



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**PETITION NO. 2 OF 2017**

**IN THE MATTER OF ARTICLES 22 (1), 23 (1), 40 AND 47 OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 22 (1), 23 (1) 40 AND 47 OF THE  
CONSTITUTION OF KENYA**

**BETWEEN**

**SHAHZID AHMED YUSUF.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF KILIFI.....RESPONDENT**

**RULING**

1. In his Petition dated 24<sup>th</sup> February, 2017 the Petitioner Shahzid Ahmed Yusuf prays for: -

**“1. A declaration that the actions of the Respondent are in contravention of the fundamental rights of the Petitioner to wit Article 47 of the Constitution.**

**2. A declaration that the illegal marking and intended demolition of the structures on that land known as Plot Number 5054/116/Kilifi situated in Kilifi Town and measuring approximately 0.1128 Ha are unlawful and void.**

**3. A permanent injunction to issue restraining the Respondent, by itself, its appointed agents and/or servants or any of them or otherwise from demolishing the structures in the Suit Property known as Plot Number 5054/116/KILIFI situated in Kilifi Town and measuring approximately 0.1128 Ha.**

**4. Costs of the Petition.**

**5. Any such other Order(s) as this Honourable Court shall deem just.”**

The County Government of Kilifi is the Respondent.

2. At the time of filing the Petition, the Petitioner also filed a Notice of Motion application of even date seeking orders as follows: -

**“1. THAT this application be certified urgent and service of the same be dispensed with in the first instance.**

**2. THAT pending the *inter-partes* hearing and determination of this application, a conservatory order does issue to restrain the Respondent, by itself, its appointed agents and/or servants from interfering with, proceeding with the demolition of the properties of the Petitioner that have been identified and marked for demolition on the portion of land known as PLOT NUMBER 5054/116/KILIFI TOWNSHIP situate at Kilifi town and measuring approximately 0.1128 Ha.**

**3. THAT pending the hearing of this Petition, a conservatory order does issue to restrain the Respondent, by itself, its appointed agents and/or servants from proceeding with the demolition of the properties of the Petitioner that have been identified and marked for demolition on the portion of land known as PLOT NUMBER 5054/116/KILIFI TOWNSHIP situate at Kilifi town and measuring approximately 0.1128 Ha.**

**4. THAT the court be pleased to make any other order fit in the circumstances of this case.**

**5. THAT costs be provided for.”**

3. In brief, the case of the Petitioner/Applicant is that he is the registered owner of Plot Number 5054/116/Kilifi Township. Being desirous of developing the same he sought and obtained consents and approvals, from the Respondent and all the other relevant agencies, to develop a multipurpose hall and residential block on the said parcel of land. It is the Petitioner’s averment that upon receiving all the necessary approvals he started implementing his project. According to the Petitioner, immediately he commenced construction, the Respondent through its agents or employees started threatening him. Further, that the illegal and unlawful actions and harassment by the Respondent have continued unabated culminating in a decision to demolish his property.

4. It is the Petitioner’s case that he will suffer irreparable damage if the Respondent is allowed to demolish his property. In his view, he has established a *prima facie* case with a probability of success as the intended demolition violates his right to own property. He asserts that he is entitled to the protection of the Constitution and that the balance of convenience tilts in his favour in the circumstances of this case. Further, that no prejudice will be suffered by the Respondent by restraining the demolition pending the hearing and determination of the Petition.

5. The Respondent opposed the application through a replying affidavit sworn by its Director of Legal Services, Michelle Bibi Fondo and a Notice of Preliminary Objection, all filed on 9<sup>th</sup> May, 2017.

6. The Notice of Preliminary Objection captures the Respondent’s opposition to the application for conservatory orders. It discloses that the Respondent opposes the application on the grounds that: -

**“1. The Petition herein relates to land use planning and environmental planning which is, pursuant to Article 162 of the Constitution and Section 13 of the Environment and Land Court Act, a preserve of the Environment and Land Court. The Court herein does not have jurisdiction to entertain the Petition.**

**2. The matters impleaded by the Petitioner are *res judicata* and this court has no jurisdiction to try them the same having been directly and substantially in ELC Case No. 95 of 2016; Shahzid Ahmed Yusuf-vs-The County Government of Kilifi.**

**3. The suit is an abuse of the process of Court as the parties herein and the issues raised are the same in ELC Case No. 95 of 2016; Shahzid Ahmed Yusuf-vs-The County Government of**

**Kilifi; which case touches the same suit property in this case, and which is pending for hearing and determination. This Court consequently has no jurisdiction to proceed any further with this present suit while the first filed suit is pending in court.**

**4. The Application as drawn presupposes that the Plaintiff has exhausted Section 38 of the Physical Planning Act, which provides an elaborate dispute resolution mechanism to be followed by persons on whom an enforcement notice has been served under subsection (1) and are aggrieved by the notice.**

**5. The Plaintiff/Applicant has not in any way followed the elaborate steps provided by Section 38 of the Physical Planning Act Chapter 286 Laws of Kenya.**

**6. The Application as preferred violates mandatory provisions of law and laid down procedures and cannot sustain the prayers sought.”**

7. The advocates for the parties agreed to prosecute the application through written submissions.

8. The Respondent has challenged the jurisdiction of this court to hear the matter. It was long established in the case of **The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] KCLR 1** that jurisdiction is everything and without it a court has no power to make one more step. Once a court establishes that it is without jurisdiction, it has no basis for continuation of the proceedings.

9. The Respondent’s position is that this court has no jurisdiction to hear this matter as the same falls within the province of the Environment and Land Court. It is also the Respondent’s case that this court lacks jurisdiction to handle this matter as the same is *res judicata*.

10. The Respondent starts its submission by pointing out that the Petitioner seeks to challenge an enforcement notice issued pursuant to the provisions of Section 38 of the Physical Planning Act. It is the Respondent’s submission that this matter touches on ownership and use of land and by virtue of Article 165 (5) (b) of the Constitution, this court has no jurisdiction to handle the matter.

11. Referring to Section 13 of the Environment and Land Court Act, 2011, the Respondent asserts that among the disputes reserved for the Environment and Land Court, as per Section 13 (2) (a), are matters relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

12. It is the Respondent’s case that in determining whether or not a constitutional right has been violated, the question whether or not the development by the Petitioner was approved by the Respondent must be decided. Such determination, the Respondent contends, can only be made by the Environment and Land Court after the Petitioner has exhausted the alternative dispute resolution mechanism provided by the Physical Planning Act. It is the Respondent’s case that the avenue opened for the Petitioner by the law is to appeal to the relevant liaison committee and, if not satisfied with its decision, appeal to the High Court as provided by Sections 38 (4) and 13 of the Physical Planning Act. In support of this proposition the Respondent relies on the case of **Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR**.

13. It is the Respondent’s averment that one cannot bring a claim challenging an enforcement notice in a constitutional petition. That the procedure provided by the law must strictly be adhered to. In support of this submission the Respondent cites **Anne Wawuda & 3 others v Kenya railways Corporation & another [2015] eKLR** wherein Emukule, J stated that: -

**“A constitutional court does recognize the existence of other laws,...except where they are inconsistent with the Constitution, and it cannot usurp the jurisdiction of other courts exercising other jurisdictions vested in them by law. A constitutional [court] must rigidly stick to its mandate.”**

14. The Respondent therefore urges the dismissal of this matter as it is wrongly before this court.

15. Turning to the issue of *res judicata*, the Respondent states that the instant application was filed after Angote, J dismissed an application in Malindi E.L.C. No. 95 of 2016 seeking to restrain the Respondent from interfering with the development of the Petitioner's property. It is therefore the Respondent's position that by virtue of Section 7 of the Civil Procedure Act this matter is *res judicata* as the parties and the subject matter herein are the same with those in the Environment and Land Court matter.

16. In support of the prayer to dismiss the matter, the Respondent cites the decision of Aburili, J in **Rose Njeri Munoru & 13 others v Hannah Mwhaki Muturi & 4 others [2016] eKLR**.

17. In response to the Preliminary Objection, the Petitioner asserts that this court has jurisdiction to hear his claim. He points out that Article 165 (3) (b) of the Constitution grants this court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Further, that Article 23 (1) of the same Constitution clothes this court with jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The Petitioner cites the decision of the Supreme Court in **Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** in support of his contention that this court has jurisdiction to hear this matter.

18. Pointing out that the Environment and Land Court is indeed of equal status with this court, the Petitioner asserts that equal standing is not the same thing as jurisdiction. In support of this statement, the Petitioner cites the decision of this court (Anyara Emukule, Said Chitembwe and Mugure Thande, JJ) in **Malindi Law Society v Attorney General & 4 others [2016] eKLR** in which the court defined the term "equal status" as follows: -

**"So what does the phrase Parliament shall establish courts of "equal status" mean in Article 162 (2)? It must be a court of the same standing as the High Court, and the persons or Judges appointed to those courts are persons of the same social standing or professional standing as persons appointed to the High Court. This is not the same thing as jurisdiction."**

19. The Petitioner asserts that the issue in this case falls under Article 40 of the Constitution which deals with the protection of the right to property and therefore the same falls squarely within the jurisdiction of this court. In support of his argument the Petitioner refers to Section 13 (3) of the Environment and Land Court Act which provides that: -

**"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."**

20. As to whether this matter is *res judicata*, the Petitioner asserts that this matter is not *res judicata* as Malindi E.L.C. No. 95 of 2016 was withdrawn through a Notice of Withdrawal dated 7<sup>th</sup> March, 2017.

21. The question that needs to be answered is whether the Petitioner's claim falls within the jurisdiction of this court. Since a plea of *res judicata* goes to the roots of the jurisdiction of the court, this particular issue will also be dealt with as it is part of the jurisdictional question posed by the Respondent.

22. In the case of **John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2015] eKLR**, Emukule, J defined jurisdiction as follows: -

**"Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter."**

23. As was stated by the Supreme Court in **Samuel Kamau Macharia v Kenya Commercial Bank**

**Limited & 2 others [2012] eKLR**, a court's jurisdiction flows from either the Constitution or legislation or both and a court can only exercise jurisdiction as conferred by the Constitution or any other law.

24. The Supreme Court in the recently decided case of **Republic v Karisa Chengo & 2 others, Petition No. 5 of 2015** put to rest the issue of the jurisdictions of the High Court, the Environment and Land Court, and the Employment and Labour Relations Court. At paragraph 79 of its judgement the Court stated that: -

**“It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165 (5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “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)”.”**

25. Each of the three courts of equal status has roles delineated for it by the Constitution which functions are elaborated through legislation by Parliament. For the Environment and Land Court, its jurisdiction is elaborated in Section 13 of the Environment and Land Court Act.

26. The Petitioner's submission that Articles 25 (1) and 165 (3) (b) empowers this court to hear this matter as it touches on violation of rights and especially the right to own property is, with respect, unsustainable. I say so, because the constitutional provisions cited by the Petitioner expressly provide that this court's jurisdiction to hear and determine the question of violation of rights is subject to Article 165.

27. Section 13 (3) of the Environment and Land Act is not a limiting provision as alleged by the Petitioner. It does not limit the jurisdiction of the Environment and Land Court to Articles 42, 69 and 7 of the Constitution. It is an explanatory provision indicating that the Environment and Land Court Act should not be read so as to preclude the Environment and Land Court from **“hearing and determining applications for redress of 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.”**

28. The matter herein relates to land use planning and that is a matter which falls within the jurisdiction of the Land and Environment Court. Any constitutional issues arising in the dispute will be dealt with by that Court – see Court of Appeal decision in **Daniel N. Mugendi v Kenyatta University & 3 others [2013] eKLR**. Any attempt by this court to entertain this matter would amount to expanding jurisdiction **“through judicial craft and innovation”** as per the words of the Supreme Court in **Samuel Kambu Macharia (supra)**.

29. On the question of jurisdiction, I therefore agree with the Respondent and find that this matter belongs to the Environment and Land Court. This court therefore lacks jurisdiction to entertain this matter.

30. I will not stop here as there is another aspect on the question of jurisdiction. The Respondent contends that this matter is *res judicata*. Its position is that the application for a conservatory order herein is similar to an application for injunction that was heard and dismissed by Angote, J in Malindi ELC No. 95 of 2016.

31. The Respondent has attached a ruling dated 3<sup>rd</sup> February, 2017 by Angote, J in which he dismissed the Petitioner's application for injunction holding that: -

**“In the absence of the approval for change of use, and in view of the belated letter from the National Construction Authority, I find that the Plaintiff has not established a *prima facie***

**case with chances of success.”**

32. The Petitioner’s response to this particular issue is found in his submissions. His case is that Malindi ELC No. 95 of 2016 was withdrawn. Apart from the fact that the Petitioner did not file an affidavit to formally rebut the Respondent’s allegation that the matter is *res judicata*, I find that the Petitioner does not deny the fact that a ruling on the question of injunction had been heard *inter-partes* and a determination made before the withdrawal of his case.

33. The application for a conservatory order herein is nothing but a reincarnation of the application for injunction that was rejected by the Environment and Land Court. The instant application is therefore an abuse of the court process. The same is also *res judicata* as the litigation before the Environment and Land Court was before a competent court and involved the same parties who were tussling over the same subject matter.

34. What is the appropriate order in this case? In my view, an order of transfer is not appropriate in this case because of the *res judicata* factor. The Petitioner’s application for a conservatory order cannot be saved and neither can the Petition.

35. In conclusion, I find that the order that recommends itself to this court is to allow the Respondent’s Preliminary Objection dated 5<sup>th</sup> May, 2017 filed in court on 9<sup>th</sup> May, 2017. The Respondent’s Notice of Motion application dated 24<sup>th</sup> February, 2017 is therefore struck out. As I have found I have no jurisdiction, the Petition is also struck out.

36. The Petitioner may have a genuine complaint against the Respondent. For that reason, I direct each party to meet own costs of the proceedings.

**Dated, signed and delivered at Malindi this 29<sup>th</sup> day of June, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**