offending structures voluntarily but the Petitioners have failed and/or refused to do so.
 - 4) That it is misleading and insincere for the Applicants to allege that the marked buildings and/or properties are on private land.
 - 5) That the Applicants cannot lay claim to a road reserve and in any event the Applicants have not placed before the Court any ownership documents of the alleged plots.
 - 6) That the Applicants have illegally encroached onto a road reserve and the 1st Respondent only marked structures that were found to be within the road reserve.
 - 7) That the said encroachment by the Applicants is a criminal offence under Section 91 of the [Traffic Act](#), Chapter 403 of the Laws of Kenya.
 - 8) That the 1st Respondent had issued the Applicants with notices as regards their encroachment onto a road reserve.
 - 9) That the said notices were issued on June, 2015 and the Applicant have had a period of close to two years now to voluntarily remove the offending structures.
 - 10) That the Applicants cannot claim to suffer irreparable damages on the basis of their encroachment onto a road reserve.

Further Affidavit

4. The 2nd petitioner herein swore a Further Affidavit on his own behalf and on behalf of his Co-Petitioners on October 2, 2017 deposed as follows: -
- (1) That the fact that the 1st Respondent have issued notices to the Petitioners and subsequently marked their buildings with an “X” meant that the building were due for demolition.
 - (2) That the Kangonde- Embu road is due to expansion/upgrade and as such the 1st Respondents requires more space/road reserve hence the introduction of the 60 Meters road reserve claim by the 1st Respondent.
 - (3) That there are no documents produced to prove that the said road was constructed in the year 1986 showing clear demarcations of the road viz-viz the location of the Petitioners buildings.



- (4) That the Petitioners have been in occupation of the said buildings/properties for as long as since 1969 and the said building have been in existence before and even after the said Kangonde-Embu Road.
- (5) That the Petitioners are living in fear not knowing when the 1st Respondent will come to demolish their houses/buildings as they are claiming the said developments are on a road reserve.

Preliminary Objection

5. The 2nd Respondent herein filed Preliminary dated May 11, 2022 in Court on May 16, 2022 and raised the following preliminary point of law: -
 1. That by dint of Article 162(2)(b) as read with Article 165(5)(b) of the Constitution and Section 13 of the Environment and Land Court Act, 2011, this Court lacks the requisite jurisdiction to hear and determine both the Application and Petition.

2nd Respondent's Submissions to the Preliminary Objection

6. It was submitted that Articles 162(2)(b) CoK 2010, provides for the establishment of the Court with status of the High Court to hear and determine disputes relating to the environment, use and occupation of land and title to land.
7. Article 165(3)(a) CoK 2010, vests the High Court with original and appellate jurisdiction in civil and criminal matters, the said jurisdiction is curtailed under Article 165(5)(b) of the Constitution where the Constitution strictly strips the High Court of Jurisdiction to hear and determine matters falling within the jurisdiction of Article 162(2) of the Constitution.
8. It is trite law that a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. The locus classicus or jurisdiction is the case of Owners Of The Motor Vessel "Lillian S" Vs Caltex Oil (K) Ltd. [1989] KLR 1 where the Court of appeal held as follows:

“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.

The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of Courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part;

“.....a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.
9. Article 165(5) CoK 2010 and Section 13 of the ELC Act is permissive, it is mandatory a rule that must be obeyed or fulfilled substantially as is in the instant petition as the jurisdiction is determined on the basis of pleadings and not on the substantive merits of the case.
10. It was submitted that the Petitioners' claim to the properties identified in their documents marked “A1” can only be properly interrogated by the Environment and Land Court before such a declaration is made.



11. To enable grant of the appropriate reliefs if any, the dispute in this petition calls for scrutiny of the Petitioners' alleged title to the parcels of land in question and the application of the doctrines and parameters applicable in the process of compulsorily acquiring land for public use as enunciated in the *Land Acquisition Act* Cap 295 Laws of Kenya. This Court cannot therefore arrogate itself the jurisdiction to venture into such territory.
12. The Respondent relied on the case of *Republic vs National Land Commission Exparte Ephraim Muriuki Wilson & Others* [2018] eKLR to fortify its position.

Petitioners Written Submissions in opposition to the Preliminary Objection

13. That it is therefore the Petitioners humble submissions that since Article 165 of the *Constitution* mandate this Court to deal with matters Constitutional rights and fundamental freedoms; the Petition herein is before the right Court and that this Court has jurisdiction to hear and determine the Petition.
14. In Nairobi High Court Constitutional Petition No E299 of 20202 – *Offshore Trading Company Limited v Attorney General & 2 Others* [2021] eKLR; Makau J observed;

“In view of the Constitutional issues raised one can rightly aver that this Court has jurisdiction to deal with constitutional issues raised in the Petition but not on land related claims which can also be determined by Environment and Land Court, a Court of equal status to this Court. However, as the High Court cannot determine land related issues raised herein, I find instead of breaking this case into two or hearing the same in piece meal, the best suited Court is the Environment and Land Court, which is the Court, that can deal with the predominant issues raised in the Petition together with the constitutional issues related to the land thereto. I find as the High court cannot determine all issues in Petition, the transfer of the Petition to Environment and Land Court to be most appropriate, so that all issues can be heard and determined together therein.”

15. See also; Mombasa High Court Constitutional Petition No 43 of 2018 *Cyber Access Ltd vs National Land Commission & 3 Others* [2020] eKLR on concurrent jurisdiction in both the High Court & Environment & Land Court.
16. Also, in Nairobi Civil Appeal No.6 of 2012, *Prof. Daniel N Mugendi vs Kenyatta university & 3 others* [2013] eKLR the Court of Appeal, held that where the Courts have concurrent jurisdictions; it would be prudent to transfer rather than strike out the Petition;

Believing as we do that the approach taken by Majanja J is the correct one, and in endeavoring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.”



17. It was further submitted that this Petition is in its last stages of hearing with parties directed to file their written submissions. That the Respondents are yet to file their written submissions and the 2nd Respondent is yet to file a response to the main Petition.
18. Finally the Petitioners submitted that it is in the interests of justice to transfer the matter to the ELC (as opposed to striking out the Petition) so as not to lose on the progress made in the hearing the matter and make it easier for the Petitioners to access justice.

Determination

19. This Court considered pleadings and submissions by parties on record.
20. The issue for determination is the Preliminary Objection raised against the Petition on the jurisdiction of this Court to hear and determine the Petition.
21. The essence of a preliminary objection was given in *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors (1969) EA 696*. At page 700, Law, JA stated that:

“..... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or 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.”
22. The Court has considered the Preliminary Objection on the issue of jurisdiction of this Court to hear and determine the dispute herein and observes as follows;
 - a) The Matter pending for hearing and determination was filed way back in 2016 has pending to date and 5 years later the issue of jurisdiction is now raised. It ought to have been raised at the onset of the filing of the Petition. Jurisdiction is a legal issue that goes to the root of the dispute, a Court cannot legally conduct proceedings without resolution of the question of jurisdiction once it is raised by a party to the proceedings.
 - b) The parties' move the Court on the dispute to be heard and determined and each party and the Court are bound by pleadings filed by the parties. In the instant Petition's content as outlined above, the Petitioners seek legal redress based on alleged Constitutional breach of their rights. These allegations deposed in the Petition clothe this Court with requisite jurisdiction as mandated under Article 165 of CoK 2010 and Article 23 (1) of [CoK 2010](#).
 - c) In the Petition, Petitioners' also claim/allege that the impending eviction and demolition of properties along the Kangonde – Embu road is unlawful as the property is not within the 60 meters road reserve for road expansion. This issue falls within the ambit of the Environment & Land Court and jurisdiction spelt out in Article 165(5) CoK 2010 and Section 13 of the ELC Act.
23. Therefore, the Petition contains Constitutional issues vide Articles 27, 28, 29, 35, 40, 43, 47 and 50 of the [Constitution](#) for determination and at the same time the ownership, title, possession, control and use of the area on Kangonde – Embu road where the Petitioners among other reside is contested. It is clear that both the High Court and ELC Court have concurrent jurisdiction to hear and determine the dispute.



24. In light of Section 1A 1B & 3A of *CPA* & Article 159 CoK that provide;

1A.

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.....

1B.

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and....

3A.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Article 159 (2) CoK 2010

- (b) justice shall not be delayed
- (d) justice shall be administered without undue regard to procedural technicalities; and.....

25. In light of Nairobi Civil Appeal No.6 of 2012, Prof Daniel N. Mugendi vs Kenyatta University & 3 Others *supra*; which mandates that where Courts of equal and concurrent jurisdiction over the matter / dispute filed the matter is transferred to the Court that can consider and determine twin issues and in;

26. Nairobi High Court Constitutional Petition No. E299 of 20202 – Offshore Trading Company Limited –v- Attorney General & 2 Others *supra*, the Trial Court considered that although it had jurisdiction to hear and determine Constitutional issues raised in light of the land claims raised, the hearing before ELC Court was appropriate to finally determine the intertwined issues in the Petition.

26. This Court finds that the justice of the case and in light of the overriding Objective to expeditiously resolve the dispute, the matter shall be transferred to Environment & Land Court on remedies under the Land laws that shall concurrently the issue of contested Constitutional breaches by the Respondents.

Disposition

1. The Preliminary Objection raised on May 11, 2022 is upheld that although the High Court has jurisdiction to hear and determine the Constitutional issues it lacks jurisdiction to hear and determine land issues.



2. The Petition is hereby transferred to the Environment & Land Court forthwith through Deputy Registrar Machakos High Court.
3. Maintenance of *status quo* is granted until further orders by the Environment & Land Court.
4. Costs shall be in the Cause.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 3RD AUGUST 2022.
(VIRTUAL CONFERENCE)**

M W MUIGAI

JUDGE

