



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO E017 OF 2021

IN THE MATTER OF: ARTICLES 1,2(5),2(6),10,19,21,22,23,24,25,28,35,47,67,159 AND 165 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF: VIOLATION OF ARTICLES 10, 35,47 AND 67 OF THE CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF: IRREGULAR ALIENATION OF PUBLIC LAND BEING PARCELS OF LAND KNOWN AS PLOT NOS MI/XVII/985, MI/XVII/625 AND MI/XVII/981

BETWEEN

- SAID ALI BIDU.....1ST PETITIONER
- STEPHEN BAYA MWANYULE.....2ND PETITIONER
- MUTUA MUTIA.....3RD PETITIONER
- JOHN SAMUEL TSUMA.....4TH PETITIONER
- MOHAMED MZEE RUBEYA.....5TH PETITIONER
- GODFREY KIMANI MBURU.....6TH PETITIONER

VERSUS

- TWALIB ABDALLA MBARAK, CHIEF EXECUTIVE OFFICER,
- ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT
- ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT
- GERSHOM OTACHI, CHAIRMAN
- NATIONAL LAND COMMISSION.....3RD RESPONDENT
- NATIONAL LAND COMMISSION.....4TH RESPONDENT

AND

- MOMBASA COUNTY GOVERNMENT.....1ST INTERESTED PARTY
- BUXTON POINT APARTMENTS LIMITED.....2ND INTERESTED PARTY

RULING

The Petition and Application

1. This ruling is subject of the Petition dated 10th March 2021. The Petitioners are tenants residing at Buxton Estate within Mombasa County having leased the houses therein from the 1st Interested Party. Through a project dubbed urban renewal and re-development of old estates within Mombasa County by the 2nd Interested Party in partnership with the 1st Interested Party, 520 housing units in the said Buxton Estate are to be demolished for purposes of construction of new apartments. It is the Petitioners' case that the project is a violation of their constitutional rights as the same is founded on illegalities.

2. The Petitioners allege that the intended construction of the new apartments has not been authorized by the 3rd and 4th Respondents as the land upon which Buxton Estate stands is alienated land and hence the use of the same without authorization is null and void for want of legality. The Petitioners further aver that the 2nd to 4th Respondents have failed to protect public assets from being corruptly alienated and have filed the Petition before court to ensure that their rights are not degraded. The Petitioners pray for the following orders;

a. That all properties known as parcel No's MI/XVII/985, MI/XVII/625 and MI/XVII/981 are portions of land which belong to the government of the Republic of Kenya, though leased to the county government of Mombasa are thereby subject to the control and management of the National Land Commission. Consequently, that the intended takeover of the said lands by the 2nd interested party for purposes of executing tender BID NO; CGM/PRO/T/002/2019 is null and void for want of authorization by the national land commission.

b. That the Respondents have acted contrary to the constitutional provisions in their failure to deal with the issues raised in the Petitioners Advocates letter dated 23rd December 2020 and failure to participate in Mombasa ELC petition no 28 of 2020 Justus Chai Mbaru & 12 Others vs County Government of Mombasa and 21 others respectively.

c. That a declaration be made that the 1st and 3rd respondents are not fit to hold public office

d. That a declaration be made that the 2nd and 4th respondents failed to discharge their constitutional and statutory duties properly in that they did not protect the ongoing illegal take over by the 2nd interested party of the three suits properties known as plot No's MI/XVII/985, MI/XVII/625 and MI/XVII/981 despite their having been aware of such an illegal alienation of the said public land.

e. The petitioners also pray for general damages to compensate them for the mental stress, anguish and trauma that they have undergone on account of the inhumane manner that they have suffered through their violence eviction from the said properties all because the Respondents completely failed to discharge their powers properly.

f. That an order be made maintaining the existing status quo on all those parcels of land known as plot nos MI/XVII/985, MI/XVII/625 and MI/XVII/981 so that further demolition works, construction works or any other works carried out on all those parties of land known as plot no's MI/XVII/985, MI/XVII/625 and MI/XVII/981.

g. The court do issue such orders and give directions as it may deem fit to meet the ends of justice.

h. Costs of the petition be provided for.

3. The Petitioners further filed a notice of motion application of even date praying for orders similar to those in the Petition. The petition is supported by an affidavit sworn by Said Ali Bidu sworn on 10th March 2021.

Preliminary Objection

4. The petition and motion were filed in court on 11th March 2021. The Motion was under certificate of urgency and upon its presentation before court it was ordered that the same be served upon the parties involved and was set for hearing on 18th March 2021. However, the 2nd Interested Party objected to jurisdiction vide grounds of opposition dated 16th March 2021 inter-alia as follows;

a. The Constitutional & Judicial Review Division of the High Court, where this petition was filed on 11th March 2021, has no jurisdiction to hear, entertain or determine this petition.

b. That the Petition before court is Res Judicata and similar to Petition

Number E017 of 2012 which is a previously determined petition involving the same properties, same parties and seeking for the same reliefs as this petition.

It is the said Preliminary Objection that is the subject of this ruling.

Petitioners' Case

5. The Petitioners are residents of several houses forming part of the larger Buxton Estate within Mombasa County. The said Estate is upon

14 acres of public land that have been leased to the 1st Interested Party by the Government of Kenya.

6. The Petitioners filed the instant petition on 10th March 2021 challenging the 2nd Interested party's project which seeks to demolish 520 housing units forming part of Buxtan Estate and which stand on the plots **MI/XVII/985, MI/XVII/625 and MI/XVII/981** listed in the petition.

7. The Petitioners aver that the Interested Parties actions violate their rights of occupation of the said plots and further that the 3rd and 4th Respondents who are vested with the powers to manage public land have not authorized the alienation of the said land for purposes of the project by the 2nd Interested Party.

8. The Petitioners allege that the 1st and 2nd Respondents have failed to manage, address and supervise issues with regard to the alienation of the suit land herein and eviction of the Petitioners and hence their integrity and leadership particularly in their scope as state officers is questionable.

9. The Petitioners further allege that the omissions by the Respondents have led the Interested Parties into committing illegalities that translate to violation of the Petitioners' fundamental rights; that the same has also resulted in a number of violation of constitutional principles by the Respondents as envisaged under Article 67(2) (a) of the Constitution, Section 5(2) (a) of the National Land Commission Act, the unlawful use of the Public Private Partnership Act of 2013 and the failure to uphold national values and principles of fair administrative action.

10. It was the Petitioners contention that they had a right to file this Petition under Articles 19,20,21,22,23,24 and 25 of the Constitution of Kenya 2010.

Respondents' Case

11. The 1st and 2nd Respondents filed a notice of appointment on 16th March 2021, and a Notice of Preliminary Objection dated 17th March 2021 seeking for the prayer that the 1st Respondent be struck from this petition and that the petition be dismissed altogether.

12. The 3rd and 4th Respondents did not enter appearance and have filed nothing towards this petition and the grounds of opposition subject of this ruling despite being served.

Interested Parties' Case

13. It is the 1st interested party's case that the petition before court is res judicata and further that it does not disclose any violation of the Petitioners' constitutional rights to engage the jurisdiction of this court.

14. The 1st Interested Party states that there has been no mass eviction of the tenants of Buxtan estate. Further, that pursuant to the relocation of the tenants, all parties involved including the tenants by themselves executed tenancy termination agreements and upon voluntary exit they collected ex gratia relocation payments.

15. It is deposed that between 4th March -16th March 2021 all the tenants had received their ex gratia payment and even booked the new apartments due for construction. The 1st Interested Party prayed for the dismissal of the Petition.

16. The 2nd Interested Party's case is that this court has no jurisdiction to handle the petition before it and has filed grounds of opposition in response to the petition urging that the prayers sought are in contravention of Articles 165(3) (b) of the Constitution and Section 13 of the Environment and Land Court Act amongst other provisions of the law. The objection on jurisdiction is the subject of this ruling.

Submissions

Petitioners Submissions

17. The Petitioners are represented by senior counsel Dr. Khaminwa and Mr. Gikandi learned counsel. In his oral submissions before court on 15th April 2021 Dr. Khaminwa stated that ethical issues have been raised in the petition with regard to integrity and the same were not issues to be resolved in the Mombasa ELC Constitutional Petition No. 28 of 2020 – **Justus Chai Mbaru & 12 others v County Government of Mombasa and 21 others**.

18. Mr. Gikandi in his written submissions dated 14th April 2021 submitted that the main issue for determination was whether or not this Court had the jurisdiction to deal with the petition herein. Counsel submitted that this Court's jurisdiction flowed from Article 165 of the Constitution; that the present petition raised issues of accountability, transparency, credibility and governance of public office as per the provisions of Article 10 of the Constitution.

19. Mr. Gikandi submitted that the 2nd issue before court was about the conduct and integrity of public officers namely the 1st and 2nd Respondents who have failed to act in accordance to the provisions of Article 10 of the Constitution with regard to the process of alienation of plots **MI/XVII/985, MI/XVII/625 and MI/XVII/981**.

20. Mr. Gikandi contended that both the High Court and the ELC may have concurrent jurisdiction to determine the issues raised in the

Petition. Reliance was placed on the **Habo Agencies Ltd v National Land Commission & Others case and in Leisure Lodges Limited v Commissioner of Lands & 767 Others [2016] eKLR**. Counsel submitted that it was upon a party to make a choice on where to file their petition and the Respondents and Interested Parties herein had no right to determine that on behalf of the Petitioners. Counsel cited **Nancy Mwangi T/A Worthlin Marketers v Airtel Network(K) Ltd (formerly Celtel Kenya Limited) & 2 Others [2014]**.

1st Interested Party's Submissions

21. **Mr. Amoko** learned counsel for the 1st Interested Party submitted that this Court lacks the jurisdiction to entertain these proceedings as the same raises matters within exclusive jurisdiction of the ELC. Relying on the Supreme Court and Court of Appeal decisions in **Republic v Karisa Chengo & 2 Others [2017]** and **Law Society Of Kenya Nairobi Branch v Malindi Law Society & 6 Others [2017] Eklr**, counsel submitted that by dint of Article 165(5)(b) of the Constitution and the cited authorities, this court has no jurisdiction over matters falling within the jurisdiction of ELC.

22. Counsel contended that in instituting this Petition, the Petitioners are outrightly abusing the court process. Counsel cited **Parag Bhabwanjighai Savani v Jitu Tribhovanshai Savani & 2 Others [2017] eKLR**, stating that it is not permissible for the High Court to sit on appeal from a decision of the ELC of equal status; that the issues raised herein were already determined in the aforesaid Mombasa ELC Petition No. 28 of 2020. Counsel submitted that the petition should be struck out with costs to the Respondents and Interested Parties on indemnity basis.

1st and 2nd Respondents Submissions

23. **Mr. Makori** learned counsel for the 1st and 2nd Respondents in his written submissions dated 6th April 2021 urged that the issue of leadership and integrity is secondary to the main issue in the Petition which is the use, ownership, possession, development and alienation of land. Counsel stated that the cases cited by the Petitioners being the Habo Agencies case and the Leisure Lodge Vs Commissioner of Lands & Others were distinguishable from the present case; that in this case the aforesaid ELC had rendered its judgement. Counsel submitted that the petition be transferred to the ELC for hearing and determination.

24. The 2nd Interested Party's submissions were filed on 19th March 2021. It was stated therein that this Court as established under Article 165 of the Constitution has no jurisdiction to entertain this Petition; that the prayers sought by the Petitioners in the notice of motion seek preservation of the three parcels of land in terms of no demolition over the buildings thereon, and none commencement of any construction works on that land.

25. It is the 2nd Interested Party's submission that the issues raised in the petition are matters relating to land and squarely fall for determination under the Environment and Land Court as mandated by Article 162(2) (b) of the constitution and actualized by Section 13 of the Land Act. That the matters which the Petitioners were keen on litigating in court were in relation to public land whose definition was a preserve of the Environment and Land Court. Further, that apart from the Environment and Land Court Act, the constitution prohibits this Court from hearing any matters dealing with land. Reference was made to Article 165(3) and Article 162(2) of the Constitution and the case of **Prof Daniel Mugendi v Kenyatta University 2013 eKLR**. A prayer was made for this petition to be transferred to the Environment and Land Court for hearing and determination.

The Determination

26. I have carefully considered the Petition before court, the Preliminary Objection, on jurisdiction, the Grounds of Opposition and the submissions of Counsels in this matter; the same curves out the issue for determination as being;

Whether or not this court has the requisite jurisdiction to entertain and determine the petition before it.

27. Jurisdiction is the authority of a court of law to hear and determine matters placed before it for adjudication. The same can be conferred by the constitution or by statute or both as was stated by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**: -

“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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

28. It is imperative that a court exercises its jurisdiction based on the provisions of the Constitution and that of the relevant statutes or both, but cannot in any manner whatsoever deal with a matter in which it has no apparent jurisdiction. Jurisdiction is central in each and every litigation as was clearly stipulated in the famous Owners of Motor Vessel Lilian ‘S’ Case, that without jurisdiction a court must down its tools.

29. This Court’s jurisdiction is donated by the provisions of Article 165(3) of the constitution as follows:

“165(3) Subject to clause (5), the High Court shall have—

(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;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.”

30. A look at the prayers sought in the Petition reveals that some issues in contention relate to violation of the provisions of the Constitution. Issues have been raised on the Respondents failure to dispense their duties as bearers of their various offices as outlined under Article 10 of the Constitution and on their integrity as outlined under Article 75 of the Constitution mainly on their conduct as state officers. The issues raised are not purely under the purview of the ELC as raised by the 2nd Interested Party in the grounds of opposition and in the Respondents submissions. However, this Court is well aware of the fact that both the High Court and the Environment and Land Court have concurrent jurisdiction in granting reliefs in a Constitutional Petition. The same position is affirmed by the holding in **Nairobi High Court Petition No 613 of 2014 Patrick Musimba v National Land Commission** and others where it was stated:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separatist view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

The court further stated 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 or the ELC Act limit the High Court’s jurisdiction in this respect 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 of constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.”

31. In the matter herein some of the issues raised do not touch on the environment and land. They touch on the alleged violation of the Petitioners’ rights to quality services by state officers and their respective offices and this court is clothed with the jurisdiction to determine whether a violation of the same did occur. In doing this, this Court must have due regard to particular circumstances of this petition. Where part of proceedings have taken place in the Environment and Land Court, and that court has made certain findings which have impact on these proceedings, this Court has the duty to act cautiously, and be deliberate in its decision so that it does not appear that this Court is acting in a manner to appear to review the decisions made in the Environment and Land Court. This Petition is the direct offspring of the Environment and Land Court Petition No. 28 of 2020 matter in relation to Plots MI/XVII/625 and MI/XVII/981 where the said court has made a judgment. Now, the Petitioners aver that the Interested Parties’ actions violate their rights of occupation of the said plots and that the 3rd and 4th Respondents have failed to properly manage public land and should therefore be punished. Further, that the 1st and 2nd Respondents have failed to manage, address and supervise issues with regard to the alienation of the suit land herein and eviction of the Petitioners and hence their integrity and leadership as state officers are questionable. In my view, the allegations against the 1st and 2nd Respondents and the Interested Parties are matters which directly emerge from the aforesaid Environment and Land Court, which is already determined. In any event this Petition still raises issues of occupation of land; and the alleged wrongful alienation of the suit property. The issues of integrity and leadership alleged herein are so directly connected, and nexed to the ELC Petition No. 28 of 2020. The Environment and Land Court has the jurisdiction to try and determine such constitutional issues which naturally emerge during proceedings in that Court. If these issues were not raised during the hearing in the ELC, then they can be raised afresh in that court. What this Court must avoid by all means is possibility to appear to preside over appeal on the Environment and Land Court matter. Furthermore, the prayers sought by the Petitioners in the Notice of Motion herein seeks preservation of the three parcels of land until the Petition is determined. If this Court allows this Petition to be heard in this Court, it will be opening afresh for hearing issues already determined by the Environment and Land Court in Mombasa ELC Petition No. 28 of 2020, and that is not acceptable.

32. For the foregoing reasons, I find and hold that the objection to jurisdiction herein has merit. The result is that this Petition is hereby transferred to the Environment and Land Court for hearing and determination.

Dated, Signed and Delivered at Mombasa this 23rd day of June, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Dr. Khaminwa for Petitioners

Mr. Gikandi for Petitioners

Mr. Makori for 1st, 2nd Respondents

Mr. Amoko for 1st Interested Party

Ms. Peris Court Assistant