



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 43 OF 2018**

**IN THE MATTER OF: ARTICLES NO. 22, 23 AND 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 23(1) & (3), 40(3) & 4  
AND 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE LAND ACT NO. 6 OF 2012**

**BETWEEN**

**CYBER ACCESS LIMITED.....PETITIONER**

**AND**

**1. NATIONAL LAND COMMISSION**

**2. CABINET SECRETARY, MINISTRY OF TRANSPORT & INFRASTRUCTURE DEVELOPMENT**

**3. THE HON. ATTORNEY-GENERAL**

**4. THIRD CHINA ENGINEERING COMPANY LTD.....RESPONDENTS**

**RULING ON PRELIMINARY OBJECTION DATED 27<sup>TH</sup> MARCH, 2018**

1. By a petition dated 22<sup>nd</sup> March, 2018, the Petitioner claims that it is the registered owner of ALL that parcel of land known as L.R. No. MN/V/1706 situate in the city of Mombasa. This land borders the Mombasa-Mariakani Highway and is within Jomvu area. Sometime in 2017, the Petitioner became aware, through Kenya Gazette Nos. 1388 and 1389 of 17<sup>th</sup> February, 2017 that the Government, through the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, intended to acquire part of its aforesaid land for purposes of expanding or dualling of the Mombasa-Mariakani Road. However, the Petitioner alleges that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have failed to respect the Petitioner's rights over the aforesaid land and have not complied with the law relating to compulsory acquisition. They have allegedly failed to notify the Petitioner of their intention to compulsorily acquire the said land, and yet they have now moved into part of the said land and marked a huge portion thereof for purposes of expanding the said road. This, the Petitioner avers has been done without involving the Petitioner or gazetting the said land for acquisition as required by the law. The Petitioner alleges that this is a violation of its right to property under Article 40 of the Constitution. The Petitioner prays for the following orders:

(a) A declaration that your Humble Petitioner's rights as enshrined under Articles 40(3) and 47(1) of the Constitution of Kenya, 2010 and Part VIII of the Land Act No 6 of 2012, Sections 107, 108, 111 and 112 have been and continue to be infringed by the Respondents in the manner pleaded herein above.

(b) An order directing the Respondents to comply with Sections 107, 108, 111 and 112 of the Land Act No. 6 of 2012 forthwith by issuing to the Petitioner the notice of intention to acquire its land as stipulated in the Constitution of Kenya, 2010 and the Land Act No. 6 of 2012 and to accord to the Petitioner an opportunity to be heard on the issue of the intended acquisition of its property in accordance with the law..

(c) A permanent injunction restraining all the Respondents jointly and severally either by themselves, their servants, agents and any other person or entity acting under their directions or instructions from entering upon the Petitioner's property known as L.R. No. MN/V/1706, Mombasa or any part or portion thereof for the purpose of constructing a road thereon or for any other purposes until and unless the Respondents comply with the provisions of the Constitution of Kenya, 2010 and the Land Act, 2012 relating to compulsory acquisition of private land for public use.

(d) An Order restraining the Respondents jointly and severally either by themselves, their servants, agents and any other person or entity acting under their directions or instructions from entering upon the Petitioner's property known as L.R. No. MN/V/1706, Mombasa or any part or portion thereof for the purpose of constructing a road thereon or for any other purposes pending the hearing and determination of the petition herein.

(e) In the alternative, and without prejudice to Prayers (a) to (d) hereinabove, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be ordered to pay to the Petitioner the sum of Kshs. 66,355,000 being the value of the portion of the Petitioner's land known as L.R. No. MN/V/1706, Mombasa, which the said Respondents intend to acquire for the expansion/dualling of the Mombasa – Mariakani Road.

(f) Costs of the petition and interest on (e) above to be borne by the Respondents.

2. Concurrent with the Petition the Petitioner also filed a Notice of Motion application of even date praying for the orders prayed for in the petition on temporary basis. Interim orders were granted ex parte on 28<sup>th</sup> March, 2018 and extended inter partes on 10<sup>th</sup> April, 2018.

### **The Preliminary Objection**

3. However, before the matter could be heard inter partes the 1<sup>st</sup> Respondent raised a Preliminary Objection to the Petitioner on the following grounds:

(a) That the court lacks the jurisdiction by dint of Article 165(5) (b) of the Constitution to hear and determine the issues raised in the petition.

(b) That the issues raised herein fall within the exclusive scope and jurisdiction of the Environment and Land Court by dint of Article 162(2)(b) of the Constitution as read together with Sections 13(2) of the Environment and Land Court Act, 2011 and Sections 128 and 150 of the Land Act, 2012.

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

### **The Determination**

4. Parties did not submit on the issue but they all filed their authorities leaving the determination of the Preliminary Objection to the court. As was stated in the **Owners of Motor Vessel 'Lilian S' vs. Caltex Oil Limited**, jurisdiction is everything, and without it the court down its tools. And so, whenever an issue of jurisdiction arises during proceedings the court is obligated to deal with it immediately and have it settled.

5. Article 165(3) (b) grants this court the power and jurisdiction to determining the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened. However, under Article 162(2) the High Court has no jurisdiction to entertain matters or disputes relating to environment and the use and occupation of, and title to land.

6. Section 13(3) of the Environment and Land Court Act states:

**“(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”**

7. My understanding is that although the jurisdiction in constitutional matters conferred by Section 13(3) of the Environment and Land Court Act can address alleged denial or violation or infringement or threat to rights or fundamental freedoms, the Section did not purport to confer exclusive jurisdiction to Environment and Land Court so as to impinge upon Articles 165(3) (b) and (d) of the constitution. A closer look at the petition at hand and the reliefs sought reveals that the petition is not just about the environment and land. Substantial issues are raised about the process alleged compulsory acquisition of land, about due process of law, denial of access to information about the intended acquisition, refusal to acknowledge the ownership of the land by the 1<sup>st</sup> Respondent and hence gazette the owner of land as such owner. Above all there is a threatened contravention or violation of the right to fair administrative action. Clearly, this is a scenario where both the High Court and the Environment and Land Court have concurrent jurisdiction. However, even where a court finds that both courts have the jurisdiction, the court must still determine which of the two courts appears to have greater or more abundant jurisdiction, so to speak. On this issue, it must be understood that the jurisdiction of the High Court is always more robust, being that the High Court under Article 165 has the jurisdiction to deal with all threats to the Bill of Rights or fundamental freedoms. When it comes to pronouncing a right protected under the Bill of Rights the High Court cannot shy away. It has the first duty to protect that right or fundamental freedom. That means that no litigant shall come to the High Court, claiming that his right under the Bill of Rights or a fundamental right is threatened, and the High court will point to him another court from which to seek redress. The High Court will always act. So, where it appears to the High Court that there is a concurrent of jurisdiction with another court, the High Court must itself discharge that concurrency of jurisdiction before pointing a litigant to another court. In the case of **Leisure Lodges Limited vs. The Commissioner of Lands and 767 others** Petition No. 21 of 2010, the court had this to say:

**“It could not have been the intention of the draftsmen of the constitution that when the court was faced with mixture of causes of action touching on the constitution, especially on fundamental rights, a separationist approach was to be adopted by the court and half the claim dispatched to one court as the other half was retained.”**

8. In the matter at hand the Petitioner has clearly outlined the constitutional provisions which he alleges have been violated, or are threatened with violations.

(a) **Article 2 (1)** of the Constitution of Kenya, 2010 provides that the Constitution binds all persons and state organs.

(b) **Article 22** of the Constitution of Kenya, 2010 grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened and that the Bill of Right binds all persons and state organs.

(c) **Article 23** of the Constitution of Kenya, 2010 sets out the authority of Courts to Uphold and enforce the Bill of Rights.

9. The Petitioner then sets out the Provisions of the law that have been violated as follows:

10. Article 40 (1) of the Constitution secures every person’s right to acquire and own property of any description and in any part of Kenya. Article 40(3) prohibits the state from depriving a person of any property or an interest in land, or title to land unless the deprivation results from an acquisition in accordance with Chapter 5 of the Constitution or is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any act of Parliament that requires prompt payment in full of just compensation to the person and most importantly allow any person who has any interest in or right over that property a right of access to a Court of Law.

11. Article 47 of the Constitution stipulates that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Article 47(2)** provide that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given reasons for the action.

12. Article 64 of the Constitution defines private land to be registered land held by any person under any freehold tenure or land held by any person under leasehold tenure.

13. Clearly these are serious constitutional issues which have been raised in this petition. They go beyond a determination of title ownership. They affect the right to property.

14. **Section 107 (1) of Land Act No. 6 of 2012** stipulate that whenever the National or County Government is satisfied that it may be necessary to acquire some particular land the respective Cabinet Secretary shall submit a request for acquisition of such land to the Commission to acquire it on its behalf. Upon approval of a request the Commission shall publish a notice to that effect in the Kenya Gazette and shall deliver a notice to the Registrar and to every person who appears to be interested in the land. Interested persons include any person whose interest appear in the land registry and the spouse of such person as well as any person actually occupying the land. All land to be compulsory acquired shall be geo referenced and authenticated by the office or authority responsible for survey both at national land county government.

15. The Petitioner in my view rightfully avers that the Respondents are violating its Constitutional rights under Articles 40(3), 47(2) and 67 of the Constitution by taking administrative action that is likely to affect it adversely without giving the Petitioner reasons for such action and or issuing appropriate mandatory notices under **Section 107 of the Land Act No 6 of 2012**.

16. **Section 110** of the Land Act, 2012 stipulates that land may be acquired compulsorily if the commission certifies in writing that the land is required for public interest as relates to and necessary fulfilment of that stated purpose. Under Section 111 of the same Act, if land is acquired compulsorily under the Act, just compensation shall be paid promptly in full to all persons whose interest in the land is determined. Section 112 of the Act stipulates that at least 30 days after publishing notice of intention to acquire such land, the Commission shall appoint a day to conduct an inquiry to hear issues of property and claims for compensation. Section 128 of the Act provides that any dispute arising out of any matter provided for under the Act may be referred to the Land and Environment Court for determination. However, in this petition no such dispute has arisen because the Respondents have not bothered to comply with the above provisions of the law. Apparently it is because of that failure to comply with the said provisions of the law that the Petitioner has filed this constitutional petition. The Petitioner’s grievance is easy to understand because the Respondents have already surveyed part of the Petitioner’s land and marked a big portion thereof which they have earmarked for acquisition for purposes of expanding/dualling the said road and the construction on the Petitioner’s land is set to start any time from now. From the activities of the Respondents, the Petitioner has reasonable cause to believe that the Government of Kenya intends to acquire its land without complying with the law and in breach of its constitutional rights.

17. It appears that all efforts to get the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to gazette the Petitioner’s property for acquisition as is required by law have been ignored by the said Respondents who appear keen to take away the Petitioner’s land without compensation. If that happens the Petitioner’s right to property will be violated.

18. From the foregoing paragraphs of this Ruling this court is satisfied that the petition herein raises issues within the jurisdiction of this court and that this court has the jurisdiction to try and to determine the petition. Accordingly therefore the Preliminary Objection dated 27<sup>th</sup>

March, 2018 by the Respondent is dismissed.

19. The costs shall abide the Petition.

That is the Ruling of the court.

**Dated, Signed and Delivered in Mombasa this 19<sup>th</sup> day of June, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Ms. Kitoo holding brief Mr. Amuga for Petitioner

Mr. Makuto holding brief Mr. Wahome and Ms. Wasuna for Respondents

Mr. Kaunda Court Assistant