



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 57 OF 2015**

**IN THE MATTER OF: A CONSTITUTIONAL PETITION BROUGHT PURSUANT TO  
ARTICLES 22, 23, 165 (3)(B) & 258 OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT OF THE SUPREMACY OF THE  
CONSTITUTION AS PER ARTICLE 2(1 AND 4) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE BREACH OF THE NATIONAL VALUES AND PRINCIPLES OF  
GOVERNANCE IN REGARDS TO ARTICLE 10 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT AND INTENDED BREACH OF THE  
FUNDAMENTAL RIGHT AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION  
REGARDING THE PROTECTION OF RIGHT TO PROPERTY**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT AND INTENDED BREACH OF THE  
FUNDAMENTAL RIGHT AND FREEDOMS UNDER ARTICLE 47 OF THE CONSTITUTION  
REGARDING THE RIGHT TO FAIR ADMINISTRATIVE ACTION**

**AND**

**IN THE MATTER OF: PRINCIPLE OF LEGITIMATE EXPECTATION**

**BETWEEN**

**FORT HOTELS LIMITED T/A COAST CAR PARK & AMUSEMENT  
CENTRE.....PETITIONER**

**AND**

**1.TOURISM FINANCE CORPORATION.....RESPONDENT**

**RULING**

1. The Petitioner filed a Petition herein dated 30<sup>th</sup> October, 2015 seeking multiple orders culminating in an order that the Respondents' actions in selling the suit property known as Mombasa Island/Block XXV/169 amounted to deprivation of property contrary to Article 40 of the Constitution of Kenya 2010.

2. To pursue its contentions the Petitioner also filed a Notice of Motion of even date with the Petition and sought conservatory orders to ensure its contention to an interest in the suit property was maintained pending the determination of the Petition. In the event no conservatory orders were granted and it was directed that the Petition as well as the Notice of Motion (for conservatory orders) be served and heard **inter partes**.

3. That window gave the First Respondent an opportunity to take out and file a Notice of Preliminary Objection dated 25<sup>th</sup> November, 2015 on a point of law on the grounds –

(1) that the Petition and the Application herein are misconceived and incompetent, fatally defective, hollow and a non-starter in law following a multiplicity of suits filed by the Applicant over the same cause of action and involving the same parties being Mombasa BPRT No. 17 of 2015; Mombasa ELC No. 30 of 2015 and Court of Appeal (at Mombasa) Application No. 52 of 2015, all awaiting hearing and determination and as such the Petition and the Application herein should be struck out with costs to the First Respondent;

(2) that the Petition herein is therefore incompetent, bad in law and should therefore be struck out in **limine** and be dismissed with costs to the First Respondent.

4. According to the **locus classicus**, decision of the Court of Appeal for Eastern Africa in **MUKISA BISCUITS COMPANY VS. WEST END DISTRIBUTORS [1969] EA 696**, at page 701 –

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”**

5. The question here is whether this is a proper preliminary objection on a point of law, that the facts pleaded by the other side are correct, and the objector is not calling upon exercise of the court's discretion.

6. I have reviewed very carefully the submissions of counsel for the Petitioner (Respondent to the Preliminary Objection) dated and filed on 2<sup>nd</sup> March, 2016, and I find that there is no objection to the facts pleaded, and no fact needs to be ascertained. The written submissions by the First Respondent are likewise agreed on the facts.

7. The First Respondent is the registered proprietor of the suit property. It had originally leased the suit property to the Petitioner for a period of five years, and three months. The term had expired but the Petitioner held over the property from month to month pending the First Respondent's discretion what to do with the suit property.

8. Following the expiry of the lease, the Petitioner resolved at a Board Meeting held on 26<sup>th</sup> January, 2012 to sell the suit property through a public auction in order to raise capital to renovate its property known Utalii House, in Nairobi. It is not disputed by the Petitioner that it was served by the First Respondent with Notice in a letter dated 10<sup>th</sup> February, 2015 of the intended sale of the suit property **“as**

is basis” and the Petitioner was advised to adjust its business accordingly.

9. In reaction to the said actions by the First Respondent the Petitioner filed Mombasa BPRT No. 17 of 2015 (**FORT HOTEL LIMITED T/A COAST CAR PARK & AMUSEMENT CENTRE VS. TOURISM FINANCE CORPORATION**), and later Mombasa ELC Case No. 30 of 2015 (**Fort Hotel t/a Coast Car Park & Amusement Centre vs. Tourism Finance Corporation**) wherein the Petitioner sought injunctive orders against the First Respondent pending *inter alia*, the hearing of the reference to the business Premises Rent Tribunal (BPRT), all of which the First Respondent maintains are misconceived and incompetent, noting that the First Respondent is a Government Corporation and the sale was advertised to be by way of open sale by public auction, and the Petitioner was not forbidden from bidding, the notice having been adequate to enable the Petitioner to prepare their finances accordingly for the bidding and/or make alternative arrangements for its business.

10. There is no disagreement over the fact that Mombasa ELC No. 30 of 2015 was considered following written submissions and arguments and dismissed on 18<sup>th</sup> September, 2015 on the twin reasons that the tenancy was neither controlled nor was the notice to the Petitioner inadequate.

11. Following the dismissal of the ELC No. 30 of 2015, the Petitioner filed Malindi UR Civil Application No. 52 of 2015. That application was dismissed with costs for non-attendance by the Petitioners (Applicants) on 27<sup>th</sup> November, 2015. No effort was made by the Petitioner to have the Ruling reviewed and have reinstated the said application by the Court of Appeal.

12. For the Preliminary Objection on a point of law, the First Respondent must **firstly** establish a point of law which supports the Preliminary Objection, and **secondly** that point of law renders the Petition incompetent, bad in law and therefore liable to be struck out with costs to the First Respondent.

13. On the question of multiplicity of suits, Section 6 of the Civil Procedure Act (Cap 21, Laws of Kenya) codifies the general *sub judice* rule that –

**“no court shall proceed with the trial of any suit or proceeding in which the matter in issue is directly and substantially between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction to grant the relief claimed.”**

14. As shown in the preceding paragraphs of this Ruling, it is not in dispute that there are other suits and proceedings filed by the Petitioner over the same cause of action and involving the same parties, namely BPRT No. 17 of 2015, and Mombasa ELC No. 30 of 2015 the former awaiting hearing and determination and the later struck out. As noted the Civil Application No. 52 of 2015 to the Court of Appeal was dismissed on 27<sup>th</sup> November, 2015.

15. The present suit brought under the guise of a Constitutional Petition, is an abuse of the court process. There are already two suits in respect of the same subject matter, the suit property. In both cases the court will be called to make a finding on the legality of the First Respondent’s acts, which would include a determination whether the Petitioner has any right under Article 40 of the Constitution, and therefore whether the First Respondent’s actions are unconstitutional, including the validity or otherwise of the notice served upon the Petitioner by the First Respondent.

16. The question of the multiplicity of suits has been considered and determined in several cases. In the case of **RETIRED MAJOR SHADRACK MUTIA MUIA VS. PROFESSOR KIVUTHA KIBWANA & OTHERS** (Nairobi High Court Petition No. 281 of 2006), the court was considering Section 84 of the repealed Constitution and said *inter alia* –

**“... Section 84 of the Constitution is a separate right, the right for a person whose rights are violated, infringed or threatened to move the High Court unhindered. The court should exercise great circumspection in interfering with the gateway of enforcement lest the rights guaranteed under the Constitution become not worth the paper they are written on.**

**This view is not inconsistent with the power of the Court to prevent abuse of its process or do justice. Allowing of abuse to take root in our system breeds impunity and the direct result is that the efficacy of court orders is lessened thereby undermining the same rights that are to be enforced.**

**Under Section 84, the court is entitled to take into account the issue of subjudice and consider whether indeed, it affects the rights to be enforced. The court is not powerless and cannot gloss over the abuse of its process merely because the matter before it is dressed as an enforcement of fundamental rights action. It must act when called upon to halt an abuse of its process in appropriate circumstances.”**

17. Likewise in **FLEUR INVESTMENT LIMITED VS. PERMANENT SECRETARY MINISTRY OF ROADS & 4 OTHERS [2012] eKLR**, the court observed –

**“...However, before considering whether there are breaches of the Petitioner’s fundamental rights and freedoms, it is important to consider whether this claim is an abuse of the court process as there are two suits pending before this court concerning the mater in issue in this Petition.**

**...Although proceedings commenced under Section 84 of the former Constitution are *sui generis* by their nature, I think the principle contained in Section 6 of the Civil Procedure Act is one of general application intended to guard the court from the embarrassment of giving inconsistent decisions, saving scarce judicial resources and protecting parties from being vexed by a multiplicity of suits. I will consider whether it applies to these proceedings in the circumstances of this case.**

**...In my view, this Petition is another suit filed to litigate the same matter between the same parties seeking similar relief. It is an abuse of the court process to file a multiplicity of suits seeking similar relief in respect of the same subject matter.**

**...I would also add that under rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006, where a constitutional issue arises in matters before the High Court, the court seized of the matter may treat the matter as a preliminary point and shall hear and determine the same.”**

18. There is no doubt the Petition and the Notice of Motion herein are an abuse of the court process. It is a mischievous and a contemptuous abuse of court process noting in particular that these are proceedings for the enforcement of fundamental rights and freedoms under the Constitution. In **CHOKOLINGO VS. THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO [1981] 1 WLR 106**, Lord Diplock warned –

**“It would be undesirable to stifle the grant of constitutional relief when a claim for relief is established and such relief is unavailable through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument.”**

19. The ELC suit was before a court with status of the High Court.

20. Though the Petition herein is filed in the High Court, the ELC is a court of the status of the High Court and has jurisdiction under Article 165(3)(b) of the Constitution to enforce fundamental rights and freedoms in any case before it.

21. The jurisdiction to enforce the provisions of the Bill of Rights (Chapter IV) is not exclusively available under **Article 22** but is part of the general jurisdiction the court has in deciding the case before it. The contention that the pending suits proceed to their logical conclusion cannot impair the determination of the Petitioner’s grievances in respect of the alleged breach of its rights to the suit

property. The relief the Petitioner seeks in these proceedings is available in the pending proceedings.

22. From the discourse above, the inevitable conclusion is simply that the Petition herein is another suit to litigate the same cause of action between the same parties, seeking the same reliefs. It is an abuse of this court's process. The Petitioner should pursue its proceedings it left midstream to vindicate its rights and fundamental freedoms if any has been infringed.

23. The First Respondent's Preliminary Objection (which was also supported by the Second Respondent the Attorney General) dated 25<sup>th</sup> November, 2015 therefore succeeds. The Petition and Notice of Motion thereunder and of even date therewith, is hereby struck out with costs to the Respondents.

24. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 28<sup>th</sup> day of April, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Gathuku holding brief for Dr. Khaminwa for Petitioner

No Appearance for 1<sup>st</sup> Respondent

Miss Lutta for 2<sup>nd</sup> Respondent

Mr. S. Kaunda Court Assistant