



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.272 OF 2012**

**ROBERT CHESANG.....1ST PETITIONER**  
**MAXWELL OTIENO ODONGO.....2ND PETITIONER**  
**ZEPHANIA JUMA AJOWI.....3RD PETITIONER**

**VERSUS**

**GAETANO RUFFO.....1ST RESPONDENT**  
**KENYA SHELL LIMITED.....2ND RESPONDENT**  
**KANGERI WANJOHI T/A KINDEST AUCTIONEER.....3RD RESPONDENT**  
**EDWARD MURIU KAMAU T/A MURIU,**  
**MUNGAI & CO. ADVOCATES.....4TH RESPONDENT**  
**STANDARD CHARTERED BANK.....5TH RESPONDENT**  
**THE ATTORNEY GENERAL .....6TH RESPONDENT**  
**COMMISSIONER OF LANDS.....7TH RESPONDENT**  
**REGISTRAR OF TITLES .....8TH RESPONDENT**  
**THE DIRECTOR OF PUBLIC PROSECUTIONS.....9TH RESPONDENT**

**RULING**

**Introduction**

1. The 2nd Respondent and the Applicant, Kenya Shell Limited, filed the Application dated 8th October 2012. It is supported by an affidavit sworn by Catherine Musakali on 9th October 2012. The Application is premised on the Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual (High Court Practice and Procedure) Rules 2006. It seeks the following orders;

***“(1) This Application be heard on priority or at the same time as the Petitioners Application***

dated 17th September 2012.

2. **The Petitioners' Petition dated 26th June 2012 be struck out.**
  3. **In the Alternative, the Petitioners' Petition dated 26th June 2012 be struck out against the 2nd Respondent.**
  4. **The cost of this Application be awarded to the second Respondent.”**
2. The facts leading up to the dispute are that the 2nd Respondent herein allegedly granted Winam Petroleum Limited a loan and the 3rd Petitioner charged his property known as LR. 1870/116/IV as security in favour of the 2nd Respondent.
  3. The Loan was not settled as agreed and the 2nd Respondent in an attempt to recover the loan, advertised the property for sale. This led to the filing of HCCC No.1089 of 2002; Winam Petroleum Products & Zephania Juma Ajowi vs Kenya Shell Limited wherein the 3rd Respondent sought to stop the intended sale of LR.1870/116/IV. The 3rd Petitioner also filed HCCC 664 of 2004 Winam Petroleum Products & Zephania Juma Ajowi vs Kenya Shell Limited seeking orders to restrain the defendant from transferring the suit property LR. 1870/116/IV.
  4. Thereafter, the Petitioners filed the Petition dated 26th June 2012 claiming a violation of **Articles 2,3,10,19,20,21,22,(1)(3),25,26(1),27(1)(2)(4)(5),28,31(b),35(2),39(2)(3),40,43(1)(b),47(1),50(1),165(3)(6)(7),259,262** of the **Constitution** and **Section 7 of Part 1 of the 6th Schedule** of the **Constitution**. They also claimed a violation of **Articles 1, 6, 8, 12, 17, 25(1)** of the Universal Declaration of Peoples and Human Rights. In the Petition, they seek various orders *inter alia* an order for a declaration of violation of the constitutional rights of housing and due process.
  5. This present Application therefore seeks to strike out the Petition dated 26th June 2012.

#### **2nd Respondent/Applicant's Case**

6. The 2nd Respondent contends that the 3rd Petitioner has previously instituted HCCC 1089 of 2002 and HCCC 664 of 2004 in an attempt to stop the 2nd Respondent from executing a charge registered against LR. No.1870/116/IV which he had offered as a security for purposes of securing the credit facility offered to Winam Petroleum Products Ltd. It claims that the property was later lawfully transferred to the 1st Respondent in order to clear the debt.
7. It is the 2nd Respondent's position that the Petition is an abuse of the Court process since the 3rd Petitioner abandoned both suits for no reason and thereafter re-introduced the suits in the form of this Petition without disclosing any particular constitutional violation. The 2nd Respondent relied on the case of Dr Kiama Wangai vs John N Mugambi and Another (2012) eKLR where the court held that where a party decides to file suit after suit between the same parties with the same action with either an intention of vexing or annoying his opponents, and without pursuing the first suit in the production line to its logical conclusion, that action may be construed to amount to an abuse of the Court process.
8. The 2nd Respondent further contends that the Petition filed by the Petitioners does not state any constitutional rights infringed upon and is baseless. It claims that the Constitutional Court is not the appropriate forum to adjudicate over alleged illegalities and fraud raised by the Petitioners which issues should be ventilated in the suits filed prior to the Petition.
9. The 2nd Respondent submitted that a Petitioner who seeks to invoke **Article 23** of the **Constitution** is obliged to state the complaint; the specific rights and freedom in the bill of rights which considers to have been denied, violated, infringed and threatened and the manner in which he believes they have been denied, violated, infringed or threatened. It therefore sought for the

Petition to be struck off for being an abuse of Court process.

### **Respondent's case**

10. In reply to the Petition the 1st and 3rd Petitioners filed replying affidavits sworn on 23rd November 2012 .
11. It is the 1st Petitioner's contention that **Article 40** as read with **260** of the Constitution protects the right to protection of property. He claims that the Respondents violated that right. It was also his claim that **Article 165** of the **Constitution** provides the High Court with unlimited original jurisdiction in criminal and civil matters and further that the High Court is the Constitutional Court hence the right forum for the Petitioners to ventilate their grievances.
12. He further contends that the 1st Respondent in his Replying Affidavit sworn on 17th October 2012 confirmed that the violation of his right to property and right to housing were committed by the 2nd Respondent. He also maintained that there were no sale of LR 1870/116/IV since the deal to sell it was fraudulent.
13. The 3rd Petitioner alleges that the 4th respondent persuaded him to withdraw HCCC 1089 of 2002 and he denied having instructed the firm of M/s. M.O.Ocharo Advocates to file Nairobi HCC 664 of 2004. He further claims that the pleadings were fraudulently prepared and were in violation of Section **34(1)** of the **Advocates Act**. He urged me to dismiss Application with costs.

### **Determination**

14. Having set out the respective parties submissions as above, I am of the view that the only issue for determination given the circumstance of this case, is whether to grant the orders sought.
15. In my view all the issues raised by the parties are weighty and no doubt would require a Court of competent jurisdiction to determine them. The question that begs is whether the Court has jurisdiction to hear and determine the present Petition?
16. Jurisdiction is everything and as was stated by the Supreme Court in **Re The Matter of the Interim Independent Electoral Commission (Application No. 2 of 2011 (Unreported))**:  
“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (**Nyarangi, JA** at p.14): “I think that it is reasonably 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.”
17. The Petitioners claims that this being a Constitutional Court it is the right Court to determine the Petition in which a claim of violation of the constitutional rights of housing and due process have been alleged. In fact the Petitioners have admitted having being to the High Court over the same property and at this point, I reiterate sentiments expressed in the case of **Philip Kipchirchir Moi - v- Attorney General & Another Petition No. 65 of 2012** at paragraph 15 where this Court stated thus;

***“.....I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction.”***

18. The Constitution 2010 does not give any body called the Constitutional Court special jurisdiction as alleged by the Petitioners. The Court established under **Article 165** of the **Constitution** is the High Court. That Article provides as follows;

**(1) There is established the High Court, which—**

**(a) shall consist of the number of judges prescribed by an Act of Parliament; and**

**(b) shall be organized and administered in the manner prescribed by an Act of Parliament.**

**2. There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.**

**3. Subject to clause (5), the High Court shall have—**

**(a) unlimited original jurisdiction in criminal and civil matters;**

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

**(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**

**(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—**

**(i) the question whether any law is inconsistent with or in contravention of this Constitution;**

**(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**

**(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**

**(iv) a question relating to conflict of laws under Article 191; and**

**(e) any other jurisdiction, original or appellate, conferred on it by legislation.**

**4. Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.**

**(5) The High Court shall not have jurisdiction in respect of matters—**

**(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;**  
**or**

**(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).**

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause(6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

19. As was stated in the Moi case (supra), there is no Court in Kenya called the “Constitutional Court” but the Court charged with the mandate to address issues of alleged violation of constitutional rights including the right to housing is the High Court and the exercises that mandate under **Article 165(3)**.

20. In invoking that jurisdiction a party can be heard by any Division of the High Court (in Nairobi and Mombasa) and by any High Court in the rest of Kenya. The fallacy expressed to be in abundance in the Moi case continues to permeate litigation including the present one, a matter this Court must continue to deride.

21. From the pleadings before Court, it is clear that the issues raised by the parties are centered around the sale of the suit property LR.1870/116/IV. The 3rd Petitioner has admitted filing HCCC 1089 of 2002 challenging the sale of the property. He later withdrew the case and the reasons for doing so are not important. The pleadings show that the 3rd Petitioner filed HCCC 664 OF 2004 over the same issue but Kasango J declined to issue an injunction restraining the 2nd Respondent from disposing or transferring the suit property. The 3rd Petitioner was dissatisfied with the ruling delivered by Kasango J and filed a Notice of Appeal dated 29th June 2005. It is unclear what happened to the appeal but his argument that he never filed the suit which is still pending before this Court (The High Court).

**Article 164(3)** of the **Constitution** provides as follows;

(1) ...

(a) .....

(b) .....

(2) .....

(3) *The Court of Appeal has jurisdiction to hear appeals from—*

(a) *the High Court; and*

(b) *any other court or tribunal as prescribed by an Act of Parliament.*

22. If there is pending an appeal from the High Court to the Court of Appeal on the same issues as in this Petition, then this Court has no jurisdiction to sit on appeal from a Court of competent and concurrent jurisdiction and the Petition amounts to an abuse of the Court and its process. In saying so, am guided by the Supreme Court decision in **The Kenya Section of the International Commission of Jurists v The Attorney-General & 2 others Criminal Appeal 1 of 2012 , [2012] eKLR** where the Court stated as follows:

*The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice.*

*The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption...”*

23. I am wholly guided and it is obvious to em tat from the facts disclosed above, the Petitioners have acted in clear disregard of the above edict and must be told so.

24. Having so held, there is little more to say. The Application is merited and the Petition herein is struck off with cost to all Respondents.

25. Orders accordingly.

**DATED, DELIVERED AND SIGNED THIS 18TH DAY OF MARCH, 2013**

**ISAAC LENAOLA**

**JUDGE**

***In the presence of:***

*Irene – Court clerk*

*Mr. Chesang for Applicant*

*Mr. Khasekhe for 1st Respondent and holding for 2nd Respondent*

**Order**

*Ruling duly read.*

**ISAAC LENAOLA**

**JUDGE**