



REPUBLIC OF KENYA

High Court at Malindi

Petition 5 of 2011

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 19, 20, 21, 22, 23 25(C), 27, 40, 50, 60(1)(b), 62(1) (h), 64, 165, 262 AND SECTION 19 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE SURVEY ACT, THE REGISTERED LAND ACT, THE PUBLIC ROADS AND ROADS OF ACCESS ACT AND THE PHYSICAL PLANNING ACT, THE LOCAL GOVERNMENT ACT

AND

IN THE MATTER OF: REGISTRATION SECTION OR BLOCK KNOWN AS CHEMBE/KIBABAMSHE, MAYUNGU, MALINDI

AND

IN THE MATTER OF: MALINDI HIGH COURT CIVIL SUIT NOS 52 OF 2007, 69 OF 2007, 46 OF 2008, 56 OF 2008, 31 OF 2009 40 OF 2011, MALINDI MISCELLANEOUS CIVIL APPLICATION NO. 17 OF 2009 AND ALL MATTERS PENDING IN THE HIGH COURT AT MALINDI RELATING TO ANY BOUNDARY DISPUTE IN THE REGISTRATION SECTION KNOWN AS CHEMBE/KIBABAMSHE LOCATED AT MAYUNGU, MALINDI

BETWEEN

MERRY BEACH LIMITEDPETITIONER

AND

THE ATTORNEY GENERAL & 17 OTHERSRESPONDENT

RULING

1. The Petition filed by Merry Beach Limited on 19th May, 2012 is supported by the affidavit of Gianluigi Cernushi a director of the Petitioner Company, the latter being the alleged registered proprietor of a leasehold interest in Plot No. CHEMBE/KIBABAMSHE/374 (the suit property). The petitioner complains that it filed a civil suit no. HCCC 31 of 2009 Malindi against the 10th respondent Gimalow co. Ltd on the strength of a Land Registrar's Report (hereinafter the first surveyor's report) prepared pursuant to a court order in Malindi HCCC 52 of 2007, which suit was between the 11th

respondent as the plaintiff and Francesco, S. Marco, S. Mlanda, Mlanda Construction, Guiseppina Cinque and Wilson Mwambire.

2. Subsequently, however, the said parties recorded a consent quashing the said report and commissioned another survey to establish boundaries between plots No. CHEMBE/KIBABAMSHE/358 AND 359 (original) by different surveyors which resulted in another report adopted by the court. (Hereinafter the second surveyor's report). It is the petitioner's complaint that the said survey was conducted without its involvement and that the second, report resulted in loss of almost half of the petitioner's plot (the suit property) and, the blockade of a public road thus denying the petitioner access allowing encroachment by the 11th respondent on the petitioner's property. The petitioner complains that he was not a party to HCCC 52 of 2007 and that the respective actions of the respondents have infringed upon his constitutional duo rights to property and to be heard. He seeks several orders including injunctions, mandamus, declarations and damages against the respective respondents.

3. Lengthy affidavits have been filed by the respondents in reply. In brief, the 14th, 15th and 18th respondents who equally lay claim to other land parcels located in the CHEMBE/KIBABAMSHE adjudication section, namely plots 419, 371 and 372, respectively, support the petition. They too take issue with the second surveyor's report. They argue that the same has enabled the 11th respondent to encroach upon a public road and the construction of a wall thereon by the said respondent. They are also aggrieved that they were adversely affected by the second surveyor's report although they were not parties in Malindi HCCC No. 52 of 2007.

4. The 11th respondent as proprietor of plot no. 519 (formerly plot 358 later subdivided into plot No's 518 and 519) is opposed to the petition. Similarly, the 8th respondent accuses the petitioner of encroaching upon plot 358 and takes issue with the nature of the petitioner's action before court. According to the 8th respondent this action does not raise any constitutional issues and, is an abuse of the court process in light of the existence of other subsisting disputes touching on the same plots. The 10th and 11th respondents filed preliminary objections to the petition, which were heard on 29-2-12.

5. The 11th respondent's Notice of Preliminary objection was filed on 18th July, 2011. It reads in part;

"1. THAT prayers c), d), e), f), g), h) and i) of the petition are subjudice and res judicata as the matters in it are also directly and substantially in issue in other civil suits in the High Court at Malindi being:-

a) Malindi HCCC NO. 52 of 2007 concerning the same subject matter.

b) Malindi HCCC No. 40 of 2011 concerning the same subject matter; and in which suit there is a valid order adopted on the 7th day of July, 2011. The suit is scheduled for hearing on the 6th day of October, 2011.

2. THAT reference should not be made to the petitioner's annexure GC- 4 as the same was not only quashed but expunged from the Honourable court's records

3. THAT this petition has been brought to this court in clear disregard of the above suits and is an abuse of the due process of court."

1. On 2nd November, 2011 the 10th respondent filed a notice of Preliminary Objection couched in the following terms:

"1. The petition and the chamber summons are an abuse of the process of the court;

(a) The petitioner is seeking to relitigate on a constitutional platform and forum matters that it has already brought and adjudicated and ought to be adjudicated before the civil process;

(b) The petitioner/applicant is seeking to circumvent the lawful and subsisting orders of a court of competent jurisdiction

(c) The petitioner/applicant is engaging in an exercise of judicial lottery.

2. The petition/chamber summons has been instituted to delay and obstruct the fair trial and determination of similar issues touching on the same subject matter and pending before other courts. This is also an abuse of the court process.

3. The hearing of the petition and chamber summons are likely to embarrass the court and the judicial process as there is likelihood of the court giving conflicting decisions on the same dispute

4. The petitioner is creating anarchy in the judicial process;

5. The constitutional court process is not the right forum to canvass and litigate the matters raised in the petition. The petitioner ought to have raised the issues within the civil law suits it already has pending and which touch on the same subject matter;

6. The petition/chamber summons is instituted for extraneous objects and purposes totally unconnected with the genuine pursuit and redress of constitutional rights and freedoms”

1. It can readily be seen that the Preliminary objections are similar in substance. During the hearing, counsel argued along the grounds in the said Notices, depending on the positions adopted to the petition. The arguments, against the petition, as I understand them are three pronged:

a. That the petition before the court does not raise any constitutional issues and

b. Is a mere relitigation of issues determined by a competent court and pending disputes brought under the guise of a constitutional petition; and

c. It is an abuse of the court process.

1. Admittedly, the suit no. HCC 52 of 2007 was settled by consent on 23-9-11. The consent was between some of the parties to this petition. That consent is at the heart of the petitioner’s grievance in the petition namely, that he was not a party thereto. Going through the material before me I have identified six suits involving some of the parties herein with regard to boundary disputes over various plots in CHEMBE/KIBABAMSHE adjudication Section. These are:

1. Malindi HCCC 52/2007 settled on 23rd September, 2011 Exemplar Ltd (11th respondent herein) vs Francesco, W. Mwambire & Giuseppe Cinque and 6 others, two of them being the directors of the 10th respondent. Plot involved: – Nos. 519, 549, 599 subdivisions of plot 358

Status: Determined. Survey report of 4th April and 19th August 2011 (second surveyors Report) adopted.

2. Malindi HCCC Msc. Civil Appl. No. 17/09 Merry Beach Ltd (Petitioner) v Municipal Council of Malindi and Gimalowi Ltd. (8th & 10th Respondent). Plot No: 374 Vis-à-vis 358, 359 and 599

Status: Leave granted to file Judicial Review Proceedings.

3. Malindi HCCC 30/09 Merry Beach Ltd vs Gimalowi Ltd (10th Respondent). Plot No. 374 vis-à-vis 549, 599 (358? 359?)

Status: Pending

4. Malindi HCCC 40/11 Malindi Musketeers Ltd (15 respondent) vs Exemplar Ltd (11th

Respondent). Plots Nos. 362 and 371 visa-a-vis 359 and sub divisions no. 518 and 519

Status: Pending

5. Malindi HCCC 300 of 2008 La Marina Ltd (14th Respondent) vs P. Ndoho (13th respondent) and Francesco, Sammy Mlanda, W. Mwambire, L. Kahindi, Gimalowi Ltd (10th respondent) Municipal council of Malindi (8th Respondent), exemplar Ltd (11th respondent), Malindi Musketeers Ltd (15th respondent) Shariff N. Habib (16th respondent) Hildegard Jung (17th respondent), Daniel Ricci (18th respondent) plot - 419 visa-a-vis Plot 358 (subdivisions 548,549, 599)

Status: Pending

6. Malindi HCCC 46/08 Gimalowi Ltd (10th Respondent) vs Pandora Ltd (Construction firm in which the petitioner has interest). Plot No. 599, 549 subdivision of 358

Status: Pending. Injunction granted against the defendant.

7. Malindi HCCC 69 of 2007 Wilson Mwambire Mwadona (director 10th respondent), Sylvester Maro, Guiseppina Ginque (director 10th respondent) and Gurdani Luredana v Daniel Ricci Plot 599 (subdivision of 358)

Status: Pending

1. HCCC 56 of 2008 Parties unascertained. Plots 599, 549, (subdivisions 358)

Status: pending

2. In her two rulings in HCCC 31/09 on 6th October, 2009 and 9th November, 2010 Omondi J. has outlined the controversy in the suits above, which, apart from HCC 52 of 2007 are still pending determination. While dismissing the present petitioner's application for injunction against the 10th respondent in HCCC 31 of 2009 Omondi J expressed herself in the following manner:

“There seems to be a series of suing and countersuing – is the applicant (Petitioner) attempting to undo (injunctive) orders obtained in HCCC 46 of 2008 in a roundabout manner...although it is said the applicant is not party in 46/08, respondent has said was only a misjoinder of names and that actually the development was being undertaken on behalf of applicant---. I am curious and apprehensive that perhaps the parties are misusing the court process to backstab one another.”

11. Upholding the petitioner's preliminary objection in the same suit, Omondi J in her second ruling delivered on 9th November, 2010 concluded:

“the upshot of all this is that the issue regarding boundary is still unclear, and there is no point in zealously hearing another application for injunction – the sentiments expressed when the ruling dated 6th October, 2009 was delivered, remains true for all parties. To attempt to hear any party on an application for injunction is in effect acknowledging the existence of a boundary and is in fact a contradiction of the court's earlier ruling concerning boundary. It would serve all parties involved in the multiple files over the parcels which all seem to have a commonality to : (a) explore the possibility of consolidating the matters, so as to avoid a situation where the court ends up giving embarrassing contradicting orders

(b) set the matters for hearing, rather than indulging in various interlocutory applications which only go to delay the quick disposal of this matter “---“

1. Clearly, that direction was not followed. Ms. Aullo for the 10th respondent, Mr. Binyenya

for the 11th respondent, and Mr. Kilonzo for the 8th Respondent taking cue from Omondi J's rulings now argue that this petition is an attempt to relitigate matters "already brought and or adjudicated and ought to be adjudicated before the civil process" and to defeat orders in HCCC 46 of 2008, which are adverse to the petitioner. That there are no constitutional issues raised in this petition. The 11th respondent contends, that prayers (c) (d) (e) (f) (g) (h) and (i) in the petitions are subjudice and res judicata being directly and substantially in respect of the same issues in HCCC 52 of 2007 and HCCC 40/2011.

2. Mr. Ereri counsel for the 1st to 7th respondent agreed with these arguments and supported the Preliminary Objections. For this part Mr. Kilonzo for the 8th respondent submitted that there is no constitutional issue before the court. Mr. Munyithya for the 13th and 14th respondent submitted that the court's jurisdiction under article 165 of the Constitution is investigative while article 22 therein contemplates merely an allegation of breach, denial, violation etc of a right. Hence the burden of a petitioner at this stage is merely to convince the court of the "existence of an allegation" in order to invoke the court's jurisdiction in Article 165. He urged the court not to strike out the Petition but to allow the petitioner to be heard. For the 15th and 18th respondents, Mr. Mayaka supported Mr. Munyithya's submissions.

3. Mr. Kinyua for the petitioner replied as follows:

a. Res judicata under section 7 of the Civil Procedure Act arises where an issue has been determined finally between the same parties. And besides, that the Civil Procedure Act does not apply to constitutional matters. Citing our new Constitution, he sought to cast aside the decision in **Thomas vs The Attorney General of Trinidad and Tobago [1991] LRC (Const) 1001** which Ms. Aulo relied on for the exact opposite proposition. He especially relied on article 21 (1) to the effect that the constitution binds every state officer including judges and articles 23(1) and 165 on the court's jurisdiction in constitutional matters.

1. He argued that the right to a fair hearing, for example, can only be limited by law and not other past or present decisions either local or from the commonwealth (article 24). He urged the court to grant the petitioner a hearing on merits without undue regard to technicalities. He cited article 22 (3) (b) of the Constitution in this regard and articles 47, 48 and 50 with respect rights to fair administrative action, to access to justice and fair hearing, and article 35(1) a b c, in support of the petitioner's prayers seeking to enforce the right to access information. He complained that his client was not heard with regard to the 1st and 2nd Survey Reports which adversely affected his right to protection of property.

2. In his view, there is no need to distinguish whether the petitioner comes under private or public law. He said only by hearing the petition can the court determine whether or not there is an infringement, and it matters not that author of impugned order is a judge. Mr. Kinyua finally urged the court to compare the prayers in the petition and those in other related suits and further cited the wide scope of discretion to courts in Article 23 with regard to possible reliefs, including judicial review.

3. In reply, Ms. Aulo urged the court not to accept the petitioner's invitation to sit on appeal on orders made by a court of concurrent jurisdiction in the related matters because that cannot be the intent of the Bill of Rights since the constitution provides for a system of appeal. She reiterated the applicability of the **Thomas -vs- AG and Tabogo Trinidad Case** and submitted that the principle of res judicata is a universal and fundamental principle resting on public policy and not a technical rule (see **E.T v The Attorney General & J. N. K. (2012)e KLR**). Mr. Binyenya and Kilonzo reinforced Ms. Aulo's arguments in broad terms. I agree entirely with the latter submissions.

4. My intention in setting out as fully as practicable the background to his petition and the parties' respective arguments, is to bring to the fore the potential breadth of the dispute or action represented in the petition, the multiplicity of parties involved and the land parcels potentially connected with the dispute. Secondly, that the main protagonists appear to be involved in serial litigations which revolve around plots Nos. 358 (its subdivisions 518, 519, 548, 549, 599) and 374 and others. While on the face of it some of the prayers in the petition appear to replicate prayers made in other suits by the

petitioner, particularly HCCC 31/09, it is difficult at this stage to say whether this petition is all about the issue of boundaries with regard to affected parcels as determined in HCCC 52/07 or as is pending determination in the other suits. Secondly the petition has brought on board many other parties.

5. In other words what is the core of the petitioner's complaint in this petition? What of the other parties each of whom has aligned themselves on different sides of the dispute? Is this petition about the infringement of the right to fair hearing, protection of property etc or is this a disguised appeal from orders in HCCC 31/09 and 46 of 2008, or an attempt torpedo the other related suits before the hearing hence an abuse of the court process? In sum does the petition raise matters subjudice and res judicata dressed up as a constitutional petition? Having anxiously examined all the material placed before me, I am persuaded at this point that there is no clear cut answer to that question. And for obvious reasons, I do not find it prudent to delve any deeper into that material lest I speak too soon on matters that require full hearing and a deeper appreciation not possible at this stage. It is reasonably anticipated that some of the arguments canvassed at this stage may well be raised at later stages in this matter.

6. The classic definition of a Preliminary Objection was stated in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors & Anor (1969)EA 696** to be:

"...in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts as pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

Applying that definition to the situation before me, and bearing in mind the multiplicity of litigants the nature of the various related litigations including the entire pleadings in the Petition, I am not satisfied that the two Preliminary objections raised conform entirely to the definition above. The volume of documents and extent of submissions made with regard to the preliminary objections is itself testimony to the controversy engendered by this petition and related cases both on facts and the law.

7. The Petition and arguments have helped to surface the chaotic situation obtaining in respect of the various litigations between the parties herein and others over related subject matter within CHEMBE/KIBABAMSHE Adjudication Section. This untidy rigmarole requires quick resolution, as no doubt, it has occasioned backlog in this court and great expense and anxiety to the parties involved. While the preliminary objections are not sustained, I deem it necessary, invoking the provisions of Section 1B of the Civil Procedure Act to order that there be a temporary stay of proceedings in the eight suits listed in this ruling, pending the hearing and determination of this petition. For that purpose I direct that this petition be mentioned before me for directions on 26th September, 2012.

Finally, I apologize for the delay in preparing this ruling, which was occasioned by a heavy work schedule and the volume of documents requiring perusal. Costs will be in the cause.

Delivered and signed this **31st August, 2012** in the presence of Mr. Binyenya for the 11th respondent, and holding brief for Ms. Oulo for 10th respondent and Mr. Kilonzo for 8th respondent.

Petitioner – no appearance.

C. W. Meoli
JUDGE
Further order

Mr. Binyenya undertakes to serve all parties with mention notice for 26th September, 2012.

C. W. Meoli
JUDGE