REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 77 OF 2014

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLE 10, 62,73 & 75 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLE 22 [1]

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE

AND

IN THE MATTER OF: MSA HCCC NO. 132 OF 2013-ABDISALAM HASSAN ISMAIL =VS= KENYA RAILWAYS CORPORATION

MSA HCCC NO.133 OF 2013 – MOHAMED HUSSEIN ADEN =VS= KENYA RAILWAYS CORPORATION

MSA HCCC NO. 134 OF 2013 – HALWA ABDULAHI MOHAMED =VS= KENYA RAILWAYS CORPORATION

BETWEEN

ABDISALAM HASSAN ISMAIL

MOHAMED HUSSEIN ADEN

HALWA ABDULAHI MOHAMED…….....……
PETITIONERS

AND

KENYA RAILWAYS CORPORATION

NDUVA MULI

STANLEY GITARI

GAPCO KENYA LIMITED……
RESPONDENTS

RULING

Introduction

1. The Petitioners filed this Petition on 11th December 2014. They claim that they are tenants in land Title Numbers MOMBASA/BLOCK XXIII/211, MOMBASA/BLOCK XXXIII.212 and MOMBASA/BLOCK XXIII/213 situate within Mombasa Island ("the suit properties"). That the suit properties were disposed of in a discreet and clandestine manner by the 1st – 3rd Respondents without following the provisions of the Public Procurement and Disposal Act, Kenya Railways Corporation Act, State Corporation Act and Articles 10, 27 and 62 of the Constitution of Kenya, 2010 and without notice to the petitioners who are tenants on the said parcels of land. The Petitioners seek in the petition an order of declaration that the sale by the 1st – 3rd Respondents of the suit properties to Gapco Kenya Limited, the 4th Respondent was in breach of rule of law, unconstitutional, null and void and that the certificates of title issued to Gapco Kenya Limited in respect of the suit properties be quashed. The Petitioners also seek an order of declaration that the 2nd and 3rd Respondents are unfit and unsuitable to hold and/or continue holding any public office.
2. On the same day, that is 11th December 2014, the petitioners filed a Notice of Motion dated 11th December 2014 in which they sought, *inter alia*, conservatory orders to restrain the 4th Respondent from dealing with, transacting and interfering with the said suit properties pending hearing and determination of the Petition.

3. The Respondents filed a Notice of Appointment of Advocates on 22nd December 2014. On the same day, they filed Grounds of Opposition and Preliminary Objection to the Petition. The gist of the Respondents Preliminary Objection is that Articles 165 (5) and 162 (2) (a) of the Constitution, expressly denies the High Court jurisdiction in respect of matters relating to use, occupation of, and title to land and that the issue of whether the petitioners should continue occupying the suit properties after termination of the lease is subjudice having been raised in HCCC Nos 132, 133 and 134 of 2013 pending in the High Court.

4. On 23rd December 2014, the Notice of Motion by the petitioners dated 11th December 2014 came up for hearing during which this court, after much discussion with counsel for the parties off the record, made inter alia an order that the petition shall be heard on 10th March 2015 and that the Respondents may raise their Preliminary Objection in opposition to the Petition at the said hearing.

5. The Respondents then filed the Notice of Motion dated 3rd March 2015 which is now considered in this Ruling in which they prayed that the court do review the direction made on 23rd December 2014 that the Preliminary Objection and the Petition be heard together and that the said order be replaced by direction that the Preliminary Objection be disposed of before hearing of the main Petition. In the alternative, the Respondents prayed that the directions of 23rd December 2014 and proceedings on the Petition be stayed pending hearing and determination of the intended Appeal. The Applicants annexed a Notice of Appeal filed in court on 24th December 2014. It is that Notice of Motion dated 3rd March 2015 that is the subject of this Ruling.

The Respondents' Arguments

6. Mr. Ndegwa, learned counsel for the Respondents submitted that hearing the Preliminary Objection with the Petition could be an error of the court. That when an issue of jurisdiction is raised, the same should be dealt with first. That if the Preliminary Objection is not heard first, the Respondents would be prejudiced by the malicious allegations made against them in the Petition. Counsel urged that under Order 45 of the Civil Procedure Rules, the court can review its orders for any sufficient reason.

The Petitioner's Arguments

7. The Petitioner's learned counsel, Mr. Mogaka submitted that section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules under which the application for review is brought do not apply to constitutional petitions. Counsel argued that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("Mutunga Rules") do not envisage the application of Civil Procedure Rules to Constitutional matters. However, Mr. Mogaka conceded that this court can review its orders in exercise its inherent jurisdiction.

8. The Petitioners' counsel further submitted that a party cannot exercise the right to appeal and the right to review at the same time. That once the Respondents filed a Notice of Appeal against the court's directions of 23rd December 2014, they had no right to seek review of the said directions. Counsel relied on the case of **KISYA INVESTMENTS LIMITED VS. ATTORNEY GENERAL & ANOTHER NAIROBI CIVIL APPEAL NO. 31 OF 1995 [1996] EKLR** where the Court of Appeal stated as follows:

> ***"The Principal and the only ground of appeal urged before us is that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this as sound position of law. The correct position appears to us to be as set out by Sarker on the Law of Civil Procedure, 8th Edition, where at page 1592 it is stated as follows:***
>
> > ***"The crucial date for determining whether or not the term of 0.47r.1 are satisfied is the date when the application was filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end…Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with….A review application is incompetent after appeal is preferred."***

9. It was contended on behalf of the Petitioners that even if the civil Procedure Rules were applicable, the Respondent's application for review does not satisfy the principles and conditions

for review because there is no error apparent on the face of the record and there is no new evidence is discovered and which was not within the knowledge of the applicants at the time the impunged order was made.

10. Mr. Mogaka urged that there will be no prejudice that will be suffered by the Respondents if both the Preliminary Objection and the Petition are dealt with together because if the court finds that it has no jurisdiction, it can either strike out the petition or refer the same to the appropriate forum for hearing and determination.

The issues for Determination

11. The main issues that arise for court's determination are:

i. Whether the application is incompetent;
ii. Whether the application is defeated by reason of the applicants having filed a Notice of appeal against the order in issue; and
iii. Whether the court can review its direction made on 23rd December 2014.

Analysis/Determination

Competency of the Application

12. The Petitioners argue that the application is incompetent because the same is brought under Section 80 of Civil Procedure Rules and Order 45 of the Civil Procedure Rules. According to the petitioners, the provisions of the Civil Procedure Act and the rules made thereunder do not apply to constitutional matters and therefore the application should fail.
13. I reject the Petitioner's submission that the application is incompetent for having been brought under the provisions of the Civil procedure Act. I hold the view, that technicalities of procedure should not be entertained in matters of enforcement of constitutional rights. I put reliance to the case of **VALLERIE NAMTILU WAFULA & ANOTHER V KENYA NATIONAL UNION OF TEACHERS (KNUT) & 2 OTHERS [2012]eKLR** where it was held as follows:

> ***"It is the second respondent's contention that in petitions of this nature the civil procedure Rules have no place and therefore any application expressed to be brought under the latter is incompetent. First and foremost it must be noted that under Article 22(3), the Chief Justice is enjoined to make rules inter alia providing for the court proceedings which shall satisfy the criteria that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedurals technicalities. Although the said Rules are yet to be promulgated (the rules have since been promulgated hereinbefore referred to as Mutunga Rules), the spirit of the foregoing provision as read together with the provisions of Article 159(2) (d) is clear that technicalities of procedure, more particularly in application brought for the enforcement of the Bill of Rights, should not be entertained. Even prior to the promulgation of the current Constitution the relevance of the Civil Procedure Rules was considered in Meme Vs. Republic [2014] 1 EA 124; [2004] 1 KLR 637, in which Rawal J (as she then was), Njagi J & Ojwang' AJ (as he then was) held that at a very basic level the Court is empowered to draw from the Civil Procedure rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual) Practise and Procedure Rules and by virtue of Order 1 Rule 10(2). This decision should put the second Respondent's position on the applicability of Civil Procedure rules to Constitutional petitions to rest."***

14. The petitioners' contention that the application is incompetent for having cited the provisions of the Civil Procedure Act therefore is not a basis to defeat the application.

Whether Application is defeated by the filing of the Notice of Appeal

15. The Petitioners contend that the orders of review cannot be granted because the Applicants have already filed a Notice of Appeal. That a party must opt either to seek review of the orders in issue or to appeal against the same but that both review and appeal options cannot be available to a party at the same time.
16. I have considered the foregoing proposition by the petitioners. It appears that there are conflicting Court of Appeal decisions on the issue. In **KISYA INVESTMENTS LTD VS. ATTORNEY GENERAL AND ANOTHER (SUPRA),** the Court of Appeal held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However, in **YANI HARYANTO VS. E.D. & F. MAN. (SUGAR) LIMITED CIVIL APPEAL NO. 122 OF 1992** the Court of Appeal observed that a Notice of Appeal is a mere manifestation of intention to appeal and the same does not constitute an actual filing of appeal. The court was of the view that:

> *"The facility of review under Order 44 (now Order 45) of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed…What rule 4(1) of order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review….An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal." (emphasis mine)*

17. While addressing the conflict emanating from the said Court of Appeal cases on whether filing of a Notice of Appeal is a bar to seeking review, Odunga, J in the case of **CHRISTOPHER MUSYOKA MUSAU VS. DALY & FIGGS NAIROBI HIGH COURT CIVIL DIVISION CASE NO. 1100 OF 2003 [2003] EKLR** stated that:

> *"In light of the two decisions emanating from the same Court of Appeal, this court is entitled to adopt either of the two decisions. In my view the Haryanto case reflects the true legal position…. The mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review…"*

18. In the case of **REPUBLIC VS. ANTI-COUNTERFEIT AGENCY & 2 OTHERS EXPARTE SURGIPPHARM LIMITED, NAIROBI JR MISCELLANEOUS APPLICATION NO. 11 OF 2012 [2014] eKLR, Odunga, J**. held that a party who has intimated his intention to appeal by filing a Notice of Appeal is not barred from applying for review. The learned Judge expressed himself as follows:

> *"It is therefore my view that as long as an appeal has not been instituted in accordance with Rule 82 of the Court of Appeal Rules a party who has intimated his intention to appeal by filing a Notice of appeal is not thereby barred from applying for review of the same decision which is the subject of the said Notice. Under that Rule an appeal is instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged, a memorandum of appeal, the record of appeal, the prescribed fee and security for costs."*

19. The subject application was filed on 3rd March 2015. Earleir, on 24th December 2014, the

Applicants had filed a Notice of Appeal against the decision they are seeking to review in the present application. The Applicants did indicate that they are yet to file a Memorandum and Record of Appeal because they are waiting for typed proceedings from the Deputy Registrar. Based on the cases cited above, it is clear that despite filing the Notice of Appeal prior to the filing of the present application for review, the Applicants are not estopped from seeking review of the same order they intend to appeal against. I therefore reject the petitioner's argument that the application is defeated by the filing of Notice of Appeal.

Whether it is appropriate to review the subject orders

20. The Petitioners contended that the Applicants have not satisfied the conditions necessary for the granting of a review order because there is no error apparent on the face of the record and there is no new evidence that is discovered and which was not within the knowledge of the applicants at the time the impugned order was made despite their due diligence. Order 45 of the Civil Procedure Rules provides as follows:

1. **(1) Any person considering himself aggrieved-**

a. **By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
b. **By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."** (emphasis mine)

21. Order 45 sets three main conditions under which an order for review may be sought: on the basis of discovery of new and important matter or evidence which was not within the applicant's knowledge despite due diligence or which could not be produced at the time the order was made; on account of some mistake or error apparent on the face of the record; or for any other sufficient reason. The last condition is very wide and gives the court discretion to review its order if a sufficient reason to do so is demonstrated. The petitioner's argument that a review is available only upon discovery of new evidence or on the basis of mistake or error apparent on the face of the record is therefore not valid.
22. Further, section 80 of the Civil Procedure Act does not have any restrictions or conditions and circumstances under which the court may review its order. Section 80 provides that:

"Any person who considers himself aggrieved-

a. **by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
b. **by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

23. Section 80 gives the court unfettered discretion to review its orders which discretion can be exercised as wide as possible to ensure the ends of justice are met. In my view, the intention of section 80 is to enable the court to exercise its discretion unfettered in order to do justice rather than to be enslaved by rigid conditions.
24. In the case of **REPUBLIC V ANTI-COUNTERFEIT AGENCY & 2 OTHERS EX-PARTE SURGIPPHARM LIMITED (supra), Odunga, J.** held that:

"It is clear that unlike Order 45 (which is a delegated legislation), section 80 of the Civil Procedure Act, (which is the parent Act) gives the court wide and unfettered jurisdiction in

the exercise of its powers of review and does not prescribe the conditions upon which an application for review may be granted. In the case of ***Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998*** *the Court of Appeal held that section 80 of the Civil procedure Act enables a court to make such orders on review application which it thinks just so that the words "or any sufficient reason" as used in Order 44 [now Order 45] rule 1 of the Civil Procedure Rules are not ejusdem generis with the words "discovery of new and important matter" etc. and "some mistake or error apparent on the face of the record" and that those words extend the scope of the review.*

Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the Civil procedure Act confers an unfettered right to apply for review and so the words "for any sufficient reason" need not be analogous with the other grounds specified in the Order.'

25. It is therefore clear that the petitioners' argument that the Applicants have not satisfied the conditions necessary for the court to exercise its review jurisdiction has no legal basis because the discretion given to the court in an application for review is wide and unfettered.
26. The next question then, is, is this an appropriate case in which the court should exercise its discretion and review the order as sought by the Applicant?
27. The Preliminary Objection touches on the jurisdiction of this court and therefore it goes to the core of the entire Petition. If the court makes a finding that it has no jurisdiction, it would either dismiss the petition or refer the same to an appropriate forum for hearing and disposal. It is trite law that jurisdiction is everything and immediately the court determines that it is without jurisdiction, it must down its tools and take no further step in the matter. This principle was propounded in the often cited case of **THE OWNERS OF MOTOR VESSEL LILIAN "S" –VS CALTEX OIL KENYA LTD [1989] eKLR** where at page 14, the Court said:-

"When a court has no jurisdiction there would be no basis for a confirmation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

28. This court is enjoined by Article 159 (2) (b) to exercise judicial authority without delay. I am persuaded that the justice of this case demands that the Preliminary objection be heard and determined first. I say so because jurisdiction is everything and a question touching on the same should be addressed at the earliest possible opportunity so that the court does not waste its judicial time hearing a matter in which it lacks jurisdiction. It would be against the spirit and letter of Article 159 if the court finds that it has no jurisdiction and that the case ought to be referred to another forum for hearing and disposal after hearing arguments and evidence on the main Petition. The court, in that instance, shall have wasted its judicial time by hearing the petition only to subsequently refer the same for fresh hearing in another forum.
29. The petitioners' argument that hearing both the preliminary objection and the main petition together would save judicial time sounds appealing but such approach may be counter-productive should the court order the reference of the matter to a different forum for hearing.

CONCLUSION

30. It is for the above reasons that I do grant the following orders

a. **This court does hereby review and does set aside directions issued on 23rd December 2014, that preliminary objection dated 19th December 2014 and the petition dated 11th December 2014 be heard together on 10th March 2015..**

b. **The order of 23rd December 2014 is hereby substituted by a direction that the preliminary objection dated 19.2.2014 and any other objection to jurisdiction to be disposed before the**

hearing of the main petition.

c. **The costs of the Notice of Motion dated 3rd March 2015 shall be in the cause.**

DATED and DELIVERED at MOMBASA this 25th day of JUNE, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasaongo

Court clerk – Kavuku

For Petitioners:

For Respondents:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE