



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 141 OF 2019

IN THE MATTER OF ARTICLES 3, 36(1) 7 (2), 39(1), 40 AND

CHAPTER 4 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT, CAP 286 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF CLAIMS OF CONTRAVENTION FO THE
CONSTITUTION AND VIOLATION OF FUNDAMENTAL RIGHTS**

AND FREEDOMS UNDER ARTICLE 36(1) AND (2), 39, AND 40

OF THE CONSTITUTION OF KENYA

BETWEEN

KADIRO JILLO HIRBO.....PETITIONER

VERSUS

DIANA MURUNGI AND VINCENT SIMBA

(being sued on their own behalf and on behalf of

FEDHA ESTATE RESIDENTS ASSOCIATION.....RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....INTERESTED PARTY

RULING

APPLICANT'S APPLICATION

1. The Petitioner through a Petition dated 4th April 2019 seek the following reliefs:-

a) A declaration that your Petitioner's rights as guaranteed under Articles 36, 39 and 40 of the Constitution have been breached and/or violated by the Respondent's illegal, malicious, frivolous and vexatious objections to the approval and building plans on L.R. No. 97/1637 Fedha Estate – Phase 2 Nairobi.

b) A permanent injunction restraining the Respondent from interfering with the Petitioner's development non property L.R. no.97/1637 Fedha Estate-Phase 2 Nairobi.

c) A declaration that the Respondent has breached and violated Article 3 and Article 22 of the Constitution of Kenya by its interference on the right to property, freedom of association and movement of the Petitioner.

d) Costs.

PRELIMINARY OBJECTION

2. The Respondent through a Notice of Preliminary Objection, object to the Petition on the following grounds:-

i) The Petition as drawn raises issues over the use of land which jurisdiction is reserved for the Environment and Land Court and therefore this Honorable Court lacks jurisdiction.

ii) That the Petition is incompetent, fatally defective and an abuse of the court process as it fails to identify with sufficient particularity which fundamental rights and freedoms of the Petitioner have been violated, how they have been violated and by whom.

ANALYSIS AND DETERMINATION

3. I have carefully considered the Petition and the Preliminary Objection and from the same arises single issue for determination being thus:-

i) Whether the Petition as drawn raises issues over the issue of land, which jurisdiction is reserved for the Environment and Land Court and therefore this Court lacks jurisdiction?

4. The Respondent submission is that the claim by the Petitioner is hinged on the use and occupation of L.R. No. 97/1637 Fedha Estate – Phase 2 Nairobi.

5. The Petitioner to the contrary urge the matter before the Court is not about land use but court upholding the Petitioner's right to property, freedom of movement and right of Association as protected under **Article 40 of the Constitution**. The Petitioner contend the right to use the land crystalized with the issuance of the approvals and licenses to the Petitioner to construct on his property. It is Petitioner's averment that the Court is not being called to demine whether that right has since accrued or not but whether the violation of that right can go on without the court declaring so. The Petitioner contend then, that is not what the court is being asked to determine.

6. The Petitioner aver that he is seeking that his right be upheld and declared that once this right has crystalized the same cannot be restricted otherwise it becomes an affront to the constitution, urging that there is no limitation whatsoever on the approvals given to the Petitioner either by law or any proceedings initiated by the respondent in any court or tribunal and hence the Petitioner is rightly before this court to have his rights upheld.

7. The Petitioner state that as a property owner he has a right to access his property; in the absence of any restriction/limitation by law, as envisaged under **Article 10 of the Constitution**; in the process for the use he is entitled to such Protection. It is further contended that the unlawful limitation and restriction to the Petitioner to freely move and enjoy the use and access to his property has caused the Petitioner to file this Petition so that the Court can uphold such crystallized right of the Petitioner. The Petitioner over that contends the Petitioner's property is one of the activities done in the enjoyment of the right to property, and urges the same ought to be upheld unless there is lawful restriction of the same.

8. In order to determine the nature of the Petitioner's claim, this court proceeded to peruse the prayers in the Petition herein, which reveal in no uncertain terms that the dispute by the Petitioner herein arises from his need to proceed with his construction without interference from the Respondent, notwithstanding the legality of the construction.

9. The Petitioner claim that his rights as guaranteed under **Article 36, 39 and 40 of the Constitution** have been breached and/or violated by the Respondent's purported illegal, malicious, frivolous and vexatious objection to approval and building plans on L.R. No.97/1637 Fedha Estate – Phase 2 Nairobi and further seeks a permanent injunction against the Respondent from interfering with the Petitioner's development on property L. R. No. 97/1637 Fedha Estate – Phase 2 Nairobi.

10. The key gravamen is that the Respondent has objected to the Petitioner proceeding with his construction because it flouts the Zoning regulations which restrict the number of floors as well as limit construction to a single dwelling unit. It is clear therefore that every other claim flows from this point. It is Respondent's contention that the matter falls squarely within the jurisdiction of the Environment and land Court and therefore this Court has no jurisdiction to hear and determine this matter.

11. **Article 165 (3) of the Constitution** confers the High Court with jurisdiction and provides thus:-

“165. High Court

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

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(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”

12. **Article 165(3) of the Constitution** is clear that the High Court has jurisdiction to determine question as to whether a right on fundamental freedoms have been infringed. However it is instructive to note that the jurisdiction provided under **Article 165(3) of the Constitution** is subject to **Article 165(5) of the Constitution** which clearly provides as follows:-

“165. High Court

(5) The High Court shall not have jurisdiction in respect of matters—

a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

13. It is therefore clear that pursuant to **Article 162(2) of the Constitution** the Parliament proceeded to enact the **Environment and Land Court Act 2011** which clearly at **Section 13** confers the Environment and Land Court with jurisdiction as follows under **Section 13(2) of the Act**.

“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 environment 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 environment and land.”

14. Clear perusal of the instant petition reveals that it relates to the land use and planning in respect of L. R. No. 97/1637 Fedha Estates - Phase 2 Nairobi. The Petition is not dealing with the right to access the property, freedom of movement and right to association as alluded to by the Petitioner. The jurisdiction to hear and determine the issue of land use and planning of L. R. No. 97/1637 Fedha Estate – Phase 2 Nairobi is specifically reserved for the Environment and Land Court as provided for by the Constitution and relevant statute. I find that the issues raised by the Petitioner, related to alleged breach and/or violation of **Articles 3, 22, 36 and 39 of the Constitution** to be ancillary issues to the main dispute which would be captured under **Article 40 of the Constitution**, the protection of right to property and would therefore fall within the jurisdiction of Environment and Land Court and not with this Court.

15. The Respondent relies on the Supreme Court of Kenya decision in the case of **Republic v. Karisa Chengo & 2 others, Petition No. 5 of**

2015 where it was stated that:-

“...we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdiction of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdiction. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.” (Emphasis added)

16. Similarly, the Environment Court in *ELC Case Number 63 of 2017 Christopher Ngusu Mulwa & 28 others V. The County Government of Kitui & Another* held as follows:-

“Consequently, and considering that a dispute relating to land and or the environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters. The two courts cannot have concurrent jurisdiction in such matters because they are too distinct courts.”

17. Further the Court of Appeal in the case of *Prof. Daniel N. Mugendi Vs. Kenyatta University & 3 others, Civil Appeal No. 6 of 2012*, stated as follows:-

“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 matter, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.” (Emphasis added)

18. From the above Court decisions, it is my view that a dispute related to land can well be commenced by way of a Constitutional Petition; laying down even claims of Constitutional violations or breach. It should be noted that, the fact that the Petitioner may be seeking Constitutional reliefs for alleged breach or violation, in itself cannot divest the Environment and Land Court of jurisdiction nor can such prayers grant High Court jurisdiction which the Constitution and Statute do not grant. The matter remains inspite of constitutional prayers in the Petition, a matter for Environment & Land Court, which while dealing with disputes relating to environment and land can deal with claims of breaches of fundamental rights associated with the land related issues.

19. In the case of *Josiah M. R. Kariuki v. Simon Gichangi Kabugi H.C Application No. 15 of 2012*, Hon. Justice Jarius Ngaah held thus:-

“Consequently of filing a suit in a court deficient of jurisdiction to determine it is on a novel question; it has arisen in several cases before and the consistent answer has always been that an order to transfer a suit from one court to another cannot be made unless the suit has been filed in a court with competent jurisdiction to determine it in the first place...”

The learned judge went on to state;

“...The guiding principle on jurisdiction still remains that a suit filed in a court without jurisdiction is a nullity ab initio and for that very reason it cannot be transferred to a court of competent jurisdiction because there is, in effect, nothing to transfer in the first place. It may be argued that this is a technicality which the court can properly ignore in the spirit of article 159(2)(d) of the Constitution which implores the courts to administer justice without undue regard to procedural technicalities. I am, however, hesitant to accept the argument whether or not a court is seized of jurisdiction to dispose of any particular matter is a question of technicality, procedural or otherwise. In my humble view, it is a question that goes to the very core of the court’s authority; that is, it either has the authority to determine the suit before it or it does not. Where the latter is the case, the court cannot take any further step purporting to sanitize what in effect is a non-existent suit; all it can do is to declare it to be what it is-a nullity.

This principle of law on transfer of suits for want of jurisdiction is not restricted to suits filed under the Civil Procedure Act and the rules made thereunder alone; it is a universal principle that straddles all manner of suits, disputes or such other matters brought before court, regardless of the form they take, where the question of the court’s jurisdiction to determine them is bound to arise.”

20. From the conclusion that I have come to, I am satisfied that the Respondents preliminary objection dated 18th April 2019 is meritorious. The same is accordingly upheld, and I proceed to make the following orders:-

- a) This Honourable Court lacks jurisdiction to hear and determine the instant Petition.***
- b) The petition is accordingly struck out and dismissed with costs to the Respondent.***

Dated, Signed and Delivered at Nairobi on this 19th day of November, 2020.

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J. A. MAKAU

JUDGE