



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO. 1400 OF 2004
IN THE MATTER OF ARTICLE 2,10,21,22,23,40,47 AND 67 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA

AND

IN THE MATTER OF THE KENYA GAZETTE NOTICE NO. 15325 VOL. CXV-NO.172
PUBLISHED

ON 6TH DECEMBER,2013 AND SUBSEQUENT CORRIGENDA

AND

IN THE MATTER OF THE VIOLATION OF THE FUNDAMENTAL RIGHT TO PROPERTY
UNDER ARTICLE 40 OF THE CONSTITUTION

AND

IN THE MATTER OF LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT 2012

AND IN THE MATTER OF THE PURPORTED REVOCATION OF THE TITLE LR. NO.
209/13238

BETWEEN

INTERCOUNTRIES IMPORTERS AND EXPORTERS
LIMITED.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1ST
RESPONDENT

CHIEF LAND REGISTRAR.....2ND
RESPONDENT

THE ATTORNEY GENERAL.....3RD

RESPONDENT

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES.....4TH
RESPONDENT**

AND

**PARK AVENUE INVESTMENTS LIMITED.....1ST
INTERESTED PARTY**

**JUBILEE INSURANCE COMPANY LIMITED.....2ND
INTERESTED PARTY**

**TRUST BANK LIMITED(IN LIQUIDATION).....3RD
INTERESTED PARTY**

**COMMISSIONER OF LANDS.....4TH INTERESTED
PARTY**

RULING

The Petitioner in the matter before this court is the 1st defendant in HCCC No. 1400/04. The background to this petition is that on the date of highlighting submissions at the closure of the hearing of HCCC No. 1400/04 the defendants raised the issue that the plaintiff had annexed a copy of Gazette Notice dated 20/12/13 which Gazette notice had the effect of revoking the title held by the 1st defendant. Parties agreed to file an application for Stay and the Petition. The same was done on the 13/8/14. The 1st defendant filed a Notice of Motion dated 11/8/14 together with its supporting documents.

The Notice of Motion filed on the 11/8/14 is brought under Order 50 rule (1) of the Civil Procedure Rule 2010 Section 3 A of the Civil Procedure Act and seeks to Stay the implementation of Gazette Notice No. 15325 issued on the 6th December 2013 and the subsequent corrigenda issued on the 20th December 2013 until the determination of the petition or the hearing and determination of HCCC No. 1400/04. It is supported by the affidavit of Arief Madhani. The Petition filed in HCCC 1400/04 by the 1st defendant/applicant was filed on the 16/9/14. The heading of the Petition is Constitution Petition No. 1400/2014. It is brought under Articles 2,10,21,22,23,40,47 and 67 of the Constitution of Kenya. It refers to the Gazette Notice and the relevant Acts, The Land Registration Act and the National Land Commissions Act 2012.

The Petitioner seeks to have several declarations made as follows; that it's fundamental right to a fair administrative action was infringed by the 1st Respondent, The National Land Commission, in contravention of Article 47 of the Constitution; that it's fundamental right to property was infringed by the 1st Respondent in contravention to Article 40 of the Constitution; that the 1st Respondent acted in excess of its jurisdiction by revoking the Petitioner's title in contravention to section 14 of the National Land Commission Act. It seeks an order of Certiorari to be issued to quash Gazette notice no. 15325 Vol. CXV-No. 172 dated 6th December and the sequent corrigenda dated 20th December revoking L. R No. 209/13238. It also seeks an order of Mandamus compelling the 2nd Respondent in the Chief Land Registrar to reinstate the title and in default the Deputy Registrar be directed to effect the same. The last order the Petitioner seeks is a permanent injunction restraining the 1st, 2nd and 3rd and 4th Respondents agents, employees or anyone acting under the authority from interfering with the Petitioners property. The petitioner also seeks costs of the petitions.

When the matter came for hearing Counsel for the Petitioner made submissions on the petition. The other interested parties too made submissions on the petition. The plaintiff/respondent made submissions in response.

The Respondent raised an issue that I cannot ignore which I will deal with first. Mr. Okeyo submitted that petition as filed is a suit within a suit; that the suit before the court was HCCC 1400/04; that the petition before the court has brought in additional parties that is The National Land Commission (NLC) and Trust Bank Ltd; that the Court can only entertain the Notice of Motion and any amendments to HCCC 1400/04 if additional parties are being added but not a suit; that as lawyers they must follow the correct procedure and that if this is not done the court has no jurisdiction in the manner in which the matter is filed and thus it is invalid, and that Order 1 Rule 8 of the Civil Procedure Rule supports his argument. Counsel further argued that there is no petition before the court that will give the court the authority to issue the orders sought under Order 53 and that Order 53 is clear on the procedure on how a party may institute a petition; that if we are to assume it is a constitutional petition then there are ways to file the suit and that what is before the court is a confused process of litigation and that the court as constituted is not a constitutional court to be called upon to adjudicate on a constitutional matter and that the orders sought cannot be granted. Counsel however went on to submit on the petition.

In response to this submission Mr. Kilonzo submitted that the court granted leave and the petition was filed by consent of all parties, that Article 165 of the Constitution 2010 does not make any distinction of the Court nor do the rules; that under the Rules the procedure of joinder and non-joinder of parties is stated and that under the Rules a party can make an oral application under sub rule 10; that technical issues are dealt with under Article 159 (2) (d) of the Constitution; that Order 53 is not quoted anywhere in the petition and that it is a procedure of the past and is not followed, and that nothing stops this court from making any of the orders sought.

I have decided to deal with this issue because it touches on the issue of this court's jurisdiction and competence of the petition. It has been held that when a party raises an issue of jurisdiction then the court must deal with it first. In the case of

Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) KLR the Court of Appeal held that "a question jurisdiction may be raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court".

There is no doubt that what the applicant filed is a petition. It cites the provisions of the Constitution and seeks declaratory orders together with orders of Mandamus and Certiorari. Order 53 of the Civil Procedure Rule provides for applications for Judicial Review. The matter before me is a petition citing the provisions of the Constitution. It is correct that in a petition a party can cite any provisions of the law, however can a petition be filed in a pending suit? In my view it cannot. Mr. Okeyo submissions that the petitioner ought to have file a separate suit is correct, even if parties had consented the right thing must be done. What happened in this matter cannot be considered a procedural technicality and the same cannot be cured by the provisions of Article 159 (2) (d) of the Constitution. It was wrong to admit the petition within this suit, what happened was un-procedurally and in my view I will not go into the merits of the petition. I therefore strike out the petition with no orders as to costs. Let the Petitioner file a separate suit as envisaged in law.

Further Order 1 rules 9 deals with misjoinder and non joinder. It states that *"no suit shall be defeated by reason of the misjoinder or non joinder of parties and that the court may in every suit deal with the matter controversy so far as regards the rights and interests of the parties actually before it."*

In my view the provisions of Order 1 Rule 9 can only assist a party in an existing suit. Order 1 Rule 9 would only be available to the 1st defendant if the application was made in HCCC 1400/04. Article 165 of the Constitution provides for establishment of the High Court. As a High Court this court has the jurisdiction to hear matters as provided under Article 165 of the Constitution but the proper procedure for filing a suit must be followed. Lastly there is the Notice of Motion filed on the 11/8/14. Mr. Kilonzo for the 1st defendant chose to argue the petition. The Plaintiff/Respondent counsel did point out this. Since there were no submissions on the said application I will not make findings on it though I note that the arguments raised in the said matter by the applicant are basically the same as those raised in the petition which I have struck out.

This court was made aware of the Gazette Notice which the applicant and the other defendants seek to challenge at the stage of submissions. As a court hearing the matter I find it necessary to make orders that will assist parties before the determination of HCCC 1400/04. I therefore make the following orders;

1. That the 1st Defendant or any of the defendants shall file a proper petition as a separate suit within 14 days from the date of this ruling.
2. In the interest of justice I stay the proceedings of HCCC 1400/04 pending the filing of the petition.
3. This matter will be mentioned within 30 days for further orders.

Orders accordingly.

Dated, signed and delivered this 17th Day of **October 2014**.

R. E OUGO

JUDGE

In the presence of:

.....**For the Petitioner**

..... **For The 1st Respondent**

.....**For The 2nd Respondent**

.....**For The 3rd Respondent**

.....**For The 4th Respondent**

..... **For The 1st Interested Party**

..... **For The 2nd Interested Party**

..... **For The 3rd Interested Party**

..... **For The 4th Interested Party**

.....**Court Clerk**