



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 398 OF 2015

DEL MONTE KENYA LIMITEDPETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MURANGA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Introduction

1. The sole question for my determination is whether the Petition raises a substantial question of law to warrant a certification and reference of the Petition to the Honourable Chief Justice for empanelment of a bench of an uneven number of judges numbering at least three to hear and determine the Petition.
2. The Petitioner through its application dated 21st December 2015 contends that there is a substantial question of law while the Respondents contend otherwise.

Background facts

3. The factual background leading to the Petition was captured in summary in my earlier ruling on the preliminary issue as to jurisdiction. Of the facts and contentions, I stated as follows in the ruling which was delivered on 1 October 2015:

“[6] The Petitioner, a multi-national corporation has been around. She is a public company listed in the New York bourse. It[sic]has a capital value in the excess of two billion United States dollars. It owns land. In Kenya the tenure are leaseholds, from the government of the Republic of Kenya. The parcels number nine and contain by measurement an aggregate of 9,143.455 hectares. The

parcels transcend the two counties administered by the 1st and the 2nd Respondents. Two of the leaseholds are set to expire in the year 2019. The other seven parcels will only see out terms in 2022. The Petitioner is an agro-pineapple farmer. Its farming circle runs three and a half years.

[7] In 2012, with effluxion of the lease terms looming, the Petitioner commenced the process of their extension. The Petitioner applied to the local county council pursuant to the provisions of the Physical Planning Act (Cap 226). The Petitioner also prompted the Commissioner of Lands. The latter wrote to all the relevant agencies, including the local land control board under the Land Control Act (Cap 302). The agencies, to wit; the District Land Officer, The District Surveyor, The District Physical Planning Officer and the County Planning Officer all responded. They had no objection to the Petitioner being granted fresh leases. The Respondents on the other hand have not issued their no objection notes.

[8] The 1st Respondent then asked the Petitioner to apply de novo prior to the 1st Respondent granting a note of no objection. The Petitioner applied. Then the twist unfolded further. The 1st Respondent asked or requested the Petitioner to surrender 1500 acres for public use. The Petitioner deemed and still deems such request unreasonable and unconstitutional.

[9] The controversy emerges further when the Petitioner alleges that the Respondents have not and are not acting in accordance with the Constitution. The Petitioner alleges that the Respondents have not complied with Article 10 of the Constitution in their respective dealings with the Petitioner. The Petitioner contends that the Respondents in contravention of Articles 27(1) and (2) of the Constitution acted in a discriminatory and blinkered manner. The Petitioner alleges that the Respondents have failed to observe the very cardinal principles as to fair administrative action as enshrined under Article 47 of the Constitution. The Petitioner claims that its right to property as protected by and guaranteed under Article 40 of the Constitution is under threat. The Petitioner consequently invites the court to instantly intercede.

[10] The stated allegations are detailed. It is these allegations which the Petitioner seeks to have the court interrogate further. Relief is the Petitioners aim ultimately and the sought reliefs number ten.”

4. Then before declining to allow the Respondents’ plea of *forum non conveniens*, I concluded as follows:

“[33] The Petition has raised challenges to the Respondents’ approach to the application by the petitioner for the renewal of the various leasehold tenures”

5. The Petitioner now contends that in the midst of all the questions and issues raised by the Petition there is a substantial question of law which would prompt the application of Article 165(4) of the Constitution.

The Law

6. A substantial question of law, in the context of matters constitution has been described as:

“...one which is of general public importance or which directly and substantially effects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or

the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial". (Emphasis added)

7. I agree with such a pertinent observation and description which was fronted by the Supreme Court of India in the case of **Chunilal Mehta -v- Century Spinning & Manufacturing Co.** AIR [1962] SC 1314. The dicta has been applied by various courts within our jurisdiction, including the cases of **Republic v- President & 5 Others Ex parte Wilfrida Itolondo & 4 Others** [2013]eKLR, **J. Harrison Kinyanjui v Attorney general & Another** [2012]eKLR, **Kalpana Rawal v- Judicial Service Commission & 3 Others**[2015]eKLR and **Martin Nyaga Wambora v Speaker County Assembly of Embu** [2014]eKLR.
8. The results in the cases were varied. The diverse decisions lead to the more prudent conclusion that as the Constitution does not itself define what a "substantial question of law" is, the question as to whether there exists a substantial question of law, even if one adopted the definition in the **Chunilal Mehta** case, is left to the individual judge to determine depending on the circumstances and unique facts of each case.
9. Thus in **County Government of Meru -v- the Ethics and Anti-Corruption Commission Milimani Law Courts Petition No. 177 of 2014** [2014]eKLR the court held that :-
 - a. *The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.*
 - b. *The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges*
 - c. *Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally"*
10. Two factors emerge in the midst of the definition in the **Chunilal Mehta's case** and the various local decisions.
11. The reference for empanelment is a jurisdiction not to be lightly exercised. Secondly, where the Petition raises or deals with an issue of public import then the balance tilts in favour of empanelment especially if it is also an issue, the determination whereof would affect the rights of both the individual parties as well as the public at large or it is an issue which is yet to be determined and settled by the court or a court superior in hierarchy. The court, of course, must take into account the need to have the dispute resolved with little or no delay noting that the decision of a single judge has basically the same force as that of an empanelled bench.

Discussion and Determination

12. The Petitioner states that the issue of extension of the leases granted to multinational companies is novel and of public importance. The 1st Respondent has made no representations on whether the Petition raises a substantial issue of law worthy of certification under Article 165(4) of the Constitution. The 2nd Respondent on the other hand contends that this issue is an afterthought as the Petitioner is yet to comply with the various provisions of the Physical Planning Act (cap 286) Laws of Kenya. The 2nd Respondent also contends that the law on " *landholding by non-citizens and multinationals such as the Petitioner is well captured and articulated in Chapter 5 of the Constitution of Kenya 2010 and the Land Act, 2012* " and as such " *does not need three or more judges to pronounce the same*".
13. I did in the course of my earlier ruling on the issue of jurisdiction state that the Petition herein raises challenges to the Respondents' approach to the application by the Petitioner for renewal of the various leasehold tenures currently held by the Petitioner but are on the verge of expiry. I still hold the same view. The Petitioner has now further crystallized my general approach to one singular issue, namely;

“What, if any, is the role and function of County Governments in issues relating to use of land, including land management such as change of user, extension of user, extension of leases, subdivisions of land and amalgamation of land”

14. A wide issue, indeed.
15. A closer reading of the Petition as well as the various affidavits filed by the parties herein would reveal that the issue is not far-fetched. At the core of the dispute ultimately will be whether or not the Petitioner is entitled to the extension of the Petitioner's lease tenures as it has sought from the Respondents. There are also corollary issues including the legality of the approach adopted by the Respondents.
16. I must state that for Article 165(4) of the Constitution to be invoked, the “substantial question” to be determined need only be a singular one, even if there exist other usual and ordinary or daily questions or issues of law. The fact that there could be many other issues should not act as an embargo to the reference of a matter under Article 165(4) to the Chief Justice once a single substantial question of law is determined to exist.
17. In the circumstances of this case, one must not lose sight of the fact that the new constitutional dispensation apparently places an interdict on the ownership or tenure of land held by foreign nationals as well as multinationals: see Article 65 of the Constitution. The Constitution also dictates under Article 62(2) that all public land shall vest in and be held by county governments in trust for the people resident in the county. Specifically under Article 62(1)(c), land “**transferred to the State by way of sale, reversion, or surrender**” shall vest in the County Government.
18. In conveyancing parlance, “reversion” arises or exists only where a term-absolute of a lease expires by effluxion of time. In effect, the contest herein is likely to lead to a situation where the Petitioner's parcels of land revert to the State upon expiry of the lease period. Upon such reversion the land is to be held by the county government, namely the 1st and 2nd Respondents, in trust for the county residents. The interest of the 1st and 2nd Respondents cannot be gainsaid. The interest of the public, namely the county residents, can also not be gainsaid. The reliefs sought touching on the extension of lease will most definitely, if granted touch on the public as well. The issue is of a weighty nature and deserves certification under Article 165(4) of the Constitution.
19. Besides, it would be more apposite if the court took judicial notice of the fact that various multinationals control large tracts of land within the country. Of particular interest must be the tracts of land in the now defunct administrative provincial units of the Rift Valley and the Coast. A determination of the general question of law isolated by the Petitioner will certainly affect the other counties as well as the residents.
20. I am aware that in **In Re the National Land Commission Advisory Opinion No 2 of 2014 [2015] eKLR**, the Supreme Court addressed in depth the general issue of land administration and management. The court did not, as apparently it had not been invited to, address the role of the County Government as a trustee of public land. In a touch and go manner, the Supreme Court however identified the mandate of extending leases as belonging to the National Land Commission under Section 13 of the National Land Commission Act, 2012 as read together with Section 18 of the same Act. The role of the County Government was however not addressed as trustee and the effect of such constitutional trust in relation to such organs as the National Land Commission and the County Land management Boards established under Section 18 of the Act. It is however to be appreciated that the Supreme Court extensively addressed the role of the National Government through its relevant ministry.
21. Ultimately, in my view, the matters raised in the Petition have far-reaching consequences. The emotive nature of land disputes itself, the interest of counties as trustees of land which revert to the State upon expiry of leases, the interest of the public that is bound to be the ultimate beneficiary of land reverting to the State and, finally, the government policy to encourage foreign investors including multinationals already holding tracts of land: all lead to the conclusion that the question as to the role, if any, to be played by county governments in the extension of the leases held by multinationals especially the period before the reversion matures would be a substantial question of law under Article 165(3)(d) of the Constitution.
22. There is merit when the Petitioner seeks that this petition be referred to the Honourable Chief Justice for purposes of Article 165(4) of the Constitution.

Disposal

23.The upshot is that I allow the application dated 21 December 2015. I certify that this Petition raises a substantial question of law under Article 165(3)(d) of the Constitution

24.Accordingly, I direct that this petition be transmitted to the Hon. Chief Justice forthwith to enable him empanel an uneven number of judges of this court not less than three.

25.Further directions shall be given by the empanelled bench.

26.The costs of the application will be in the cause.

Dated, signed and delivered at Nairobi this 29th day February, 2016.

J.L.ONGUTO

JUDGE