



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 202 OF 2017

IN THE MATTER OF: ARTICLES 22, 28, 47, 50,157 & 165(3) OF THE CONSTITUTION

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER ARTICLE 22,28,47, OF THE CONSTITUTION REGARDING RIGHT TO FAIR ADMINISTRATIVE ACTION AND INHUMAN TREATMENT RELATING TO THE PETITION BEING PLACED IN DOUBLE JEOPARDY.

BETWEEN

JULIUS KEA MBAWAPETITIONER

-VERSUS-

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF SURVEY.....2ND RESPONDENT

CHUNKY LIMITED.....1ST INTERESTED

PARTY CURLY WURLY LIMITED.....2ND INTERESTED PARTY

KAHIA TRANSPORTERS LIMITED.....3RD INTERESTED PARTY

TRADE LEAD LIMITED.....4TH INTERESTED PARTY

NATIONAL LAND COMMISSION.....5TH INTERESTED PARTY

JUDICIAL SERVICE COMMISSION6TH INTERESTED PARTY

RULING

The Preliminary Objection

1. By Petition dated 26th July, 2018 the petitioner sought orders that:

a) A declaration that the Applicants rights have been violated

by failure of the respondents to release their requisite reports necessary to determine the issues herein.

b) An order be issued compelling the 1st Respondent to release the report of his investigations and the 2nd Respondent to give a report on the Deed plan Registrations carried out in relation to ownership dispute for plot No. 909/VI/MN out of complaint made by the Interested Party.

c) *An order staying the proceeding in ELC NO. 405 of 2017 KAHIA TRANSPORTERS LIMITED and TRADE LEAD LIMITED versus NATIONAL LAND COMMISSION.*

d) *Any further relief that the court may deem fit to grant for a just determination of the issue raised herein.*

2. By a **Preliminary Objection** dated **3rd June, 2020** the 3rd and 4th Interested Parties herein object to the jurisdiction of this Court over the subject matter on the following grounds:

a) *The High Court lacks jurisdiction to hear and determine or transfer the matter by didn't of Article 162(2), (b) as read together with Article 165(5) of the Constitution.*

b) *By dint of Article (b) of the Constitution, Environment, and Land Court Act, Land Registration Act and the Land Act only Environment and Land Court are vested with the jurisdiction to hear and determine the matter.*

c) *By dint of the Court of Appeals holding in the Owners of Motor Vessel "Lillian 'S' v Caltex Oil [Kenya] 1989 eKLR, Equity Bank Limited v Bruce Mutie Mutuku T/a Diani Tour and Travel[2016], Karisa Chengo, Jefferson Kalama Kenga & Kitsa Charo Ngati v Republic [2015]eKLR and the Supreme's Court Holding Republic v Karisa Chengo 7 2 others[2017]eKLR, the 4th and 5th Respondent prays that the whole Petition be struck out with costs.*

The Response

3. The Petitioner is opposed to the Preliminary Objection. However, Counsel for the Petitioner did not file a response to the Preliminary Objection but opted to file its written submissions. The Respondents did not participate in the Preliminary Objection proceedings. However, their Counsel on record indicated that they were in support of the Preliminary Objection.

Submissions

4. Parties filed submissions to the Preliminary Objection. **Mr. Peter Omwenga** Learned Counsel for the 3rd & 4th Interested Party submitted that the present Petition touches on a dispute on title to, use and occupation of land hence its institution in the High Court renders it incompetent, null and void hence incapable of being transferred. Counsel cited the case of **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel; Civil Appeal No.13 of 2016[2015] eKLR**, where the Court of Appeal held that jurisdiction cannot be conferred even by consent of the parties where no such jurisdiction exists.

5. **Mr. Borana** Learned Counsel for the Petitioner and the 1st and 2nd Interested Parties submitted that the preliminary objection was an afterthought having been brought three (3) years after filing of the Petition.

6. Counsel submitted that the Petition dated **26th July, 2018**, reveals that the prayers sought are limited to the Petitioner's right to protection of property as well as fair administrative action and the Petitioner's grievance has been confirmed by the Director of Survey vide report dated **24th August, 2018** which revealed that the Petitioner has been deprived of his legal right to property through fraudulent acquisition of title. Therefore, this Court has jurisdiction to deal with the deprivation of property.

7. **Mr. Borana** further submitted that the issues of Fair Administrative Actions are not within the purview of the Environment and Land Court since the said Court is mandated to deal with matters of land disputes and can only have residual powers to make any judicial review orders. Consequently, Counsel urged this Court to strike out the Preliminary Objection.

Analysis and Determination

8. This Court has considered the Preliminary Objection and submissions by Counsel. There is only one issue for determination, and that is whether or not this Court has the jurisdiction to hear and determine the petition herein. It is clear from the prayers in the petition that the prayers sought require this Court to make a finding on alleged breaches of a fundamental right or freedom, while at the same time make finding on the title, use, occupation and to land.

9. It is noteworthy that the High Court has undisputed jurisdiction to hear and determine issues relating to protection of fundamental rights to protection of property from arbitrary deprivation thereof. The High Court is specifically barred by the constitution under **Article 165 (5) (b)** from dealing with matters falling within the jurisdiction of the **Environment and Land Court**. So, to the mind of this Court, this means that where a petition contains in the prayer what this Court may call a **"mixed grill"**, it is upon the court to determine whether or not another court may have the best of the jurisdiction, that is, a jurisdiction which may take care of the entire **"mixed grill of a prayers"**. In this case this court is specifically barred from determining issues of title, occupation or land use. Yet, these are clearly prayers made in the petition before the Court and the dispute between the parties is the ownership of **Plot No. 909/VI/MN**, and vide the prayer 1 and 2 of the Petition, the Petitioner seeks to compel the 1st Respondent to release an investigation report and the 2nd Respondent to give a report on the deed plan registration carried out in relation to the subject property.

10. The Petitioner's Counsel argues that the ELC lacks the jurisdiction to determine the issue of Fair administrative action since the same are not within its purview. Therefore, the question to ask is whether the Environment and Land Court has jurisdiction to deal with allegations of breach of fundamental rights and freedoms. If the answer is in the affirmative, then the best Court to entertain the present Petition which contains this mixed grill of prayers would be to the Environment & Land Court. In the case of **Ifdid Ole Tauta & others vs Attorney General (2015) eKLR**, a three judge bench held as follows:

“having regard to constitutional provision under Article 165(3) (b) and Section 13(3) of the Environment and Land Court Act, in constitutional matters touching on the violation and/or infringement of the fundamental Bill of rights and freedoms as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and a party could bring such matters either before the High Court and or before the Environment and Land court.”

11. Similar arguments were made in **Patrick Musimba vs. National Land Commission & 4 Others [2015]eKLR**, where issues concerning breaches of fundamental rights and freedoms were mixed up with those of ownership. The High Court held that it had the jurisdiction. However, what is distinguishable in this case is that it did not specifically seek to establish title or ownership. What is clear to me from the case of IFDID *supra*, is that the Environment and Land Court has the jurisdiction to determine constitutional matters touching on the violation and/or infringement of the fundamental bill of right and freedoms as far as the same relate to the Environment and Land. That being so, and given that the High Court is expressly bared from determining issues of title, occupation of and title to land, this court believes that the issues in this matter can best be canvassed and determined in the Environment and Land Court. And having found that this court has some limited jurisdiction in this matter in as far as the constitutional issues raised herein, this court also has the jurisdiction to transfer this matter to the Environment and Land Court.

12. The upshot is that the Preliminary Objection is upheld with the direction that this suit is herewith transferred to the Environment and Land Court for hearing and determination. The costs of the

Preliminary Objection shall be in the Petition.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 17th day of December, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

M/S Ondieki for 3rd and 4th Interested Parties

Mr. Borana for Respondents

Ms. Peris Court Assistant

NOTE: This Judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.