



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Petition 1 of 2013**

**In the Matter of: Articles 2, 3 (1), 10(2) (c), 22 (1) & (4), 23 (1) & (3), 40(2) & (3), 47(1), 50 (1), 60(1) (b), 68, 94, 160(1), 165(3) (b) and 258(1) of the Constitution of Kenya, 2010**

**and**

**In the Matter of: Rules 11, 12, 13, 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006**

**and**

**In the Matter of: Standing Order Number 210 of the Kenya National Assembly Standing Orders adopted on 10th December 2008**

**and**

**In the Matter of: Constitutional Petition Numbers 1 and 3 of 2012 at Bungoma**

**and**

**In the Matter of: The Report of the Joint Departmental Committees of agriculture, livestock and co-operatives, and lands and natural resources on the petition of illegal acquisition of land in busia county, known as bukhayo/nasewa/1500 by Mumias Sugar Company Limited pursuant to standing order no. 198**

**and**

**In the Matter of: alleged contravention of articles 2, 3, 10(2) (c), 60(1) (b), 68, 94, 160(1) and 258(1) of the Constitution of Kenya, 2010**

**and**

**In the Matter of: Alleged Contravention and/or Apprehended Contravention of Fundamental Rights and Freedoms under Articles 40 (2) & (3), 47(1), and 50(1) of the Constitution of Kenya**

**BETWEEN:**

**RULING**

The respondent in this petition filed a preliminary objection that the respondent is immune from legal proceedings in respect of acts done or omitted by him in his official capacity as set out in the Powers and Privileges Act of the Laws of Kenya.

Mr. Ngwele advocate for the respondent submitted that the report on petition is not subject to debate. The substance of this petition was such report. He quoted sections 4,12 and 29 of the Powers and Privileges Act cap 6 which gives immunity to members of parliament while discharging their duties and according to him this was one of them.

He further submitted that prayers in the petition seeks to ***“stop respondent from effecting the recommendations”*** yet the speaker does not effect the recommendations hence the application is misplaced. He urged the court to strike out the petition. He also cited several case law to support his submissions. I have had opportunity to read through the said authorities which basically refers to sections 4, 12 and 29 of cap 6.

Mr. Maura opposed the preliminary objection and urged court to dismiss it. In his submissions, it is only the court which can cancel title yet that was the recommendation contained in the report. He submitted that any law which contravenes the provisions of the Constitution is void. He quoted article 10 (2) ,21 (1), 23, 59 and article 160 which gives the Judiciary independence.

The report was filed without hearing both parties and that there is no party immuned to the provisions of this court, and that the speaker can be made a party to a suit if his report is inconsistent with the Constitution. He also cited case law to support his submissions.

Under section 12 of cap 6, provides ***“no proceedings or decision of the assembly or the committee of privileges acting in accordance with this act shall be questioned in any court.”***

The petitioner has submitted that where the law conflicts with the Constitution, the constitution prevails and in their minds they have stated that their clients right to property as provided in the Constitution has been violated. Secondly that they were never given an opportunity to be heard by the committee which prepared the report.

The report was already tabled in parliament and adopted. To this extent I agree with Mr. Ngwele that parliament is functus officio. The Joint Departmental committee was tasked with duty to investigate the sale of land parcel no. Bukhayo/Nasewa/1500. The Joint Departmental committee by ordering cancellation of the titles as the petitioner argue and I agree that they acted unconstitutional and acted in excess of their powers. It is the high court given powers to order for cancellation of titles. However, while adopting the report, the speaker was only carrying out many of its duties under the doctrine of separation of powers. Although separation of powers is not absolute, the speaker can be held accountable when necessary. By the speaker allowing adoption of the report seeking to cancel title of land was allowing a process that is a nullity from the start. It is not within the mandate of the JDC to order for cancellation of title. The body tasked with implementing what parliament has passed is the Executive. It is apt to the petitioner to take measures against the Executive to stop it from implementing the recommendations tabled by the legislature. Suing the speaker when parliament is functus officio is an exercise in futility and therefore the petition against him only serves no purpose and ought to be struck out. I am persuaded by a holding of Justice Gikonyo in the case of Moses Wamalwa Mukamari Vs. John O. Makali and 3 others Bungoma HCC no.. of 2013, the judge had this to say ***“if there be any liability, which is quite a rare incident or a cause of action arising from the exercise of a judicial function, that liability is the***

***liability of the state, it is contrary to the Constitution to join the judicial officer in suit challenging what he did in his official capacity. The proper party to be sued is the Attorney General”.***

Similarly in the case of Trusted Society of Human rights Alliance vs. A.G. & 2 others Nbi HC & Petition no. 229 of 2012 [2012] e KLR at paragrph 71, the court sated ..... ***however there is a ligitimate question of how far the authority of the court to review the decision of other state organs which exercise independent contitutional authority go. There are some areas where the court can simply not go;***

***Some outer limits on its power to review the decisions and actions of other branches and state organs”.***

In the trusted society case, the court explained the importance of the doctrine of the sepataion of powers and which is recognised in our Constitution, taking into account the need for checks and balances by each. The petioer submitted that the Joint Departmental Committee disregarded the existence of Bungoma HC Petiton nos. 1 & 3 of 2012. The petitioner has not annexed any pleadings to indicate who the parties are and whether stay was obtained in the said petitions.

In my view given the independence of the organs, I believe the court will not be influenced by the findings of the Joint Departmental Committee while handling the suits before it.

As ealier stated in this ruling, prayers (c), (d) & (e) would be for actions against the Executive in my view and not parliament. The petition as against the speaker only contravenes the provisons of chapter 6 of Laws of Kenya in regard to powers and priviledges.

I do thus find the preliminarhy objection is merited and proceed to strike out this petion. I make no order on costs.

**RULING DATED, SIGNED, READ AND DELIVERED** in open court this 15<sup>th</sup> day of MAY 2013.

**A. OMOLLO**

**JUDGE.**