



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 13 OF 2012

**IN THE MATTER OF: ARTICLES 22, 23 & 40 OF THE CONSTITUTION OF
KENYA AND (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT
PRACTICE AND PROCEDURE RULES 2006**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION
REGARDING PROTECTION OF RIGHT TO PROPERTY RELATING TO LAND
PARCEL NO.GALU/KINONDO/396**

BETWEEN

SALIM IDD ZAKUMERA PETITIONER

VERSUS

WILSON BURUGU GITAU 1ST RESPONDENT

LAND REGISTRAR, KWALE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. In response to the Petitioner's case herein for among other relief “*a declaration that the Petitioner is the rightful and bona fide owner of land known as Galu/Kinondo/396*”, the 1st Respondent has taken a Preliminary Objection seeking the striking out of the Petition and subsequent application made thereunder on the grounds that:
 - a. *Article 162 (2) of the Constitution ousts the jurisdiction of this court in matters relating to land which should be dealt with by the Environment and Land Court.*
 - b. *A statutory mechanism therefor exists for the resolution of disputes in respect of title and/or entitlement to land.*
 - c. *The Petitioner's Petition relates to purported rights which require prior determination through*

inter alia viva voce evidence and hence it does not fall within the realm of a constitutional court.

2. On account of the technical nature of the objections taken by the 1st Respondent, the court granted the Ex-parte Applicant opportunity to seek representation by counsel, or take legal advice on the Preliminary Objection. On the return date, the Ex-parte Applicant indicated that he had sought counsel and was ready to proceed with the objection.
3. Counsel for the 1st Respondent in arguing the Preliminary Objection contended that the issue whether or not the Ex-parte Applicant is the rightful owner of the property is a matter to be determined first before the jurisdiction of the Constitutional Court can be invoked and that it is the Environment and Land Court established under Article 162 (2) of the Constitution which should deal with question of the Petitioner's right to the property. Counsel for the Attorney General supported the Preliminary Objection.
4. In answering the Preliminary Objection, the Ex-part Applicant maintained that there was evidence of his ownership of the suit property in the investigations conducted by the Criminal Investigations Department. He however prayed that the court transfers the suit to the Environment and Land Court.
5. In her reply, counsel for the 1st Respondent indicated that the she did not object to the transfer of the case to the Environment and Land Court.
6. Because of the unrepresented status of the Ex-parte Applicant, the Preliminary Objection taken by the 1st Respondent was not fully canvassed before court, and the court does not feel that it is well served to make a substantive determination on the Preliminary Objection. That will have to await another opportunity where the court has the benefit of full argument on the issues raised.
7. In the present matter, the court will grant the consent of the parties to transfer the dispute to the Environment and Land Court (ELC) for hearing and disposal in accordance with the directions to be given by that court.
8. For that purpose, the parties will attend the Judge of the Environment and Land Court for mention on a date convenient to the court and the parties.

Dated signed and delivered this 10th day of December 2013.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Salim - Petitioner in person

Miss Ngige for the 1st Respondent

No appearance for the 2nd and 3rd Respondents

Mr. Buoro - Court Assistant