



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT MOMBASA

ELC CASE NO.39 OF 2020

SULEYMAN BITTOKK ABDHI T/A AZHAR PROGRESSIVE

HIGH SCHOOL & 40 OTHERS.....PLAINTIFFS/RESPONDENTS

VERSUS

ALI SALIM KARAMA

MAKAWI SALIM KARAMA.....DEFENDANTS/APPLICANTS

RULING

The application is dated 2nd December 2021 and is brought pursuant to Section 3A of the Civil Procedure Act, Order 2 Rule 15 & Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this Application be certified as urgent, service thereof be dispensed with and the same be heard ex-par/e in the first instance.
2. That the Honourable Court do issue orders to strike out with costs the Petition dated 16th November 2020 and filed in court on 16th November 2020.
3. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
4. The costs of this application be provided for.

It is based on the grounds that the Applicants/Defendants are the Registered and legal owners and landlord of Plot No. 9129/1/MN. That the Constitutional Petition No. E10 of 2020 does not meet the threshold as to what constitutes a constitutional petition in that the issues in question is rent arrears and there is no violation of any Bill of rights and freedoms. That the 3rd and 4th Petitioners are minors and therefore have no legal capacity to institute this suit on their behalf. That on 10th November 2020, the Petitioner filed a Reference No. 274 of 2020 in the Business Premises Rent Tribunal against the Applicants over the same subject matter and this suit therefore violates the principle of sub judice. That the Business Premises Rent Tribunal has been operational since 10th November 2020 till to date and subject to the Business Premises Rent Tribunal Act; any reference to a complaint made in the Business Premises Rent Tribunal amounts to a stay and therefore, there is no need to file another suit in another Court with the same subject matter. That the Respondent, before filing the suit herein in this Honourable Court, also filed Civil Suit No E162 of 2020 on 15th October 2020, however, having failed to obtain favourable orders in lower court, the Respondent proceeded to file the Petition herein. That the school in question is a private school and the students are well capable of paying the school fees hence the Petitioner should be able to pay the rent arrears and annual rent as agreed in the Tenancy agreement. That this since subject matter is a controlled tenancy and this Honourable Court lacks jurisdiction to determine or make any orders thereof in regard to the suit. That since the dispute is about payment of rent arrears amounting to Kshs. 605,000/=, the pecuniary jurisdiction of the matter lies with lower court which proceedings were already instituted in Civil Suit No. E162 of 2020. That the Plaintiffs petition is therefore misconceived, incompetent and bad in law and is an abuse of the process of the honourable Court. That the said Petition is an exercise in futility, incompetent and amounts to wastage of the precious judicial time. That it is in the interest of justice for the Honourable Court grants the orders sought.

The Respondent submitted that Section 13(1) of the Environment Act No 19 of 2011 is of the view that the Environment and Land Court has unlimited original and appellate jurisdiction to determine any dispute in accordance to Article 162(2) (b) of the Constitution and with provision of this Act or any other law applicable in Kenya relating to environment. Section 13(7) (a) states that the Environment and Land Court shall have the power to make an order and grant any reliefs as the Court deems fit and just which includes interim or permanent preservation orders. Article 162 of the Constitution grants the ELC equality of status with the High Court. By dint of this equality of status, the ELC Court has unlimited original jurisdiction in Civil disputes germane to land and the environment.

That the Plaintiff/ Applicant herein only moved this honourable Court after he was left with no option as to the forum to file his suit, for reasons that by then there were orders issued by the Employment and Labour Court in ELRC Petition No. 100 OF 2020 which had stopped the operations of the Business and Rent Tribunal and notice had also been issued to the effect that operation at the Tribunal had been suspended from 16th July, 2020 until further notice, this is well stated in the Plaintiff/Respondent's replying affidavit and in particular annexure SBA- 1 where the Applicant/ Respondent has attached a copy of the court order and a notice from the Business and Rent Tribunal. It is their submission that the Plaintiff/ Respondent had no choice but to move the Environment and Land Court as the students were in a verge of missing out in sitting for their final exams as the Defendant/Respondent herein had locked and or blocked the only entrance used to access the school.

That this suit was filled and served upon the Defendant/ Applicant way back on 16th November 2020, where the Defendants/ Applicants filed a response before this honourable Court, and has also through their respective Advocates file several applications before this Honourable Court without raising any issue insofar as this Court's Jurisdiction is concerned. It is their submissions that the Defendant/ Applicants herein are estopped from attacking the Jurisdiction of this Court for reasons that they acknowledged this court's jurisdiction. They ought to have filed a preliminary objection on point of law at before the first inter-party hearing of the suit filed by the Plaintiff/ respondent herein in pursuance of Order 2 rule 9 of the Civil Procedure Rules. That that Plaintiff/Respondent herein has only filed ELC No.39 of 2020 and he is not aware of any suit pending before the Lower Court, in case No. Civil Suit No E162 of 2020, as alleged by the Defendant/ Applicant. The same suit had been withdrawn by Plaintiff with no orders as to cost in conformity to Order 25 Rule 9. The same notice had been filed on the 9th November 2020 and served upon the Defendants/ Applicants Advocates. Reference can be made in the Plaintiff/ Respondents annexure marked SBA-2. That the Plaintiff/ Respondents suit has no dealings or connection whatsoever with any suit pending before the chief magistrate.

That the Plaintiff/ Respondent herein filed this suit on behalf of himself and behalf of the Forty (40) other Plaintiff's/ Respondent in pursuance to Order 1 Rule 8 (1) which states that where numerous persons have the same interest in any proceedings, the proceedings may be commenced and unless the Court otherwise orders, continued by or against any one or more of them as representing all. That he who alleges must prove or adduce evidence to back his allegations. The Defendant/ Applicant has not adduced any evidence whatsoever to show indeed who among the Forty (40) Plaintiff's / Respondent is a minor.

This court has considered the application and submissions therein. The relevant provisions that grant the Environment and Land Court jurisdiction are Article 162(2) of the Constitution which provides as follows:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

Pursuant to provisions, the Environment and Land Court Act was enacted which elaborates on the jurisdiction of the Environment and Land Court in section 13 thereof as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) 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.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the

decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act in addition provides under Section 15 that appeals from decisions of the Business Premises Rent Tribunal shall lie to the Environment and Land Court Act.

I find in the instant case that this court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand. It was held in the High Court case of **Bernard Murage vs Fineserve Africa Ltd & 3 others (2015) eKLR** that:

“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy be pursued first”

It is a principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** where the court stated:-

“Constitutional violations must be pleaded with a reasonable degree of precision.

The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.

The Court of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** provided the standard of proof in Constitutional Petitions. The Court of Appeal judges stated;

*“...The principle in **Anarita Karimi Njeru (supra)** that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of **Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639** holds true today:*

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st Respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

*We wish to reaffirm the principle holding on this question in **Anarita Karimi Njeru (Supra)**. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”*

In the case of **Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013** stated;

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated.”

On perusal of the Petitioner’s pleadings, the evidence as well as the submissions of the parties, it is my considered view that the Petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the Respondents. He has not adduced any evidence to demonstrate the alleged violations. The issues in question here are rent arrears.

Be that as it may, I find that the petitioner filed a claim at the Business Premises Tribunal and rightly so and should not have filed this matter in this court until it reached the appeal stage and the same is subjudice. I reject the reasons given by the Petitioners that the operations of the Tribunal had been suspended hence this suit was filed. I find that application is merited and I strike out this petition with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23rd DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE