



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CIORAM: R MWONGO, J)

JUDICIAL REVIEW NO. 6 OF 2015

(Formerly Nakuru JR 99/2009)

IN THE MATTER OF AN APPLICATION BY WAIRIMU NGIGI AND 20 OTHERS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SUBDIVISION OF LAND ARISING FROM DECREE ISSUED IN NAIROBI HCCC NO. 2286 OF 1993

BETWEEN

WAIRIMU NGIGI AND 30 OTHERS.....APPLICANTS

AND

DIRECTOR OF SURVEY OF KENYA.....1ST RESPONDENT

DISTRICT LAND REGISTRAR.....2ND RESPONDENT

COMMISSIONER OF LANDS.....3RD RESPONDENT

AND

KIAMBU NYAKINYUA FARMERS CO.LTD.....INTERESTED PARTY

AND

ELIJAH NJUGUNA MUTITU & 1697 OTHERS...PROPOSED INTERESTED PARTY

RULING ON DIRECTIONS

Background information

1. This is an old matter that first commenced in 1993 in Nairobi. It came before me after ADR failed to resolve the parties' dispute and I can well understand why. The dispute involves the emotive issue of land rights and there are too many parties springing up from time to time, for any ADR resolution to be made and entrenched.

2. The file came before me several times for directions, and being a very large file, and time being brief, I directed the parties to file brief summaries of the case to enable me to give directions. Likewise, I enlisted my researcher to prepare a brief write up on applicable case law.

3. The brief history of this dispute the above company was incorporated by women who performed before Kenya's first President to enable them save and purchase land for their own and their children's future use. Three parcels were bought, namely:

i. LR No. 11191/2 registered as I.R. No. 20271/7 measuring approximately 8507 acres.

ii. LR No. 378/2 registered as I.R No. 18643/6 measuring approximately 4869 acres.

iii. LR No. 380 registered in the Government Land Registry in Volume N.I. Folio 244/4 measuring approximately 1040.4 acres. The total acreage therefore was approximately 14416 acres.

4. The properties were registered as **LONGONOT/KIJABE BLOCK 6 (KIAMBU) NYAKINYUA** belonging to KIAMBU NYAKINYUA FARMERS COMPANY LIMITED. In the 1990s it was decided that the land should be subdivided and the directors recognized only 974 persons as bonafide members entitled to land therein. Vide NAIROBI HCCC No. 2286 of 1993 , Wairimu Ngigi and others vs Kiambu Nyakinyua Farmers Company Limited, the plaintiffs went to court to have the court declare that indeed they too were members and that the Company had 1403 members and recognized the register that had been filed as the correct register of members. The court issued a decree to this effect in 2003. The current issue is that the directors did not follow the Court's Decree and the applicants are pursuing the same since they were not included in the subdivision.

5. The original Judicial Review application seeks the following reliefs:

“a). An order of Prohibition seeking to prohibit the District Land Registrar of Nakuru from issuing titles in respect of LR No 380, 378, 1119/2 (NEW LONGONOT- KIJABE BLOCKS 6, KIAMBU NYAKINYUA/3013) on the ground that issuing of titles in respect of the said property to Kiambu Nyakinyua Co. Ltd n until subdivision is carried out on the ground as per the order by the Surveys appointed by this Court and up which reflects the subdivision is prepared.

b). An order directing the Director of Surveys to implement the decision of this Court.

c). An order of mandamus seeking to compel the Commissioner of lands to issue titles in respect of LR No 380, 378, 1119/2 (NEW LONGONOT- KIJABE BLOCKS 6, KIAMBU NYAKINYUA/3013) according to the decree of this Honourable Court issued on the 31/3/2003”

6. The ultimate order sought is in respect of titles for over 14,400 acres of land duly subdivided to over 1,400 individuals.

Case Law on High Court or ELC Jurisdiction

7. In the Supreme Court case of **Republic v Karisa Chengo & 2 Others [2017] eKLR** the Court had the following to say:

“[50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words: “By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”

[51] Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the Constitution, or legislation (see In Re the Matter of the Interim Independent Electoral Commission, at paras. 29 and 30; and Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others, Sup.Ct. Civil Application No. 2 of 2011 [para. 68]). In this instance, the jurisdiction of the specialized Courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the ELC and the ELRC. Such legislation is to be interpreted in line with relevant constitutional provisions hence our position in Gatirau Peter Munya v. Dickson Mwenda Kithinji and Two Others, Sup. Ct. Civil Application No. 5 of 2014; [2014] eKLR, where we examined the constitutional provisions alongside legislative provisions on elections, and held [para. 77] that “the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.” In the instant case too, we take guidance from the Constitution, as we interpret it alongside the relevant statute law, pertaining to the specialized Courts.

[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with suis generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

8. In the case of **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR**, the court stated as below in the

respective paragraphs;

“59. Lenaola, J (as he then was) grappled with the question “whether the jurisdiction to hear and determine new cases relating to the environment and use and occupation of, and title to land vested exclusively on the Environment and Land Court established under Article 162(2) of the Constitution” in the High Court in the case of Edward Mwaniki Gaturu & another vs. Hon. Attorney-General & 3 others [2013] eKLR.

9. The learned Judge had no difficulty in rejecting the argument that magistrates’ courts lack jurisdiction over those matters. The Judge held that the ELC court does not have exclusive jurisdiction to hear and determine such matters. In reaching that decision, the Judge reasoned:

“41. ...Article 162(2) of the Constitution provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) then provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the Environment and Land Court Act. No. 19 of 2011 which came into effect on 30th August 2011.....

68. It is in the spirit of these constitutional demands that Parliament is clothed with the power, under Article 23, to enact legislation conferring original jurisdiction to subordinate courts in appropriate cases to hear and determine applications regarding protection and enforcement of the Bill of Rights, notwithstanding that the High Court, under the same provision, has jurisdiction over similar matters. Had the framers of the Constitution intended to restrict the power of Parliament to enact legislation conferring jurisdiction on magistrates’ courts with respect to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to land, it would have done so in express terms in the same way that the High Court is expressly barred, under Article 165(5), from exercising jurisdiction in respect of matters “falling within the jurisdiction of the courts contemplated in Article 162(2).”

69. The choice of language in Article 165(5) is also instructive. Article 165(5) provides:

“(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

70. Contrast the expression “reserved for the exclusive jurisdiction” with the expression “falling within the jurisdiction”. It is a pointer, in our view, that it was never intended that disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land would be “reserved for the exclusive jurisdiction” of the specialized courts under Article 162(2). It is also noteworthy that In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR, the Supreme Court of Kenya in construing Article 165(3) of the Constitution that confers jurisdiction on the High Court to hear any question respecting the interpretation of the Constitution noted that although the High Court was entrusted, under that Article, with the mandate to interpret the Constitution, that:

‘empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction.’

71. By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates’ courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.”

Conclusion

10. As shown in the Background Information, the substantive issues in this matter clearly arise out of disputes as to the rights to be issued title deeds pursuant to a proper survey. An order of mandamus to issue title deeds is the eventual outcome sought i.e subdivision, ownership and titles.

11. In my view the dispute is centrally located in and under the jurisdiction of the Environment and Land Court established under **Article 162(2)** of the **Constitution**. Any further pursuit of this case in the High Court will turn out to be an exercise in jurisdictional futility.

Directions

12. It is hereby directed that this file be and is hereby transferred to Nakuru to be placed before the Judge presiding over the Environment and Land Court for further directions. Mention shall be on 12th February, 2019 in Nakuru ELC, the same date as was fixed for directions in this court

13. **Orders accordingly.**

Dated and Delivered at Naivasha this 20th day of December, 2018.

RICHARD MWONGO

JUDGE

Delivered in the presence of:-

1. Mburu F. I. holding brief P. K. Njuguna for the Applicant
2. Muthee holding brief for proposed 2nd Interested Party
3. Akoto holding brief for Interested Party
4. Court Clerk – **Quinter Ogutu**