



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 34 OF 2017

IN THE MATTER OF: ARTICLES 10, 20, 21, 22, 23, 27, 40, 47, 258 & SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION

AND

IN THE MATTER OF: THE ALLEGED SALE OF THE PETITIONERS' PROPERTY KNOWN AS L.R. NOS. MN/VI/909 AND 910 AND REGISTERED AT THE LAND TITLES REGISTRY MOMBASA AS CR. 7239/1 AND 7964 RESPECTIVELY

AND

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 21 & 22 OF THE CONSTITUTION OF KENYA

BETWEEN

1. CHUNKY LIMITED

2. CURLY WURLY LIMITED.....PETITIONERS

AND

1. PATRICK NDUNE

2. MOHAMED ABDIKHAIYA

3. SAHAL AHMED DAHIL

4. KAHIA TRANSPORTERS LIMITED

5. TRADE KEAD LIMITED

6. MINISTRY OF LANDS, HOUSING

& URBAN DEVELOPMENT

7. DIRECTOR OF SURVEY, MINISTRY

OF LANDS, HOUSING & URBAN DEVELOPMENT

8. CHIEF LANDS REGISTRAR

9. COUNTY LANDS REGISTRAR, MOMBASA

10. NATIONAL LANDS COMMISSION

11. THE HON. ATTORNEY GENERAL

12. EDWARD KIGURU.....RESPONDENTS

RULING

The Preliminary Objection

1. By a Preliminary Objection dated 2nd October, 2017 the 4th and 5th Respondents herein seek to stop the hearing and determination of the Petition herein dated 27th July, 2017. The grounds upon which the Preliminary Objection is premised are that the High court lacks jurisdiction to hear, determine or transfer the matter by dint of Article 162(2) (b) as read together with Article 165 (5) (b) of the constitution, and that it is only the Environment & Land Court that has the capacity to deal with this matter pursuant to Article 162 (2) (b) aforesaid. Because of alleged lack of jurisdiction the 4th and 5th Respondents pray that the petition herein be struck out with costs.

The Response

2. Only the Petitioners oppose the Preliminary Objection. Respondents 1, 2, 3, 6 – 12 did not participate in the Preliminary Objection proceedings.

3. the Petitioners filed grounds of opposition on 5th October, 2017 stating that the High Court has jurisdiction to hear and determine the petition and applications for redress of a violation or infringement of or a threat to a right or fundamental freedom under the Bill of Rights, arguing further that Articles 162 (2) (b) and 165 (5) (b) do not preclude this court's jurisdiction to hear and determine petitions and applications for redress of constitutional rights. The Petitioners further argue that the general jurisdiction of the Environment and Land Court set out in Section 13(3) of the Environment and Land Court Act restricts the jurisdiction of that court to hear questions related to denials, violation or infringement of rights and fundamental freedoms and that relating “... to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution” and that at the very least, and in the alternative, both this court and the ELC have concurrent jurisdiction over the matter at hand.

The Petition

4. The petition filed herein and whose hearing and determination the Preliminary Objection seeks to stop prays for the following orders:

(a) A declaration that your Petitioners' fundamental rights to the protection of their property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached;

(b) A declaration that the 6th to 10th Respondents had no jurisdiction in law or under the Constitution of Kenya to purport to alienate and allocate land or in any other way deal with it which was not Government or Public land but privately owned land;

(c) A declaration that the 1st Petitioner, CHUNKY LIMITED, is and remains the registered Proprietor of the property comprised in Title No. C.R. 7239/1 (Plot No.MN/VI/909) and is entitled to all the rights prescribed by law and attendant thereto including, *inter alia*, the right to use, occupy, develop and the quiet and peaceful enjoyment thereof without any lawful interference or hindrance thereof;

(d) A declaration that the 2nd Petitioner, CURLY WURLY LIMITED, is and remains the registered proprietor of the property comprised in Title No.C.R.7964/I(Plot No.MN/VI/910) and is entitled to all the rights prescribed by law and attendant thereto including, *inter alia*, the right to use, occupy, develop and the quiet and peaceful enjoyment thereof without any lawful interference or hinderance thereof;

(e) A declaration that the Deed Plan Nos. 407082, 407085 and 393141 and the respective Title promised thereon namely C. R.68639 (Plot No.5154/VI/MN),C. R. 68637(Plot No.5153/VI/MN) and C. R. 68273 (Plot No.5151/VI/MN) are a nullity in law and of no effect or consequence whatsoever and did not or do not confer any proprietary or other rights whatsoever upon Patrick Ndune, Mohamed Abdi Khaiye, Sahal Ahmed Dahil, Kahia Transporters Limited or Trade Lead Limited;

(f) Consequently, an order that the aforesated Titles registered as C.R.68639 (Plot No. 5154/VI/MN), C. R. 68637 (Plot No. 5153/VI/MN) stand void and nullified and concerned;

(g) An order directing the Land Titles Registrar Mombasa County, to rectify his records in the register to reflect the cancellation of the aforesated Titles;

(h) Consequently, an order prohibiting the 1st to the 5th Respondents whether by themselves or through any other person purporting to derive Title through or under them from interfering with your Petitioners' proprietary and/or possessory rights or enjoyment of the suit property;

(i) A permanent order restraining the 1st to 5th Respondents from interfering with the Petitioners' property or use, occupation and development thereof as well as all the rights prescribed and attendant thereto in law in any way or manner whatsoever;

(j) A permanent order prohibiting the 6th to 10th Respondents from engaging in any conduct which is inconsistent with the Petitioners' proprietary rights and interest and/or treating the subject property belonging to the Petitioners as though it were public land available for allocation;

(k) Compensation by way of damages for unlawful interference with the Petitioners' proprietary rights and development of its property and/or use and occupation thereof;

(l) The costs of and consequent upon this Petition be paid and borne by the Respondents; and

(m) All other or such orders or relief as this court may deem just and fit or appropriate to grant.

Submissions

5. Parties filed submissions to the Preliminary Objection. Mr. Peter Omwenga for the Objector submitted that the aforementioned thirteen (13) reliefs numbered [a] – [m] set out at pages 240–242 of the Petitioner's bundle clearly relates to:-

i) the protection of fundamental rights to protection of property and from arbitrary deprivation thereof;

ii) alienation and allocation of land;

iii) title, proprietorship, use, occupation and development of land.

6. Counsel submitted the land subject of the proceedings is that contained/comprised in the **Title No. C.R 7239/I [Plot No. MN/VI/909], C.R No. 7964/I [MN/VI/910], Deed Plan Nos. 407082, 407085 and 393141 and titles therefrom being C.R No. 68639 [Plot No. 5154/VI/MN], C.R No. 68637 [Plot No. 5153/VI/MN], C.R No. 68273 [Plot No. 5151/VI/MN].**

7. Mr. Omwenga raised the following issue which he proceeded to submit on.

‘Whether the High Court has jurisdiction to entertain disputes falling under Article 162[2][b] of the Constitution of Kenya, 2010.’

8. Mr. Omwenga cited the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E.A 696** which is a leading authority on when Preliminary Objections on pure points of law can be raised. Counsel cited Article 162 [2] [b] of the Constitution which provides for the establishment of a Court with the status of a High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. In the discharge of their mandate Parliament enacted the **Environment and Land Court Act No. 19 of 2011** whose date of commencement was on **30th August, 2011**. Under Section 4 thereof the Environment and Land Court was established as a superior court of record with the status of the High Court. Counsel submitted that it should be noted that both under the Land Registration Act and the Land Act a Court is defined as the Environment and Land Court established under Section 4 of the Environment and Land Court Act. Article 162 [2] [b] of the Constitution as well as Section 4 of the Environment and Land Court Act specifically provides that the Environment and Land Court status is equivalent to the High Court. Mr. Omwenga contrasted this with the position under Article 165 [3] subject to Clause 5 which states that the High Court shall have –

[b] Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

[5] The High Court **shall not** have jurisdiction in respect of matters –

[b] Falling within the jurisdiction of the courts contemplated in Article 162 [2].

9. Mr. Omwenga submitted that the matters under Article 162 [2] [b] are those that relate to the environment and the use and occupation of, and title to, land which matters he submitted are all those subject of the Petition dated 27th July, 2017 as per the reliefs set out at pages 240–243 of the Petition herein.

10. Mr. Omwenga also referred the court to the case of **Owners of the Motor Vessel Lillian ‘S’ vs. Caltex Kenya Ltd [1989] KLR 1; Nyarangi J.A stated:-**

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. Counsel submitted that this 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. This being the position, it is incapable of being transferred to a court having jurisdiction. For

the proposition that this court also lacks the jurisdiction to transfer this suit to ELC, Mr. Omwenga cited the case of **Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour & Travel; Civil Appeal No.13 of 2016** [2016] eKLR – where the Court of Appeal sitting at Mombasa stated:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.

12. Further, in **Karisa Chengo, Jefferson Kalama Kengah & Kitsao Charo Ngati vs. Republic** [2015] eKLR the Court of Appeal reiterated the legal position that a Judge of the Environment and Land Court has no jurisdiction to entertain, hear and determine matters reserved to the High Court. Notwithstanding the serious repercussions on matters already determined the said Court of Appeal’s finding was upheld by the Supreme Court in **Republic vs. Karisa Chengo & 2 others** [2017] eKLR.

13. In view of the foregoing, Mr. Omwenga submitted that the Petition dated 27th July, 2017 and lodged herein on 28th July, 2017 together with the Notice of Motion ought to be dismissed with costs to the 4th and 5th Respondents.

14. On his part Mr. Khagram for the Petitioners submitted that the 4th and 5th Respondents are being simply less than candid and disingenuous in challenging jurisdiction when they themselves have filed similar Petitions and had the benefit of the jurisdiction and orders made in its favour by this very court. Counsel referred court to Exhibit ‘DP-3’ to the Affidavit of Divyanshu Panchal filed on the 5th October, 2017. The annexure shows proceedings where the 4th and 5th Respondents have sought from this court similar reliefs that the Petitioners currently seek. It is the Petitioners’ submission that this court has and continues to retain jurisdiction to hear and determine this petition contrary to the 4th and 5th Respondents’ allegations which can only be, in light of the foregoing, self-serving.

Mr. Khagram relied on the following authorities:-

1) Leisure Lodges Ltd vs. Commissioner of Lands & 767 Others [2016] eKLR; and

2) Patrick Musimba vs. National Land Commission & 4 Others [2015] eKLR.

15. The Petitioners aver that by their petitions, they seek to enforce rights under Articles 10, 20, 21, 22, 23, 27, 40, 47 & 258 of The Constitution of Kenya 2010 and Article 23 clearly gives this court jurisdiction to hear and determine matters seeking redress of a denial, violation or infringement of or threat to and right or fundamental freedom. Mr. Khagram submitted that none of these matters fall within the jurisdiction of the Environment & Land Court contemplated in Article 162(2).

Analysis and Determination

16. I have considered the Preliminary Objection and submission of 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 use, occupation and ownership of title. As submitted by Mr. Omwenga, this court is required to make a finding on:

(i) The protection of fundamental rights to protection of property from arbitrary deprivation thereof.

(ii) Alienation and allocation of land.

(iii) Title, proprietorship, use, occupation and development of land.

17. While clearly 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 my mind, this means that where a petition contains in the prayer what I 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.

18. The issue to ask then is whether the ELC has jurisdiction to deal with allegations of breach of fundamental rights and freedoms. If that were so, then the best court that can handle this mixed grill of prayers would be to the ELC. In the case of **IFDID OLE TAUTA & OTHERS VS. ATTORNEY-GENERAL** [2015] eKLR, among the several issues raised were the question whether the suit ought to have been brought before the Environment and Land Court.

After discussing the question at depth, the three Judge Bench (P. Nyamweya, R. Ougo and J. Mutungi JJ) held *inter alia* –

“1. Article 162(2) (b) of the Constitution made provisions for the establishment by Parliament of a court with the status of the High Court to hear and determine disputes relating to environment, use and occupation of, and title to land. The Environment and Land Act No. 19 of 2011 was enacted to give effect to Article 162 (2) (b) of the Constitution...It is not disputed that the instant Petition was filed before the enactment of the Environment and Land Court Act which established the Environment and Land Court. The Petitioners could not therefore be faulted for having filed their suit in the constitutional and Judicial Review Division of the High Court;

2. Whereas the jurisdiction to determine whether there had been a violation of any of the rights under the Bill of Rights was vested in the High Court under Article 165(3) (b), the said jurisdiction was subject to clause (5) which prohibited the High Court from exercising jurisdiction over matters that fell within the province of the courts established under Article 162(2).”

19. And while acknowledging that courts have been faced with applications raising objections on their jurisdiction to entertain suits on matters that fell within the jurisdiction of the courts established under Article 162(2), that court stated that the practice had not been to dismiss the suits, but to transfer them for hearing at the right forum, and concluded that –

“...having regard to the 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...[and therefore the Environment and Land Court had the jurisdiction to deal with the Petition]”

20. The same 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 I believe 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.

21. 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 in Mombasa this 16th day of April, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Khagram for Petitioners

Mr. Kirui for 4th and 5th Respondents

Mr. Kaunda Court Assistant