



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 193 OF 2018

JOHN NJERU NYAGA.....1ST PETITIONER

MARTIN MUGAMBI NJERU.....2ND PETITIONER

NKUGWE INVESTMENTS LIMITED.....3RD PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

JUDGMENT

1. The three petitioners, John Njeru Nyaga, Martin Mugambi Njeru and Nkungwe Investments Limited, by way of their petition dated 16th May, 2018 pray for:

i. A declaration that the Petitioners' right to fair administrative action was violated by the Commission by failing to give the Petitioners an opportunity to be heard;

ii. A declaration that the Commission did not properly investigate or interrogate the complaints filed before it which adversely mentioned the Petitioners' property;

iii. A declaration that the Petitioners' right to peacefully own, use and enjoy the property has been and continues to be violated by its continued being part of the Report;

iv. An order of permanent injunction stopping and/or restraining the Respondents and/or any government institution from implementing the adverse mentions and/or recommendations contained in and or taking any adverse action on the basis of *The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, particularly in Annexes Volume II, page 718 of the Report or any part thereof in reference to the Petitioners' Property LR No. 209/10722/88 South C;

v. An order of permanent injunction stopping the Respondents and or any government institution from implementing the adverse recommendations contained and/or taking any adverse action on the basis of *The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, particularly in Annexes Volume II, page 718 of the Report or any part thereof in reference to the Petitioners' Property LR No. 209/10722/ 88 South C;

vi. An order of judicial review in the nature of certiorari to bring to this Honourable Court and quash the findings and recommendations and/or any mention and/or reference to the Petitioners' Property LR No. 209/10722/88 South C contained in *The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Ndungu Report) and expunge from all records all references and/or mention of the Petitioners' Property known as LR No. 209/ 10722/ 88 South C;

vii. Costs consequent upon this Petition be borne by the Respondents.

2. The Attorney General is the 1st Respondent and the National Land Commission is the 2nd Respondent.

3. The 1st and 2nd petitioners' case is that in March 2006 they acquired ownership of the 3rd Petitioner company together with all its assets

and liabilities at the time of purchase. One of the assets of the company is the property known as LR No. 209/10722/88 South C (“the property”), which the petitioners later learnt was the subject of inquiry by the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (“Commission”) which later came up with “The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land” popularly known as the Ndung’u Report.

4. The property is adversely mentioned specifically in the section designated as “Complaints from the Public” where it is stated that the property is public land allocated to individuals who sought to change user to residential. It is the petitioners’ case that the adverse reports made by members of the public to the Commission were never interrogated and remain un-interrogated to date.

5. The petitioners assert that their rights under Articles 47 and 48 of the Constitution and Section 3 of the Fair Administrative Action Act, 2015 were infringed, as they were not given any notice of the complaints lodged before the Commission against them, and neither were they given an opportunity to be heard before the release of the Ndung’u Report. It is further alleged that the Commission acted arbitrarily in coming up with the findings which were prejudicial to them. It is thus the petitioners’ averment that the findings and recommendations of the Commission or any mention of the petitioners’ property in the Ndung’u Report is illegal, irrational, actuated with malice and in bad faith, and ought to be expunged.

6. The petitioners further claim that their right to peacefully own and enjoy property which they lawfully acquired as protected under Article 40 of the Constitution was infringed by the actions of the Commission. It is asserted that the adverse mention of the property in the Ndung’u Report has affected the market value of the property by making it unattractive to potential buyers.

7. The 1st Respondent opposed the petition by way of a notice of preliminary objection dated 25th September, 2019. It is the 1st Respondent’s averment that by virtue of Article 162(2)(b) of the Constitution, as read with Section 13 of the Environment and Land Court Act, 2011, this Court lacks jurisdiction to hear and determine matters relating to environment and land. It is asserted that the proper forum for disputes touching on environment and land is the Environment and Land Court.

8. The petitioners filed grounds of opposition dated 11th October, 2018 in response to the 1st Respondent’s notice of preliminary objection. According to the petitioners, the issues raised in the petition fall within the jurisdiction of this Court as donated by Articles 22, 23 and 165 of the Constitution. The petitioners contend that the issues arising from the petition concern the procedural impropriety by the Commission in arriving at its findings and not ownership of land.

9. After careful consideration of the parties’ pleadings and submissions, I find that the issue that should be addressed on priority basis is whether this Court has jurisdiction to hear and determine this petition.

10. The petitioners by way of their written submissions dated 11th October, 2018 submit that the petition is not about ownership of land or any interest in land but fair administrative action. The petitioners complain that they were not notified of the complaints raised before the Commission regarding the property, and they were not given an opportunity to be heard before the Commission compiled its report. The assertion that this Court has jurisdiction to hear this matter is supported by reliance on several cases including **Joseph Kaara Henry Mwethaga v Chris M. Gaturu t/a Crima Enterprises & 3 others [2017] eKLR**; **Habo Agencies Limited v National Land Commission & 3 others [2018] eKLR**; and **Republic v Truth, Justice and Reconciliation Commission & another Ex-Parte Beth Wambui Mugo [2016] eKLR**.

11. The 2nd Respondent filed written submissions dated 22nd November, 2018 in support of the 1st Respondent’s preliminary objection arguing that the issues herein fall within the provisions of Article 162 of the Constitution as read with section 13 of the Environment and Land Act. It is the 2nd Respondent’s argument that the case is about use and title to the suit land as the petitioners claim title to it while the finding in the Ndung’u Report is that the suit land is for public use. It is thus the 2nd Respondent’s contention that the matter ought to have been filed in the Environment and Land Court.

12. The 2nd Respondent further submits that Article 165(5)(b) is clear that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution. The cases of **Republic v National Land Commission Ex-parte Ephraim Muriuki Wilson & others [2018] eKLR**; and **Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd [1989] eKLR** were cited as buttressing this point.

13. Article 162(2) of the Constitution establishes a court with the status of the High Court which is empowered to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Consequent thereto, the National Assembly passed the Environment and Land Court Act, 2011 (“the Act”) which sets out the jurisdiction of the Environment and Land Court as follows:

13. 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, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

14. The jurisdiction of the Environment and Land Court has been interpreted in several decisions including that of **Republic v National Land Commission Ex-Parte Ephraim Muriuki Wilson & others [2018] eKLR** where it was posited that:

“25. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2)(b) of the Constitution and Section 13 of the Act. In this regard, my view is that the intention in the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction.

26. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters which fall within the ambit of the Environment and Land Court. This is clearly provided for under Section 13 (3) of the Act. Sub-section 7 (b) above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Judicial Review application challenging the decision of the Respondent revoking its title to land and grant the prerogative reliefs sought.

30. A High court may not determine matters falling squarely under the jurisdiction of the ‘status courts’ namely the Employment and Labour Relations Court (read Industrial Court) and the Land and Environment Court. But even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of this case. It falls squarely in the forbidden sphere of the specialized courts...”

15. In the above case, the case was filed before the Judicial Review Division of the High Court even though the dispute involved trust land. The Court ultimately determined that:

“32. While the Constitution guarantees right to access courts, the same Constitution neither operates in a vacuum nor does it automatically oust other constitutional and statutory provisions brought to life by the legislative arm of government such as the Environment and Land Court Act. As such, where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction will be inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the Constitution. Consequently, I find and hold that the jurisdiction of this Court in this matter has been improperly invoked. The *ex parte* applicant ought to have filed this Judicial Review application in the Environment and Land Court.”

16. I also find the decision in **Pamoja Women Development Programme & 3 others v Jackson Kihumbu Wangombe & another [2016] eKLR** relevant to this matter. In that case it was held that:

“16. I agree there is *no substantive concurrent jurisdiction* shared between the High Court of Kenya and the two Article 162(2) Equal Status Courts. Indeed our Constitution advertently aimed to isolate the jurisdiction of the Equal Status Courts and prohibit the High Court from exercising jurisdiction in areas of specialisation of these Courts. However, I believe the constitutional architecture provides for *incidental concurrent jurisdiction*. For example, there is no longer any serious questions that the two Equal Status Courts have case-wide jurisdiction to hear and determine any additional other issues raised or pleaded in a case which is primarily on their area of specialisation even if those issues normally fall outside their jurisdiction. This is the reason Equal Status Courts can deal with any issues raised respecting the violation of the Bill of Rights for example.

17. In my view, this incidental concurrent jurisdiction includes the ability of both the High Court and the Equal Status Courts to deal with certain procedural or administrative questions that present quasi-judicial issues where the Court in question is requested to act in the interests of justice or due administration of justice. This is where I would locate the ability of any of the three superior courts of cognate jurisdiction to transfer to the counterpart superior court any case filed before it that would more appropriately be adjudicated in the cognate superior court. Under this incidental concurrent jurisdiction, the High Court was able, for example, to transfer certain matters to the Environment and Land Court and the Environment and Labour Relations Court initially.”

17. The complaints at the centre of the petition herein are against the findings of the Commission as captured in the Ndungu Report. The petitioners are essentially objecting to the allegations made concerning the property LR No. 209/10722/88 South C, and that the findings therein have infringed upon their ownership, enjoyment and use of the land. This has thus thrust the matter into the specialised jurisdiction of the Environment and Land Court as envisaged under Section 13 of the Act. The decisions cited above confirm the obvious fact that the Environment and Land Court is a specialised Court with the requisite jurisdiction to hear and determine matters concerning the rights and fundamental freedoms under the Bill of Rights which arise from land disputes. Therefore, the Environment and Land Court has the jurisdiction to determine whether the petitioners’ rights under Articles 40 and 47 of the Constitution have been infringed upon in regard to the listing of their property in the Ndungu Report.

18. I concur with the decisions above, as well as the position of the respondents, that the issues raised herein would be better determined by the Environment and Land Court which has the advantage of specialised expertise in matters relating to land. In light of this finding, I hold that I have no jurisdiction to proceed to determine any other issue raised in this petition.

19. Having arrived at the conclusion that I have no jurisdiction to hear and determine this matter, the correct order to issue, as per the Court of Appeal decision in **Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour & Travel [2016] eKLR** is to strike out this petition.

20. The petition is therefore struck out and the parties are directed to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MAY, 2021.

W. Korir,

Judge of the High Court