



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 35 OF 2015

IN THE MATTER OF: INTERPRETATION OF CHAPTER FIVE, LAND AND ENVIRONMENT, ARTICLES 64, 67, 67(e) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: JURISDICTION OF THE NATIONAL LAND COMMISSION AND COUNTY LAND MANAGEMENT BOARDS PURSUANT TO ARTICLES 67(e) OF THE CONSTITUTION AND SECTION 35 OF THE NATIONAL LANDS COMMISSION ACT NO. 5 OF 2012

AND

IN THE MATTER OF: ARTICLES 40, 22, 23, 165(3) (d) AND 159(2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONSTITUTIONALITY OR OTHERWISE OF THE COMPLAINT NO. CLMB/KWL/05 AGAINST DR. ALFRED KAMAU BY THE KWALE COUNTY MANAGEMENT BOARD

BETWEEN

DR. WILFRED JAMES KIMANI KAMAU

FAITH NJERI KAMAU.....PETITIONERS

AND

- 1. NATIONAL LAND COMMISSION**
- 2. THE GOVERNMENT OF KWALE COUNTY **
- 3. KWALE COUNTY LAND MANAGEMENT BOARD ...**
- 4. THE HONOURABLE ATTORNEY-GENERAL **
- 5. MWINYI KIMORU .**

6. JUMA MASTAJABU

7. HASSAN MASTAJABU.....RESPONDENTS

JUDGMENT

1. In this Petition dated 8th June, 2015 and filed on 9th June, 2012, the Petitioners Dr. Wilfred James Kimani Kamau and Faith Njeri Kamau sought the following orders -

(a) A declaration that the National Land commission and/or the County Land Management Board has no mandate to investigate, question or make recommendations on the Title to private land under Article 67 of the Constitution, the National Land Commission Act and/or under any other law whatsoever.

(b) A declaration that the National Land Commission and/or the County Land Management Board has no jurisdiction on all disputes touching on the environment, the use and occupation of and title to private land under Article 67 of the Constitution, the National Land Commission Act and/or under any other law whatsoever.

(c) A declaration that the National Land commission and/or the County Land Management Board has no jurisdiction on all disputes touching investigation and adjudication of claims arising out of Article 67(2) (e) of the Constitution without express legislation as provided for in Section 15 of the National Land Commission Act 2012 (No. 5 of 2012).

(d) A declaration that proceedings in Land Reference No/Title No. Galu/Kinondo/339, Complaint No. CLMB/KWL/05 against Dr. Alfred Kamau by the Kwale County Management Board are *ultra vires* the powers of the Kwale County Land Management Board and unconstitutional.

(e) A declaration that Section 35 of the National Land Commission Act, 2012 (No. 5 of 2012), does not donate jurisdiction to investigate title to private land to county management boards.

(f) An order of certiorari quashing the proceedings in Land Reference No/Title No. Galu/Kinondo/339, complaint No. CLMB/KWL/05 against Dr. Alfred Kamau by the Kwale Land County Management Board.

(g) An order of prohibition barring the National Land Commission and/or the Kwale County Land Management Board from investigating, challenging and/or in any manner whatsoever questioning the validity of title to plot Kwale/Galu Kinondo/339.

(h) Costs of this petition.

2. The Petition was supported by the Affidavit of the First Petitioner, Dr. Wilfred James Kimani Kamau sworn on 8th June, 2015, the Verifying Affidavit of the said Petitioner, and the grounds on the face of the Petition. Conservatory orders were granted on 9th June, 2015, staying further proceedings before Kwale County Land Management Board Complaint No. CLMB/KWL/05 against the first Respondent.

3. Though the Petition, the Chamber Summons and the conservatory order was served upon the First

Respondent on 10th June, 2015, no Memorandum of Appearance was entered by the first Respondent. And though the Second and third Respondents were served with the Chamber Summons of 8th June, 2015 and a Hearing Notice of the Chamber Summons thereof, no appearance was entered on their behalf. Though similarly served none of the other Respondents entered appearance. The conservatory orders issued on 9th June, 2015 were confirmed on 2nd December, 2015, pending the hearing and determination of the Petition. And further, despite service of a Hearing Notice dated 23rd March, 2016, only the Attorney-General appeared on 11th May, 2016.

4. In effect none of the Respondents filed any papers in support or in opposition to the Petition. Only the Petitioners' counsel filed on 13th November, 2015, written submissions dated 10th November, 2015.

THE PETITIONERS' CASE

5. The Petitioners are the registered proprietors of the property known as title Number KWALE/GALU/KINONDO/339 measuring approximately three (3.0) hectares purchased on 18th October, 2007.

6. The Petitioner was called by an officer of the Second and Third Respondents and was informed that he was required to appear in the Kwale County Land Management Board on 2nd June, 2015 at 10.00 a.m. to answer a complaint relating to an alleged dispute of ownership of the suit land. The complainants, it was established by the Petitioners' representative were the Fifth, Sixth and Seventh Respondents on the ground that the suit land belonged to their forefather one Mwathumani Suleiman.

7. The Petitioners contend that the constitution of the Kwale County Land Management Board is a direct interference and challenge to the private rights legally vested in them pursuant to Article 40, 61 and 64 of the Constitution of Kenya 2010. The Petitioners consequently submit that the challenge to private rights vested in private hands is the preserve of the Environment and Land Court established pursuant to Article 162(2) of the Constitution of Kenya, 2010, and not in the First and/or the Third Respondents herein.

8. The Petitioners also contend that the proceedings in Complaint No. CLMB/KWL/05 against Dr. Wilfred Kamau (the Petitioner) by the Kwale County Land Management Board is unconstitutional for lack of jurisdiction, that the said process is *ultra vires* the functions and powers of the National Land Commission and the Kwale County Land Management Board, the Third Respondent as set out in Article 67 of the Constitution and Sections 5, 6 and 18 of the National Land Commission Act 2012 (No. 5 of 2012).

ANALYSIS

9. The *locus classicus* case on jurisdiction is the **MOTOR VESSEL "LILLIAN "S" VS. CALTEX OIL (KENYA) LIMITED [1989] KLR1**, where the court said –

“...jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....”

10. Jurisdiction is either conferred by the Constitution or statute. It cannot be conferred to the court by consent of the parties as parties have no such power. The principle of jurisdiction applies to tribunals, commissions or other administrative boards. They have no jurisdiction other than what is conferred by statute upon such commission, tribunal or other body or authority. The jurisdiction of the National Land Commission is fixed under Article 67 of the Constitution and is principally to manage public land on behalf of the national and county governments. Public land is defined under Section 62(1) of the Constitution. It excludes, community land under Article 63 of the Constitution, and private land under

Article 64 which consists of –

- (a) registered land held by any person under any freehold tenure;**
- (b) land held by any person under leasehold tenure; and**
- (c) any other land declared private land under an Act of Parliament.**

11. The Petitioners' ultimate argument was that, neither the National Land Commission nor the Kwale County Land Management Board had the jurisdiction to investigate the Petitioners' title to land, nor was the Petitioners' land public, but private land. The purported investigation was therefore illegal, and urged the court to allow the Petition.

THE RESPONDENTS' CASE

12. The Petition was essentially unopposed. None of the Respondents, apart from the Attorney-General, the 4th Respondent, entered appearance or raised any objection to the Petition. Mr. Ngari, learned counsel who appeared for the Attorney-General informed the court that he would leave the matter for the determination of the court.

DISPOSAL

13. Considering that the Petition herein was not opposed at all, I reiterate that the First, Second and Third Respondents had no jurisdiction to summon the Petitioners or any of them over the ownership of the suit land. As for the Fifth, Sixth and Seventh Respondents where land has been sold by our forefathers, it is sold, and the title of the buyer is valid and enforceable, and can only be invalidated by a court of law, and not any other unauthorized body or persons. Their complaint before the National Land Commission, the Government of the County of Kwale, and the Kwale County Land Management Board was misconceived as it had no basis in law.

14. The Petition herein is brought under Articles 40, 22, 23, 165(3)(d) and 159(2) of the Constitution of Kenya 2010. Article 22(1) gives every person the right to institute court proceedings claiming that a right or fundamental freedom on the Bill of Rights has been denied, violated or infringed, or is threatened.

15. Article 40 guarantees every person the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. The Petitioners are owners of private land as defined in Section 64 of the Constitution. The Constitution vests in the National Commission, the power to investigate title in relation to public land, and not private land. It was therefore a violation of the Petitioners rights to own property of any description in any part of Kenya for the First, Second and Third Respondents to purport to investigate the Petitioners' title to the suit land. It was violation of the Petitioners constitutional rights aforesaid.

16. Article 23(1) invests in this court, in accordance with Article 165 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.

17. The purported investigation of the Petitioners' title by the First, Second and Third Respondents under a complaint by the Fifth, Sixth and Seventh Respondents, is a threat to the Petitioners' right to property as guaranteed by Article 40 of the Constitution. Article 23(2) provides that in any proceedings brought under Article 22, the court may grant appropriate relief, including –

- (a) a declaration of rights;
- (b) an injunction;
- (v) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation and

(f) an order of judicial review.

18. As the Petition herein was essentially unopposed, and being a threat to the Petitioners' right to property, the Petitioners succeed and there shall be orders in terms of paragraph 22 of the Petition –

(a) A declaration that the National Land commission and/or the County Land Management Board has no mandate to investigate, question or make recommendations on the Title to private land under Article 67 of the Constitution, the National Land Commission Act and/or under any other law whatsoever.

(b) A declaration that the National Land Commission and/or the County Land Management Board has no jurisdiction on all disputes touching on the environment, the use and occupation of and title to private land under Article 67 of the Constitution, the National Land Commission Act and/or under any other law whatsoever.

(c) A declaration that the National Land commission and/or the County Land Management Board has no jurisdiction on all disputes touching investigation and adjudication of claims arising out of Article 67(2) (e) of the Constitution without express legislation as provided for in Section 15 of the National Land Commission Act 2012 (No. 5 of 2012).

(d) A declaration that proceedings in Land Reference No/Title No. Galu/Kinondo/339, Complaint No. CLMB/KWL/05 against Dr. Alfred Kamau by the Kwale County Management Board are ultra vires the powers of the Kwale Land County Management Board and unconstitutional.

(e) A declaration that Section 35 of the National Land Commission Act 2012 (No. 5 of 2012), does not donate jurisdiction to investigate title to private land to county management boards.

(f) An order of certiorari quashing the proceedings in Land Reference No/Title No. Galu/Kinondo/339, complaint No. CLMB/KWL/05 against Dr. Alfred Kamau by the Kwale Land County Management Board.

(g) An order of prohibition barring the National Land Commission and/or the Kwale County Land Management Board from investigating, challenging and/or in any manner whatsoever questioning the validity of title to plot Kwale/Galu Kinondo/339.

19. As the Respondents did not take part in or contest the Petition, I direct that each party, the Petitioners and Respondents shall bear their respective costs.

20. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 31st day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Mukomba holding brief Mutugi for Petitioner

Mr. Ngari for Respondent

Mr. S. Kaunda Court Assistant