



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 17 OF 2018**

**IN THE MATTER OF: ARTICLES NOS. 10, 22, 23, 25, 27, 28, 40,  
47, 67 AND 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT,  
2011**

**AND**

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

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

**AND**

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

**BETWEEN**

**1. THERESIA RUNJI**

**2. MARIETA GITONGA CHEGE**

**3. NAOMI KIIO**

**4. SAMMY M. KARA.....PETITIONERS**

**VERSUS**

**NATIONAL LAND COMMISSION.....RESPONDENT**

## RULING

### The Preliminary Objection

1. Before the petition before this court dated 13<sup>th</sup> February, 2018 could be heard, the Respondent herein filed a Preliminary Objection on 28<sup>th</sup> March, 2018 objecting to the jurisdiction of this court to her the petition, and instead stating that the matters complained of in the petition fall within the jurisdiction of the ELC by dint of Articles 165(5) 162(2) (b) of the constitution as read together with Section 13(2) of the Environment and Land Court Act 2011 and Sections 128 and 150 of the Land Act, 2012.

### The Petition

2. In the petition the Petitioners state that they were originally allocated the parcel of land known as Plot No. 3912 and Plot No. 3913 Section VI MN, FR/312/162 by the Kenya Government as compensation after eviction from Sheikh Sayed Children's Centre Bombolulu Mombasa. The said allocation was vide Part Development Plan No. 12.3.CT. 121.96. That the parcel of land known as Plot No. 3913/VI/MN measures 2.0 hectares whereas the parcel of land known as Plot No. 3912/VI/MN measures 1.997 hectares hence a total 3.997 Ha. The alleged allocation was as a result of the resettlement exercise following eviction of the Petitioners with others from parcels of land situated in Bombolulu, Mombasa and which was allocated to the President of the United Arab Emirates for the purpose of building an orphanage for Muslim children in Mombasa. The Petitioner states that in consideration of the Petitioners vacating the said land at Bombolulu, the Commissioner of Lands allocated the Petitioners the two parcels of land known as Plot No. 3912 and Plot No. 3913 Section /VI/MN. The two parcels of land were allocated for industrial use. They were allocated in 1996 to the Petitioners. The 1<sup>st</sup> and 4<sup>th</sup> Petitioners were issued with allotment letters for Plot No. 3912 and 3913 Section/VI/MN vide letter of Allotment Ref No. 90750/XIV dated 27<sup>th</sup> July 2000. The Petitioners aver that they had the legitimate expectation that the then Commissioner of Lands would issue titles to them relating to the parcels of land known as Plot No. 3912 and Plot No. 3913 Section/VI/MN. However the Petitioners were shocked to learn that the Commissioner of Lands cancelled their survey plan without informing the Petitioners or obtaining their consent regarding the same and allocated the said plots to other parties, to wit, Miqdad Enterprises. Consequently, the said Plot No. 3912 and Plot No. 3913 Section/VI/MN, FR/312/162 were consolidated into Plot Number 4688/V/MN and thereafter consolidated to make Plot Number 4805/VI/MN. The Petitioners aver that the net effect of such consolidation is a total violation of the 1<sup>st</sup> and 4<sup>th</sup> Petitioners constitutional rights relating to the protection of their property aforesaid. The same were unlawfully gifted by the Commissioner of Lands to the said Miritini Free Port Limited. Subsequently, the Petitioners averment they moved the court vide an application dated 20<sup>th</sup> November, 2007 in *HC Misc Civil Application Number 318 of 1996, Elizabeth Mundingi & 7 others versus The Attorney General and The Commissioner for Lands* for orders that the Commissioner of Lands be restrained from registering Grant of Plot Number 4688/VI/MN in the name of Miqdad Enterprises. The said orders were granted on 28<sup>th</sup> November, 2008 and served upon the Commissioner of Lands. However in blatant violation of the said Court order dated 28<sup>th</sup> November 2008, the Commissioner of Lands registered Plot number 4688/VI/MN in the name of Miqdad Enterprises, who later sold it to Miritini Free Port Limited.

3. The said Martini Free Port Limited who was also the registered owner of all that Parcel of Land known as LR. NO. MN/VI/468 and situate at Miritini area of Mombasa County (hereinafter "the suit property") proceeded to consolidate the (2) Plots of land known as Plot No. 3912 and 3913/VI/MN with Plot No. L.R. No. MN/VI/4688 so as to create Plot No. MN/VI/4805. It is alleged that on or about the 9<sup>th</sup> January 2015, the Respondent by a Gazette Notice No. 149 dated the 7<sup>th</sup> January 2015, which was published under the authority of the Government of Kenya on behalf of the Respondent, informed the Public that the Government of Kenya intended to acquire (22.11 Ha) from the suit property LR. NO. MN/VI/4805 for purposes of construction of the Mombasa-Nairobi Standard Gauge Railway. Subsequently Miritini Free Port was awarded a sum of Kshs.1,475,486,485/= plus the further interruption award of Kshs.360,000,000/=. The Petitioners aver this award was fundamentally flawed as the Respondent was and is aware that Miritini Free Port Limited was not and is not the absolute owner of all the said parcel of land being Plot No. MN/VI/4805

4. The Petitioners aver that the suit property herein was the subject of inquiry at Public Hearings in Mombasa conducted by the Respondent who vide its ruling dated the 1<sup>st</sup> December 2015, confirmed that the same was lawfully acquired by the Miritini Free Port Limited. The above awards were made after the said Public hearing. The Miritini Free Port Limited accepted the award made by the Respondent and supplied details of her bank account into which the money was to be deposited. The Petitioners allege that they became aware of such award only after the same was covered in a news report in one of the local dailies. The Petitioners made innumerable follow ups and have written several letters to the Respondent demanding payment, and which letters are yet to elicit any response from said Respondents. Later, the Respondent invited the Petitioners to Nairobi to discuss the issue of compensation and no formal agreement has ever been reached so far.

5. The Petitioners aver that the failure by the Respondent to promptly compensate the Petitioners even after the award was made of their land to Miritini Free Port Limited is a clear violation of the Petitioner's rights as set out in the Constitution. The Petitioners now claim their rightful share in the suit property and hence this Petition.

6. The Petitioner prays for a declaration that the Respondent contravened the Constitution and their actions are unlawful, void *ab initio*.

(i) That the Respondent abused their statutory powers in refusing to compensate the Petitioners.

(ii) An order directing the Respondent, to forthwith tabulate, assesses and compensate the petitioners the value of their property **Plot No. 3912 and 3913/VI/MN** as at **July 2000**.

(iii) An order that the petitioner is entitled to interest, and any other damages applicable in law on the compensation to be awarded by the Respondent from the date provided in Law until payment in full at Commercial rates.

(iv) Costs of the petition be borne by the Respondent.

(v) That the Honourable Court do make any other orders that it may deem necessary in the interest of justice.

7. The issue before the court is whether the matters raised in the petition fall within the ELC.

### **Submissions**

8. **Mr. Wahome** for the Respondent submitted that this court has no jurisdiction to hear and determine the petition as the petition before the court challenges the compulsory acquisition of the suit property and the subsequent award of compensation issued to Miritini Free Port Limited, and that these issues fall within the exclusive jurisdiction of the ELC by dint of Section 13 of ELC Act and Section 128 of the Land Act.

9. On his part **Mr. Gikandi** for the Petitioner submitted that the issue complained of in the petition is abuse of power by organs of the state which led to failure to compensate the Petitioners for their property and which in itself is a violation of the Petitioners' right to property under the constitution. Mr. Gikandi submitted that in the least there is a concurrence of jurisdiction, and that if that is correct the High court has the greater jurisdiction because it has the constitutional duty to protect violation of fundamental rights or freedoms.

### **The Determination**

10. I have considered the submissions of the parties to the Preliminary Objection. I have also considered the authorities submitted by the parties. 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.

11. 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.

12. 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.”**

13. 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 leading to compulsory acquisition of the land, about due process of law, denial of access to information, arbitrary mergers of plots leading to alleged loss of property by the Petitioners, and alleged outright lies and bad faith leading to loss of property. Above all there is a threatened contravention or violation of the right to fair administrative action. In the case of **Habo Agencies Limited vs. National Land Commission & others Petition No. 44 of 2018**, I found, in an almost similar situation as follows:

**“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.”**

14. 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.**

15. The Petitioners have outlined the constitutional provisions which they alleges have been violated, or are threatened with violations.

(a) **Article 2 (1)** of the Constitution 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 sets out the authority of Courts to Uphold and enforce the Bill of Rights.

16. 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.

17. 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.

18. In my view these are serious constitutional issues which have been raised in this petition. They go beyond a determination of title ownership. They affect the fundamental right to property.

19. **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. To purport to engage in the affairs envisaged under Section 107 (1) above without giving notice to all affected parties if proved, would amount to a violation of protected right.

20. The Petitioners in my view rightfully aver 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**.

21. 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 and filed herein on 28<sup>th</sup> March 2018 by the Respondent is dismissed.

22. The costs shall abide the Petition.

That is the Ruling of the court.

**Dated, Signed and Delivered at Mombasa this 23<sup>rd</sup> day of July, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Kibara holding brief Mr. Gikandi for Petitioners

Mr. Kaunda Court Assistant