



REPUBLIC OF KENYA

High Court at Malindi

Petition 11 of 2011

IN THE MATTER OF: ARTICLES 21, 22 & 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOM UNDER ARTICLES 40, 47, 60, 64, 65, 73 & 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROTECTION

OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006

BETWEEN

BEACH BAY HOLDINGS LTD.....PETITIONER

AND

1) RATIM RELATORS LIMITED

2) THE COMMISSIONER OF LANDS

3) THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. The Petitioner commenced these proceedings by way of a Petition dated 25th August 2011 and filed on 1st September 2011.

2. In the Petition, the Petitioner is seeking for several declaratory orders against the Respondents, the main one being that the acts carried out by the Respondents in the preparation and production of the letter of allotment reference number 5529/102 dated 24th December 1991 be declared void and that the letter of allotment reference number 5529/102 and any title subsequently issued by the court be cancelled. The Petition is supported by the Affidavit of David Pola Mramba.

3. The 1st Respondent filed the Notice of Preliminary Objection dated 21st February 2013 on 22nd February 2013. That is what is before the court.
4. The Notice of Preliminary Objection has raised two issues for determination:
 - a) That the suit is a land case and should be filed in the Land and Environmental Division.
 - b) That the suit is defective since it was filed as a Petition and should have been a Complaint under the Land Act.
5. Mr. Ole Kina, counsel for the Petitioner and Mr. Njeru, counsel for the 1st Respondent made their oral submissions on 22nd April 2013.
6. Mr. Njeru, counsel for the 1st Respondent abandoned the first issue in his Notice of Preliminary Objection because the Petitioner was now before the Environment and Land Court.
7. On the second issue of his Preliminary Objection, Mr. Njeru, counsel for the 1st Respondent submitted that the claim by the Petitioner is an ordinary land matter and not a constitutional matter.
8. According to counsel, all the prayers in the Petition are covered under the Provisions of Section 13(7) of the Environment and Land Court Act No. 19 of 2011. In view of Order 1 to Order 4 of the Civil Procedure Rules, counsel urged, all suits are supposed to be commenced by way of a Complaint.
9. Counsel submitted that the procedure adopted by the Petitioner herein is wrong because it is not provided for in the Civil Procedure Rules; that the Petitioner has been able to get conservatory orders despite the provisions of Order 10 of the Civil Procedure Rules; that the procedure which has been adopted by the Petitioner will not allow the Respondent to file a counter-claim so that all the issues can be litigated upon once.
10. The 1st Respondent's counsel further submitted that the Respondent will not be able to raise the issue of limitation of time considering that the Petitioner is seeking for an eviction order against his client; that the nature of the Petition shall require *viva voce* evidence and that the parties will not be able to comply with the provisions of Order 11 of the Civil Procedure Rules, 2010 if the suit was to proceed in the present form. Consequently, counsel prayed that the Petition should be struck out.
11. Mr. Ole Kina, counsel for the Petitioner submitted that the issues raised by the 1st Respondent's counsel do not amount to a Preliminary Objection. According to counsel, a Preliminary Objection should be a pure point of law which proceeds on the assumption that the facts as pleaded are true.
12. The Petitioner's counsel further submitted that the 1st Respondent had not conceded that his client's letter of allotment is a forgery and that the Petitioner's title is a valid one.
13. According to counsel, the 1st Respondent, in filing the Preliminary Objection, had ignored the Gicheru Rules. Counsel submitted that the Gicheru Rules apply and binds this court because this court was established pursuant to the provisions of Article 162 (2) (b) of the Constitution.
14. The Petitioner's counsel further submitted that section 13 (2) (d) of the Environment and Land Court Act No. 19 of 2011 provides that this court has jurisdiction to determine disputes relating to public, private and community land and contracts in granting any enforceable interests in land. Further, counsel urged, section 13(3) of the Act bestows on this court the jurisdiction to determine applications for redress of a denial, violation or infringement of, or threats to, rights or fundamental freedoms relating to the environment and land.
15. This, according to counsel, is a Constitutional court; and therefore has the jurisdiction to enforce the Constitution and the Bill of Rights.

- 16.** Counsel further submitted that the Preliminary Objection raises technicalities which are prohibited by Article 159 (1) (d) of the constitution; that the prayers in the Petition are provided for under section 13 of the Environment and Land Court Act, 2011 and more specifically section 13 (7) (h).
- 17.** The Petitioner's counsel finally submitted that the duty of the Petitioner is only to serve the Respondents and that Order 1 Rule 10 of Civil Procedure Rules does not apply so does Order 11 of the Civil Procedure Rules.
- 18.** According to counsel, it is not the business of the Petitioner to advise the Respondent on how he should agitate for its rights. Consequently, counsel submitted that the Preliminary Objection is unfounded and that the same is a waste of the court's time.
- 19.** I have considered the submissions by the learned counsels. It is true, as argued by the Petitioner's counsel, that a preliminary objection should only raise a purely point of law. In my view, when a party challenges the procedure that another party has adopted to move the court, such a challenge is purely a matter of law and can be argued either by way of filing a formal application or by way of a preliminary objection.
- 20.** The procedure to commence a suit is provided for in the statutes and in some instances in the Constitution. It is purely a point of law on how a party should commence a suit and consequently, the current Preliminary Objection is correctly before the court.
- 21.** Article 22(1) of the Constitution provides that every person has the right to institute court proceedings claiming that his rights or fundamental freedoms in the Bill of Rights have been denied, violated or infringed or are threatened. Article 22(3) on the other hand provides that in any proceedings brought under Article 22, a court may grant appropriate relief including declaration of rights, injunction, conservatory orders, an order of compensation and an order of judicial review.
- 22.** Section 19 of the sixth schedule of the Constitution provides that until the Chief Justice makes the rules contemplated by Article 22, the Rules for the enforcement of the fundamental rights and freedoms under section 84 (6) of the former Constitution shall continue in force with the alterations, adaptations, qualifications and exceptions as may be necessary to bring to them into conformity with Article 22.
- 23.** On the other hand, Section 13(3) of the Environment and Land Court Act provides that nothing in the 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 freedoms relating to the environment and land under Articles 42, 69 and 70 of the constitution.
- 24.** Declarations have been known to state parties' rights, set out the construction of the constitution or a statute or declare that an administrative act is invalid.
- 25.** The procedure of how a party is supposed to move the High Court or the Environment and Land Court, which has the same status as the High Court, where he is alleging the infringement of his rights and freedoms or where he is seeking for the orders enumerated under Article 22 (3) of the Constitution is provided for in the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High court Practice and Procedure Rules, 2006 (Gicheru Rules). That is the Plain reading of section 19 of the sixth schedule of the Constitution. That section is binding on this court.
- 26.** The only procedure recognised under the Gicheru Rules of moving the court for the enforcement of the bill of rights is by way of a Petition. The Respondents are supposed to answer the Petitioner's case by filing Replying Affidavits and annex any document that they may wish to rely on.
- 27.** It is not for the Petitioner to ascertain whether the filing of the Petition will deny the Respondent the right to state its case fully. If the Respondent, as has been submitted herein, cannot ventilate its case fully in the Replying Affidavit, it has the option of filing its own case in a manner that will enable the court

address its claim. The Respondent cannot ask the court to strike out the Petition just because it wants the Petitioner to move the court in a particular manner.

28. As to whether any justiciable issue for determination has arisen between the Petitioner and the Respondent, that can only be addressed in the Respondent's Replying Affidavit.

29. In the circumstances and for the reasons I have given above, I dismiss the 1st Respondent's Notice of Preliminary Objection dated 21st February, 2013 with costs to the Petitioner.

Dated and Delivered at Malindi this **16th** day of **May**, 2013.

O. A. Angote
Judge