



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MILIMANI COMMERCIAL COURTS

JUDICIAL REVIEW APPLICATION NO. 71 OF 2016

(CORAM: R.E. ABURILI – J)

**IN THE MATTER OF AN APPLICATION BY ISMAIL RAHIMTULA TRUSTEES
REGISTERED AND SONY HOLDINGS LIMITED FOR LEAVE TO APPEAL
FOR ORDERS OF PROHIBITION AND CERTIORARI AGAINST THE
NATIONAL LAND COMMISSION IN THE MATTER OF
ARTICLE 22 AND 23 OF THE CONSTITUTION.**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE APPLICANTS
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 40,
47 AND 48 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE NATIONAL LAND COMMISSION IN THE
MATTER OF ARTICLES 64 AND 68 OF THE CONSTITUTION OF KENYA
IN THE MATTER OF FAIR ADMINISTRATIVE ACT, NO. 5 OF 2015**

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW
REFORM ACT, CHAPTER 26 LAWS OF KENYA**

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

KENYA RAILWAYS STAFF

EX-PARTE

THE ISMAIL RAHIMUTULLA TRUSTEES REGISTERED SONY HOLDINGS LIMITED

JUDGMENT

1. the Applicant's Notice of Motion dated 17th February, 2016 seeks four principle reliefs as against the Respondent herein, to wit:
 - a. An Order of Prohibition do issue prohibiting the National Land Commission from conducting any hearing and/or review over the alleged complaint with regard to LR. No. 209/11458, whether on 17th February, 2016 as now fixed or at any time thereafter.
 - b. An order of certiorari do issue to bring into this court and quash the order by the National Land Commission to issue a Notice and conduct a review and/or hearing in respect of the parcel of land known as LR. No. 209/11458, which said order appeared in an advertisement in the Daily Nation issue of 22nd January, 2016 by the National Land Commission.
 - c. The Court do make a declaration that the National Land Commission has no jurisdiction to hear and determine any proceedings touching on the property whether as it has purported to do or at all.
2. The application was vigorously opposed by the respondent and the interested party who filed replying affidavits and parties canvassed the application by way of written submissions.
3. After carefully considering the parties' respective positions, I am of the view that this matter ought to be determined at a preliminary stage without delving into the merits or demerits of the application. I have given reasons for such an approach in the body of this brief judgment.
4. I must however point out that besides the issue of this judgment delivery having been delayed due to my transfer to another station and the challenges of settling in a new station, this court had, prior to my said transfer, to raise issues with parties' advocates who kept filing documents after documents, submissions after submission even after the file had been reserved for judgment by recalling the judgment in the name of the right to be heard in response thereby creating delay in writing and delivery of the judgment. This was coupled with the transition of the court from Nairobi to another equally busy station.
5. The following issues flow for determination:
 - (1) Whether a decision of a court of concurrent jurisdiction binds this court.**
6. The respondents contended that this court is not bound by the decision by Hon. Justice Odunga, J in JR. No. 117 of 2016 referring to property LR. No. 209/6506/1 allegedly being part of LR 209/6525 from which LR 209/11458 is alleged to have been excised. Whereas it is true as was held in **Mohamed Abushiri Mukullu Vs Minister for Lands and Settlement & 6 Others [2015]eKLR** that under the principle of stare decisis, although not bound to do so, the court should follow a decision of a judge of equal jurisdiction unless the decision appears to be clearly wrong; nonetheless, this court is bound only by the decisions of a court superior to it. The decisions of courts of equal jurisdiction are only persuasive authorities and for the sake of certainty and consistency especially where such decisions have not been overruled by a court superior to this court. See also **Justice Jeanne W. Gacheche & 5 Others v Judges and Magistrates Vetting Board & 2 Others [2015]eLKR**.
7. Accordingly, the obvious answer to this first issue is that this court is not necessarily bound by a decision of a court of concurrent jurisdiction.
 - (2) The Second issue for this court's determination, arising from the pleadings and submissions is whether this matter is for determination by this court or by the Environment and Land Court.**
8. Among the questions raised in this matter are whether the law grants the Managing Director of Kenya Railways Corporation, the power to transfer land by **Vesting Order**. The other question is whether the Exparte Applicants were accorded a fair hearing by the NLC. The third question is whether the NLC had jurisdiction to hear and determine the dispute before it, involving the parties herein over the subject property, since the land in question is alleged to be private land and not public land. Another question that emerges from the pleadings and submissions by parties in whether the disputed property is private or public land.
9. Commencing with the issue/question of jurisdiction of this court to hear and determine the matter herein, it is important to note that whenever any question of jurisdiction of the court is raised, it is upon the court to determine the question on the issue first before delving into any other question. This is so because it is trite law that jurisdiction is everything without which a court of law acts in vain.
10. And where a court of law determines that it has no jurisdiction to hear and determine the matter, it must down its tools.
11. As correctly submitted by the parties in this matter, jurisdiction emanates from the statute or the Constitution and therefore the parties cannot confer or vest into a court jurisdiction, not even by consent.
12. The interested party raised a preliminary objection predicated on the claim that:

“The suit herein involves the ownership of land LR No 209/11458. The constitution expressly grants the Environment and Land Court, the jurisdiction to deal with matters concerning ownership of land”.

13. On the part of the Respondent, they framed issues as follows, for consideration by the court: -

- (a) Whether LR No 209/11458 is private or public land;***
- (b) Whether the interested party has jurisdiction to review the title of LR No. 209/11458;***
- (c) Whether the application has acquired indefeasible title;***
- (d) Whether the complaint before the Respondent discloses a cause of action in law;***
- (e) Whether the suit parcel was legally acquired or not.***
- (f) Whether the suit parcel was legally acquired or not.***

14. In the view of the exparte applicant, the issue subject of these Judicial Review proceedings is not the ownership of LR No. 209/11458 as contrived by the interested party but whether the Interested Party had a right in law to lodge a complaint before the Respondent alleging that it was the registered owner of LR No. 209/6525 (part) from which LR No. 209/11458 was purportedly excised from, when it knew or ought to have known that the said LR No. 209/6525 had been surrendered to the Commissioner of Lands by the KRC almost 15 years; and that LR No. 209/11458 was granted shortly thereafter.

15. From the above statement by the Exparte Applicant, it is clear to me that the applicant is contesting what it calls ***“the Interested Party’s purported claim of ownership of the subject property LR 209/6525 when it knew or ought to have known that the said title had been surrendered to the Commissioner of Lands by the KRC 15 years before and a grant issued shortly thereafter.”***

16. That statement in my view by the Exparte Applicant, challenges the Interested Party’s title to the disputed property and nothing short of that, however well-crafted it may be by the Exparte Applicant.

17. In addition, the Exparte Applicant claims that the Director of Kenya Railways Corporation did not have power or right in law to transfer or confer a right over any land by way of Vesting Order as he allegedly purported to do.

18. A challenge to a transfer of land is a challenge that is likely to cause a reversal of such transfer of title to land and eventually vesting it in favour of the adverse party which in the view of this court can only be entertained by the Environment and Land Court.

19. Whereas a finding that the applicant was denied a right to a fair hearing is a general finding which can be made by any court of law, my humble view is that a claim challenging transfer of or conferment of a right over any land by way of Vesting Order as alleged in this matter is a claim over ownership and title to land.

20. Furthermore, the provision of the Fair **Administrative Action Act**, implementing **Article 47 of the Constitution** can be applied by any court of law, whether that Court is the High Court or a Court of Equal Status like the Environment and Land Court (ELC).

21. In my humble view, therefore I have no doubt in my mind that the question of whether the exparte applicant was accorded a fair hearing by the National Land Commission or not and or whether the provisions of NCL Act and the FAA were adhered to, what this court observes is that the main dispute as between the parties relates to ownership and or legality of title to the suit property. That kind of dispute and the issues of fair hearing and jurisdiction of NLC can be considered and a determination made by the Environment and LAND Court and in the end avoid multiplication of disputes involving the same parties and same subject matter before different courts of law with concurrent jurisdiction.

22. **Article 162(2)(b) of the Constitution** clearly establishes a specialized court to determine disputes relating to Environment and the use and occupation of and title to land. Under **Article 165(5)(b) of the Constitution**, the High Court is expressly barred from hearing and determining matters falling within the jurisdiction of the courts contemplated in **Article 162(2) of the Constitution**.

23. The contemplated courts are the Employment and Labour Relations Court and the Environment and Land court. The latter court established under the **Environment and Land Court Act, Section 13 of the Act** confers jurisdiction on the court as contemplated in **Article 162(3) of the Constitution**.

24. Under **Section 13(7) of the Environment and Land Court Act**, the court has power to grant/issue orders including Declarations, Judicial Review or Prerogative Orders, Specific Performance, Damages among other orders.

25. Whereas I am in agreement with the Exparte Applicant’s submission that the matter before this court is a judicial review matter. However, the issues in the dispute are about ownership of the subject LR No. 209/11458 and even if that were not to be the case, the Environment and Land court still has jurisdiction of Judicial Review in matters Land and Environment. That jurisdiction of Judicial Review is not exclusive to the High Court.

26. Accordingly, I have no hesitation in finding that the preliminary objection as taken is proper before this court moreso when **Section 13(2) (e) of the Environment and Land Court Act** makes it clear that the ELC has jurisdiction to hear and determine any other dispute relating to

environment and land and under section 13(7) thereof, to make orders including prerogative orders.

27. The ELC court in addition, has jurisdiction under **Section 13(3)** to hear and determine applications to redress of a denial, violation or infringement of, or threat to rights or fundamental freedoms relating to a clean and healthy environment. Failure to accord a party an opportunity to be heard or a fair hearing is a violation of a constitutional right which can be redressed through Judicial Review by any court exercising judicial review jurisdiction, depending on the subject matter in the dispute.

28. In my humble view, the Preliminary Objection as raised meets the threshold in **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 690**. Albeit it is argued by the Exparte Applicant that the matters in dispute before this court are not matters falling under the jurisdiction of the ELC and therefore prohibited by **Article 165(5) of the Constitution**, but are matters under the supervisory jurisdiction of the High Court under **Article 165(6)**, it is the view of this court that the Environment and Land court being a court of equal status as the High court, has supervisory jurisdiction of subordinate courts and tribunals in matters stipulated under **Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court**.

29. In addition, albeit it is true that the right to fair administrative action exercised by Judicial Review court is a constitutional issue, and as was held by Odunga, J in **HCC 353 of 2010, Githunguri Dairy Farmers Cooperative Society vs County Council of Kiambu & Others.**, the ELC in my humble view, **under Section 13(7) of the ELC Act** has concurrent jurisdiction to hear and determine matters Judicial Review.

30. That being the case, and there being no bar under **Article 47 of the Constitution** of the exercise of Judicial Review jurisdiction by ELC in matters of fair administrative action, I find and hold that to say that the High Court has exclusive jurisdiction in matters judicial review even where Judicial Review matter relates to Land and or Employment and Labour Relations is to attempt to clothe this court with jurisdiction which it is expressly divested of by the Constitution.

31. For the above reasons, I find and hold that the court that has jurisdiction to hear and determine the merits of the issues raised in this matter is the Environment and Land Court.

32. Accordingly, I shall not delve into those core issues/questions as the very issues raised are out of the jurisdiction of this court and are matters land as stipulated in **Articles 162(2)(b), 165(5)(b) of the Constitution and Section 13 of the Environment and Land Court Act**.

33. In the end, I decline to entertain the merits of this matter and direct that this file shall be placed before the Presiding Judge of the Environment and Land Court, NAIROBI for further directions/orders as he may deem just and fit to order.

34. Parties to fix dates before ELC upon the Deputy Registrar of this court remitting the file to the ELC.

35. Each party shall bear their own costs of this case whose merits have not been delved into.

Dated, Signed and Delivered at NAIROBI this 27th day of September 2018.

R.E. ABURILI

JUDGE