



REPUBLIC OF KENYA  
 IN THE HIGH COURT OF KENYA  
 AT MOMBASA  
 CONSTITUTIONAL PETITION 65 OF 2011

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS  
 OF INDIVIDUALS UNDER ARTICLE 23(3) AND 165(3) OF THE CONSTITUTION  
 AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND**

**FREEDOMS UNDER ARTICLE 40, 62(2) AND 63 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 1,2,3,6,7,8,9 AND 17 OF THE UNIVERSAL DECLARATION  
 OF HUMAN RIGHTS (UDHR)**

**BETWEEN**

**KASSIM ALI KAMA***(Suing on his own behalf and on behalf of 610 residents of Mabatini, Nyumba Sita,*

*Vidziani, Gonjora, Fahamuni and Kingwede Area – Msambweni-Kwale County)*.....PETITIONERS

**AND**

- KWALE INTERNATIONAL SUGAR COMPANY LTD**.....1<sup>ST</sup> RESPONDENT
- COUNTY COUNCIL OF KWALE**.....2<sup>ND</sup> RESPONDENT
- DISTRICT LAND REGISTRAR-KWALE**.....3<sup>RD</sup> RESPONDENT
- THE SENIOR REGISTRAR OF TITLES**.....4<sup>TH</sup> RESPONDENT
- THE COMMISSIONER OF LANDS**.....5<sup>TH</sup> RESPONDENT
- TREASURY OF KENYA**.....6<sup>TH</sup> RESPONDENT
- THE PERMANENT SECRETARY MINISTRY OF AGRICULTURE**.....7<sup>TH</sup> RESPONDENT
- THE PROVINCIAL ADMINISTRATION**.....8<sup>TH</sup> RESPONDENT
- THE HON. ATTORNEY GENERAL**.....9<sup>TH</sup> RESPONDENT

**RULING**

The petitioner is suing the respondents on his own behalf and on behalf of 610 residents of Mabatini Nyumba Sita, Vidziani, Gonjora, Fahamuni and Kingwede area, Msambweni Kwale District. He has brought the petition alleging contravention of the Constitution by the 5<sup>th</sup> Respondent. He alleges that the 1<sup>st</sup> Respondent entered into a lease agreement with the 6<sup>th</sup> and 7<sup>th</sup> respondents with the consent of 2<sup>nd</sup> 3<sup>rd</sup>

4<sup>th</sup> and 5<sup>th</sup> respondents which lease resulted in the acquisition of the petitioner's ancestral land. They are aggrieved by that disposition and seek orders to compel the 5<sup>th</sup> respondent to issue them with letters of allotment of the subject land; and an order for the 3<sup>rd</sup> and 4<sup>th</sup> respondents to issue the petitioners with certificate of ownership and an injunction order of compensation amongst others. A preliminary objection was raised by the 1<sup>st</sup> respondent to the prosecution of this case before this court. The preliminary objection was to the effect that this court lacks jurisdiction to hear and determine this matter in view of the provisions of Article 165 as read with Article 162 of the Constitution of Kenya 2010. Article 165 (3) provides that the High Court shall have **unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine whether Bill of rights has been denied, violated, infringed or threatened; jurisdiction to hear appeals of tribunals; jurisdiction to interpret the constitution and jurisdiction conferred by legislation**. Article 165 (5) provides:

*“The High Court shall not have jurisdiction in respect of matters –*

*(a) .....*

*(b) Falling within the jurisdiction of the court's contemplated in Article 162 (2).”*

Article 162 (2) provides:

*“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*

*(a) Employment and labour relations; and*

*(b) The environment and the use and occupation of, and title to, land.”*

The learned advocate for the 1<sup>st</sup> respondent submitted that parliament established the Environment and Land court by ‘The Environment and Land Court Act, 2011’ (Act 19 of 2011). The commencement of that Act was on 30<sup>th</sup> August 2011. Learned advocate for the 1<sup>st</sup> respondent referred the court to section 4 of Act No. 19 of 2011 which provides as follows:

*“Establishment of the Court.*

*4. (1) There is established the Environment and Land Court.*

*(2) The Court shall be a superior court of record with the status of the High Court.*

*(3) The Court shall have and exercise jurisdiction throughout Kenya and shall pursuant to section 26, ensure reasonable and equitable access to its services in every county.”*

It was argued that Articles 165 and 162 took effect from the date the Constitution of Kenya 2010 was promulgated. That those Articles according to the Constitution were not suspended and accordingly the advocate argued that section 30 of Act 19 of 2011 was unconstitutional. It was unconstitutional because it allowed the High Court to continue hearing matters involving land until The Environment and Land Court is established and operationalised. The advocate for the 1<sup>st</sup> respondent submitted that section 30 of Act 19 of 2011 was null and void. That section provides as follows:

*“30. (1) All proceedings relating to the environment or to the use and occupation and title of land pending before any Curt or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.*

*(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.”*

The 1<sup>st</sup> respondent submitted that this petition which was filed on 25<sup>th</sup> October 2011 should not have been filed in the high court but should have been filed in the court established by Act 19 of 2011 that is, the Environment and Land Court. The second limb of the 1<sup>st</sup> respondent's preliminary objection was that the authority filed in court on 26<sup>th</sup> October, 2011 being authority for Kassim Ali Kama to sue on behalf of the 610 other persons was incompetent because it was not signed by all those persons. The respondent argued those other persons having failed to sign that authority contravened order 1 Rule 13 (1) of the Civil Procedure Rules 2010. That rule provides where there are more than one plaintiff, one or more of them may be authorized to act, plead and appear for the others. Order 1 Rule 13 (2) provides that such authority shall be in writing and shall be signed by the parties giving it. In this petition, some of the parties have appended their signature next to their name in that authority while others have not. The petitioner's learned advocate submitted that the High Court has jurisdiction to hear and determine this matter as per Article 165(3) (b) of the Constitution. That the court had the jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights had been denied, violated, infringed or threatened. Those according to the petitioner were the rights that were being violated and hence this petition. Learned advocate argued that since the Environment and Land Court had not being established as envisaged by Act 19 of 2011 and because when then petitioners approached the court, they were being evicted and their crops were being uprooted, it would have been unjust to have expected them not to approach this court. In regards to the objection relating to the unsigned authority, for the petitioner to act, the petitioner requested the court to apply the overriding principle under Section 1A of the Civil Procedure Act Cap 21 and overlook that failure.

If I may, I will begin by considering the 2<sup>nd</sup> limb of the preliminary objection. What is before court is a Constitutional petition seeking orders as set out above in this ruling. This is not an ordinary civil action to which the civil procedure rules apply. That being so, those rules do not apply to the petition. The petition is based on alleged violation of the petitioners' Constitutional rights. That being so, proceedings relating to a Constitutional matter cannot be subject to the ordinary civil procedure rules. It should be noted that directions have not yet been given for the hearing of this petition and at such a time, the court may direct that all parties do sign their authority to validate their representation by the petition. Alternatively, if the court after hearing the petition was of the view that an infringement had occurred, and was to make declaration in respect of the alleged ancestral land the court on making such a declaration can have an audit undertaken of the persons directly affected by such an infringement. It is therefore the finding of the court that Order 1 Rule 13 of the Civil Procedure Rules is not applicable to a Constitutional petition. That objection is therefore rejected ad overruled.

On the other limb of the preliminary objection, it is correct to say that article 162(2) does provide for the establishment of the court that will entertain environmental matters and matters relating to the use, occupation of and title to land. I ask myself a rhetorical question. Is this petition one such matter? I find that it is. The petitioner seeks determination of his and of 610 other persons rights on the subject land leased to the 1<sup>st</sup> respondent. Although the petitioner alleges infringement of fundamental rights, in reality he seeks a declaration in respect of the title to land. The petition therefore falls within the definition assigned to article 162(2). Article 165(5) does indeed take away the jurisdiction conferred on the Environment and Land court from the High Court. Does this court have jurisdiction to hear and determine this petition?. The sixth schedule section 22 of the constitution provides as follows:

***“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or corresponding court established under this constitution or as directed by the Chief Justice or the Registrar of the High Court.”***

The Honourable the Chief Justice by a gazette notice.....has acted as per that schedule. This is the notice that was gazetted:

***“THE CONSTITUTION OF KENYA  
THE ENVIRONMENT AND LAND COURT ACT  
(No. 19 of 2011)***

***IN EXERCISE of the powers conferred by the sixth schedule part 5 section 22 of the Constitution of Kenya, 2010, and in pursuance of section 30(1) of the Environment and Land Court Act, (No. 19 of 2011) of the laws of Kenya on transitional provisions for proceedings relating to the environment and the use and occupation of, and title of land, as read with section 31 of the Act, the Chief Justice makes the following practice directions pending the establishment of the Environment and Land Court. All proceedings relating to the environment and the use and occupation of, and title of land pending before the Court of Appeal, High Court, Subordinate Courts or Local Tribunal of competent jurisdiction other than Land Disputes Tribunals which existed under the now repealed Land Disputes Tribunals Act, No. 18 of 1990, shall continue to be heard and determined by the same Courts or Tribunal. Any proceedings which were pending before the District Land Disputes Tribunals as at the date of the enactment of the Environment and Land court Act, 2011, shall be moved to the nearest Resident Magistrate's Court for hearing and determination by a court presided over by a magistrate of the rank of Resident Magistrate.***

***All proceedings which were pending before the Provincial Land Appeals Committees as at the date of the enactment of the Environment and Land Court Act, 2011, shall be moved to the nearest High Court for hearing and determination.***

***The proceedings to be moved to the Resident Magistrate's Courts and High Court respectively, shall be under separate registers to facilitate ease of movement to the Environment and Land Court once established in the event that the proceedings are not concluded before the establishment of the said court.***

***All new disputes relating to the environment and the use and occupation of, and title to land shall be filed in the nearest High Court under a separate register to facilitate ease of movement of the proceedings to the Environment and Land Court once established.***

***Dated the 9<sup>th</sup> February, 2012-03-27  
W. MUTUNGA,  
Chief Justice/President, Supreme Court of Kenya." ....***

The gazettment of those rules is inconformity with the Constitution. But as correctly submitted by the 1<sup>st</sup> respondent, this Constitutional matter was filed in October, 2011. Act 19 of 2011 commenced on 30<sup>th</sup> August 2011. As of now, there is however, no judge appointed to sit in the Environment and Land Court as established under that Act. The petitioner when he approached the court in October 2011, he did so under certificate of Urgency. The urgency was that he and 610 other persons were allegedly being evicted and their crops were being uprooted. The petitioner alongside with the petition filed an interlocutory application by way of notice of motion dated 25<sup>th</sup> October 2011. The court on 26<sup>th</sup> October 2011 certified that notice of motion as urgent and granted conservatory orders stopping the eviction of the petitioner and the 610 persons and stopping the encroachment by the 1<sup>st</sup> respondent of the subject land. There would have been great injustice, which I believe was not intended by the Constitution, if the petitioners were prevented from approaching the High Court for conservatory orders. At this point I wish to state that I am wholly persuaded by the finding in the case **JOHN HARUN MWAU & OTHERS VS THE HON. ATTORNEY GENERAL & O CONS THERS CONSTITUTIONAL PET. 65 OF 2011 CONSOLIDATED WITH PETITIONS. NOS.123 OF 2011 AND 185 OF 2011 NRB.** The court in that case was determining the election date of the 1<sup>st</sup> election in Kenya after the promulgation of the Constitution of Kenya 2010. What is pertinent in that judgment to this case is as follows:

***“The intention of the transitional provisions is to ensure a seamless and less disruptive transition from the old order to the new one. This means existing institutions, offices, appointments and laws are validated by the new Constitution until such time as that new Constitution takes full effect.”***

The constitution as provided under Article 165 as read with Article 162 has not fully been put into effect because presently there are no sitting judges in the Environment and Land Court. Bearing in mind the provisions of schedule 6 Section 22 and considering that there are no judges in that court, I am unable to

find that the petitioner's petition is incompetent nor do I find that this court lacks jurisdiction. The Chief Justice gave directions on the hearing of land matters in the gazette notice reproduced above. Those directions give the High court the jurisdiction to hear this petition up and until the Environment and Land Court is established as per Act 19 of 2011. The High Court therefore has jurisdiction to entertain matters relating to land until then. It follows that section 30 of Act 19 of 2011 reproduced above is not unconstitutional because it simply advances the provisions of the sixth schedule section 22 of the constitution. Accordingly, this limb also fails and the preliminary objection raised by the 1<sup>st</sup> respondent is dismissed with costs to the petitioner.

**DATED and DELIVERED at MOMBASA this 29<sup>th</sup> day of *March*, 2012.**

**MARY KASANGO**  
**JUDGE**