



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 18 OF 2013

IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 43(1)(B) & 28 CONSTITUTION OF KENYA

AND

ARTICLES 2, 19, 20, 21, 22, 23, 24, 25, 35, 43, 45, 48, 50

AND

ARTICLES 53, 54, 57, 62, 159, 165 OF THE CONSTITUTION OF
THE REPUBLIC OF KENYA & RULE 11C & 12 (PROTECTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
INDIVIDUAL) PRACTICE AND PROCEDURE RULES AND
ALL OTHER ENABLING POWERS AND PROVISIONS OF THE
LAW

AND

IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL
DECLARATION OF HUMAN
RIGHTS

AND

IN THE MATTER OF: ARTICLE 11 OF THE
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS

AND

IN THE MATTER OF: ARTICLE 27 OF
INTERNATIONAL CONVENTION OF THE RIGHTS OF THE
CHILD

AND

IN THE MATTER OF: ARTICLE 26 OF THE
CONVENTION ON THE RIGHTS OF PERSONS WITH
DISABILITIES

BETWEEN

1. ANNE WAWUDA

2. JANE W. RAKORO

3. JOHN ATIENO AGOLLA (SUIING ON THEIR BEHALF AND

ON BEHALF OF THE
RESIDENTS OF BIRIKANI ESTATE CHANGAMWE.....
PETITIONERS

VERSUS

1. THE KENYA RAILWAYS CORPORATION

2. THE HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

THE PETITIONERS

1. The Petitioners and the thirty-one (31) families they purport to represent, allege that they are residents of Birikani Estate Changamwe, area of Mombasa and allege that they have been living in the Estate for over 40 years on the average, peacefully without force or secrecy, and that the former and current administrative officers, including the District Officer, the Chief and Assistant Chief and the general Provincial Administration Mombasa are well aware of their status.

THE PETITION

2. In a Petition dated and filed on 27th March, 2013, the Petitioners claim on their own behalf and on behalf of other residents of Birikani Estate Changamwe that they, and the persons on whose behalf they brought the Petition, are entitled to the declarations that to:-

(a) the right to accessible and adequate housing and to reasonable standards of sanitation as provided for under Article 43(1)(b) of the Constitution of Kenya, 2010, Article 11 of the International Covenant of Economic, Social and Cultural Rights as read with Article 2(6) of the Constitution of Kenya, 2010.

(b) the right of access to information held by the state and another person and required for the exercise or protection of any right or fundamental freedom as protected by Article 35(1) of the Constitution of Kenya and Article 9 of the African Charter on Human and Peoples Rights as read with Article 2(6) of the Constitution of Kenya, 2010.

(c) the right not to be treated in a cruel, inhuman or degrading manner as protected by Article 29 of the Constitution of Kenya, 2010.

(d) the right to fair administrative action as protected by Article 47 of the Constitution of Kenya, 2010.

(e) the right of every child to be protected from inhuman treatment as guaranteed by Article 53(1) (d) and Article 37 on the convention of the right of the child as read with Article 2(6) of the Constitution of Kenya. Further, the best interests of the child are of paramount importance in every matter concerning the child as recognized in Article 53(2) of the Constitution of Kenya, 2010.

(f) the right of older members of society to live in dignity and respect as protected by Article 57 (c) of the Constitution of Kenya, 2010.

(g) the rights of person with disabilities to be treated with dignity and respect as protected by Article 54(1) (a) of the Constitution and Article 26 of the convention on the right of persons with disabilities.

THE INTERIM ORDERS

3. Together with the Petition the Petitioners filed an application by way of a Chamber Summons in which they sought, and were on 28th March, 2013 granted orders by way of temporary injunction restraining the Kenya Railways Corporation (the First Respondent) from in any way interfering with the Petitioners quiet enjoyment and occupation of the said Estate land. Those orders have been extended from time to time, and are still subsisting, pending the determination of the Petition.

THE PRELIMINARY OBJECTION

4. In a Notice of Preliminary Objection filed on 24th May, 2013, signed but not dated, the First Respondent raised a Preliminary point of law that the High Court (this Court) has no jurisdiction to try the dispute disclosed by the Petition and the Chamber Summons aforesaid under its Supervisory Jurisdiction (Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 or Article 22 of the Constitution because:-

(a) the Petitioners expressly admit they do not have any

rights over the suit premises,

(b) the Petitioners admit that the First Respondent is the legal and beneficial owner of the suit property,

(c) that consequently the Petition is an attempt to enforce a non-existent right by the Petitioners against the legal rights of the First Respondent,

(d) that the High Court can only enforce a right which exists and that where there is no right in existence, nothing can be enforced.

THE SUBMISSIONS

5. The First Respondent's submissions dated 19th March, 2014 were filed on 20th March, 2014 together with a list of authorities. A Further Supplementary List of Authorities was filed by the First Respondent's counsel on 26th June, 2014, but is dated 20th June, 2014. On their part counsel for the Petitioners filed their submissions on 15th July, 2014 and are dated 14th July, 2014. As expected the Petitioners counsel, and counsel for the First Respondent took divergent views. I will commence with the submissions of counsel for the Petitioners.

THE PETITIONERS' COUNSEL'S SUBMISSIONS

6. The essence of the submissions by counsel for the Petitioners was that the Preliminary Objection raised by the First Respondent was misplaced because it was purportedly brought 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. The said rule says:-

“23. Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such an issue as a Preliminary Point and shall hear and determine the same.”

7. Counsel submitted that we rule concerns matters under determination by the High Court other than constitutional petitions and if in the course of such determination a constitutional issue arises within the same case, then the issue may be decided as a Preliminary Point, and not a **Preliminary Objection**. Counsel consequently concluded that the invocation of the rule as a basis for raising the Preliminary Objection is a misunderstanding of the intent and purpose of the rule.

8. Counsel also submitted that the point raised by the First Respondent's counsel was not a pure Preliminary Objection in the classic definition set out in the case of **MUKISA BISCUITS MANUFACTURING COMPANY LIMITED VS. WESTEND DISTRIBUTORS [1969] 696** where Newbold, P. defined a Preliminary Objection –

“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.”

9. Counsel therefore submitted that the First Respondent's counsel's submission that the Petition discloses an ordinary civil dispute is an issue of fact rather than an issue of law. Counsel maintained that this is a proper constitutional matter and not an ordinary civil suit for adverse possession as contended by the First Respondent's counsel.

10. He contended that the Petitioners had clearly indicated the provisions of the Constitution alleged to have been violated or threatened to be violated by the Respondents, and the Petition cannot therefore be regarded as an ordinary civil dispute because the Environment and Land Court has no jurisdiction to grant the rights and freedoms which are threatened with breach by the First Respondent. Counsel therefore urged the court to dismiss the Preliminary Objection and allow the Petitioners to ventilate their case at a full trial before this court.

11. In this regard counsel relied upon the decision of the court in **SATROSE AYUMA & OTHERS VS. THE KENYA RAILWAYS CORPORATION & OTHERS** (High Court at Nairobi Petition No. 65 of 2010) where identical issues were raised and dealt with by the High Court, and where the court granted temporary orders restraining the First Respondent pending the determination of the Petition.

12. While appreciating the Petitioners' submissions, with respect, the point raised by the First Respondent is one of jurisdiction, and jurisdiction when raised, takes centre stage. As candidly stated by Nyarangi JA in the case of **OWNERS OF MOTOR VESSEL “LILLIAN S” VS. CALTEX OIL (KENYA) LIMITED [1989] KLR1**, at 14 – where the learned Judge said –

“.....I think it is necessarily plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 a matter before it the moment it holds the opinion that it has no jurisdiction.”

13. To determine whether or not a court has jurisdiction, it is the duty of the court to examine the subject matter of the dispute, and ascertain where jurisdiction lies in respect of that subject matter. If the court ascertains that the jurisdiction of the subject matter lies in another court or tribunal established under or pursuant to the Constitution to adjudicate disputes, then this court will in deference to that court down its tools.

14. In the instant case, the subject matter of the Petition is the **“...use and occupation of, and title to land”**. This is the subject of jurisdiction under Article 165(5) which expressly provides this court shall not have jurisdiction in respect of matters –

“.....falling within the jurisdiction of the courts constituted in Article 162(2).”

15. The courts contemplated in Article 162(2) are the courts

of 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.

16. Sections 15 of the Environment and Land Court Act,

2011 (No. 19 of 2011) grants that court jurisdiction in these terms –

“13(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 provision of this Act or any other written law relating to environment and land.

(2)

(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, right fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

(6)

(7) In exercise of its jurisdiction, under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including:-

- (a) interim or permanent preservation orders including injunctions,**
- (b) prerogative orders,**
- (c) award damages,**
- (d) compensation,**
- (e) specific performance,**
- (f) restitution,**
- (g) declarations, and**
- (h) costs.”**

17. It is therefore not correct for counsel for the Petitioners to contend that only the High Court has jurisdiction to grant the remedies sought by the Petitioners. To uphold that view would allow the Petitioners and the like minded persons liberty and license to substitute the general constitutional jurisdiction of this court under Article 22 of the Constitution, to be applied to try ordinary civil disputes or grant relieves thereunder without there being a complaint and a finding that the specific statutory procedure or its remedies are constitutionally deficient. I will cite a few Kenyan and foreign cases to buttress the position that a constitutional court cannot permit a Petitioner to ignore the statutory framework established under the Constitution itself.

18. In **SPEAKER OF NATIONAL ASSEMBLY VS. KARUME [1992] KLR 425**, the court said –

“where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution of an Act of Parliament, that procedure should be strictly followed.”

19. In **KENYA BUS SERVICES LIMITED & 2 OTHERS VS. ATTORNEY-GENERAL [2005] KLR 787** at page 799, following Trinidad & Tobago case of **Re Application by Bahadur [1986] LRC (Const) 297**, at page 298 where the court said:-

“The Constitution is not a general substitute for the normal procedure for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution. (Harrikson vs. Attorney-General of Trinidad & Tobago [1979], 3 W.L.R. 62 applied).”

20. In the South African case of **ANDREW LIONEL PHILLIPS & 15 OTHERS VS. NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS (CC-55 of 2004)**, S KWEYIYA J. said:-

“.....I do not think that an Act of Parliament can simply be ignored and reliance placed directly on provision in the Constitution, nor is it permissible to side-step an Act of Parliament.

The court also cited **NARTOSA & OTHERS VS. MINISTER OF EDUCATION FOR WESTERNSCAPE & OTHERS** where:-

“The court was concerned with the appropriateness or otherwise of granting relief directly under the Constitution without a complaint that an Act of Parliament was constitutionally deficient in the remedies it provides. The court could not conceive that it is permissible for an applicant, save by attacking the constitutionality of the statute to go beyond the regulatory framework, which is established.”

22. This position was echoed and re-emphasized in the case of **ABDALLAH MANGI MOHAMED VS. LAZARUS & 5 OTHERS [2012] eKLR** where Muriithi J held:-

“.....where there is a dispute as to the applicants’ entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicant’s claim to the property rather than clog the constitutional court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for enforcement of constitutional rights to property should be discouraged.”

23. In ignoring the statutory provisions the Petitioners deny the First Respondent, the right to natural justice required under Article 22(3) (d) of the Constitution and in particular the right to a fair hearing by the appropriate court on tribunal as enshrined in Article 50, and is consequently unduly oppressive and prejudicial to the First Respondent because:-

(a) the First Respondent is denied its right to interrogate the Petitioners’ allegations of fact in their pleadings by way of discovery, interrogatories, request for particulars and pre-trial conference, and all the instruments of defending available in an ordinary civil dispute;

(b) the First Respondent is denied a fair hearing to cross-examine the Petitioners’ witnesses;

(c) the First Respondent is denied the right to an undertaking as to damages and security for costs against the harm caused by injunctive orders;

24. By presenting the Petition under Article 22 of the Constitution the Petitioner has ignored and side-stepped the aforesaid provisions of the Constitution, the Judicature Act, the Civil Procedure Act, the Land Act, the Limitation of Actions Act, the Evidence Act and not least, the Environment and Land Court Act, laws which govern issues relating to eviction disputes. This court cannot allow the Petitioner to ignore the statutory framework established under the Constitution for resolution of disputes relating to land or the environment.

25 The Petition herein and many like it, has been presented as Constitutional Petitions, when there is no constitutional issue at stake, when the issue is merely a dispute over eviction, or better still a question of adverse possession, merely for the sole purpose of avoiding uncomfortable questions at a hearing for the same injunctions and declarations, through an ordinary civil suit in the civil jurisdiction of the High Court.

26. In the circumstances, the court is bound to exercise its inherent power to prevent abuse of its process. In the words of the court, in **KARIUKI & OTHERS VS. DAWA PHARMACEUTICALS COMPANY LIMITED & OTHERS [2007] E.A. 235,**

“.....Nothing can take away the court’s inherent power to prevent abuse or trivializing of its process by striking out a frivolous and vexatious application. Baptizing such matters constitutional cannot make them so, if they are plainly frivolous or vexatious or elevate them to a constitutional status when they are in fact plainly an abuse of the court’s process.”

27. A constitutional court does recognize the existence of other laws (e.g. the public interest), 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 must rigidly stick to its mandate. In relation to Article 22, the denial, violation or infringement on threat must be against any of the **Chapter Four Fundamental Rights** and Freedoms. The enforcement of any other right takes away a Petitioner outside the realm of Article 23, citizen **qua citizen**, including corporate citizens. Social and economic rights specified under Article 43(1) are a responsibility of the State under Article 43(3) of the Constitution.

28. For all those reasons, I allow the First Respondent’s Preliminary Objection filed on 24th May, 2014, and the Petition herein is hereby struck out and Chamber Summons dated 27th March, 2013 hereby dismissed with a direction that each party bears its own costs.

29. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 15th day of May, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Ms. Jadi holding brief Muchiri for Petitioner

No Appearance for Respondents

Court Assistant Kaunda