



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Petition 21 of 2010**

**IN THE MATTER OF: ARTICLES 2, 19, 20, 21, 23, 25 (c), 31, 35, 40, 50 (1), 165 (3), 262 AND SECTION 7 OF PART 1 OF THE 6<sup>TH</sup> SCHEDULE OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 75 OF THE CONSTITUTION OF KENYA, 1969 AND ARTICLES 10, 21, 29, 31, 40 AND 50 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: PLOT NOS. KWALE/DIANI BEACH/BOCK 856, 551, 552, 553, 554, 556, 557, 558, AND 559**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT**

**AND**

**IN THE MATTER OF: THE GOVERNMENT LANDS ACT  
AND**

**IN THE MATTER OF: MOMBASA HIGH COURT CIVIL SUIT NUMBERS: HCCC 140/2003  
AND 108 OTHERS AND KWALE SRMCC 171/2010**

**AND**

**IN THE MATTER OF: TITLE NOS. KWALE/DIANI COMPLEX/056 AND 488 OTHERS**

**BETWEEN**

**LEISURE LODGES LIMITED ..... PETITIONER**

**AND**

**THE COMMISSIONER FOR LANDS AND 767 OTHERS.. RESPONDENT**

**RULING**

- 1) The Petitioner who holds title to the suit property known as Darad Farm being Plots Nos. Kwale/Diani/Blocks 856, 551, 552, 553, 554, 555, 556, 557, 558 and 559 has sued 767 Respondents being Government officers, Public Officers sued in person, beneficiaries of purported allotment of the said property under a squatter settlement scheme and its former advocate, seeking protection of its right to property and consequential reliefs set out in its Petition dated 7<sup>th</sup> December 2010 and amended on 11<sup>th</sup> August 2011.
- 2) The Petitioner's case is that the Government officers named as Respondents have allocated the Petitioner's property the subject of this litigation to private individuals under a settlement scheme known as Diani Complex Settlement Scheme using a fictitious survey map while the Petitioner remained the lawful registered proprietor of the suit property under the real map RIM No. 201/3/2, which action has resulted in tension and violence between the Petitioner and the allottees of the land and leading to suits and counter-suits amounting to 111 law suits pending before the court wherein the Petitioner and some Respondents have obtained injunctions one against the other. The Petitioner therefore seeks the protection of its constitutional right to property which it alleges has been infringed upon by the actions of the respondent government officials in allocating the suit property to private individuals while the suit property land already been acquired by the Petitioner and therefore contends that the Government's action amounts to illegal compulsory acquisition. The Petitioner seeks various consequential reliefs in the Petition and temporary orders pending the determination of the Petition by an amended Chamber Summons of 11<sup>th</sup> August 2011.
- 3) Before the Chamber Summons and the Petition could be heard, some Respondents with the support of the other Respondents raised substantively three points by way of Preliminary Objection, as follows:
  - a) The issues raised in the Petition would have been litigated through ordinary civil suits as they were not of constitutional character and were, in any event, not pleaded with sufficient particularity to enable the Respondents know the case they were to meet;
  - b) Some of the Respondents had proprietary interests in the suit property and had filed suits to protect such interests relief which would now be adversely affected by the Constitutional Petition; and
  - c) The previous cases between the parties would operate as bar to the Petition by reason of sections 6 and 7 of the Civil Procedure Act.
- 4) The Respondents relied on two High Court decisions namely **Alphonse Munga & Others v. African Safari Club Ltd, Nairobi H.C. Pet. No. 564 of 2004** and **Ben Kipeno & Others v. A.G. & 2 Others, Nairobi H.C. Pet. No. 15 of 2007** for the propositions that where there is clean procedure for redress for any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed, without trivializing the constitutional jurisdiction by using it where the normal procedures of ordinary civil courts would suffice; that the Petitioner needed to set out his case with precision citing relevant sections, sub-sections or even sub-paragraphs to enable the Respondents prepare for the challenge; and that fundamental rights were only enforceable against the Government.
- 5) The Petitioner's counsel in responding to the Preliminary Objection contended that the Petition is a claim in public law for the enforcement of the Petitioner's right to property against the state and named private individuals and for the constitutional interpretation of the Government officers' power to administratively create titles. It was contended the named Respondents abused their powers in creating fictitious titles using a survey Plan which is only available at Mombasa Land Registry and allocating the suit property which lawfully belongs to the Petitioner by virtue of first registration as absolute proprietor to the Respondent third parties. The counsel further contended that the joinder of the beneficiaries of the allotted land gives them the opportunity to bring the dispute for determination by the court. The Commissioner for Lands who had been sued in two previous suits was, according to counsel, sued in those suits in his capacity as Commissioner for Lands while he is sued in the Petition as a beneficiary of abuse of power by officers of the State. Counsel contended that the Petition concerned the abuse of state powers of police, prosecution and allocation of land resulting in clear violation of the Petitioner's right to property under Article 40 of the Constitution. Counsel urged that the issue of Bill of Rights must be

considered more permissively having regard to the duty of the court under Article 20 of the Constitution to extend and interpret rights, and under Articles 22 and 23 to determine the merits without regard to technicalities of procedure. Counsel distinguished the case law authorities cited by the Respondents as being relevant to the Old Constitution and not the Constitution of Kenya, 2010.

6) I have considered the Preliminary objection and I find that the issue for determination is whether the Petitioner's case raises any constitutional issues and how these may be litigated. I do not find an issue arising from the objections relating to section 6 and 7 of the Civil Procedure Act because an order for stay under section 6 of the Act does not bar an order for consolidation of the suits (See **Mulla on the Code of Civil Procedure 16<sup>th</sup> Ed. (2001) at pp. 150-1**) and the suits previously determined by consent of the parties were against the Commissioner of Lands as such not as a beneficiary to the alleged abuse of power alleged in the Petition.

7) **Whether the Petitioner's case raises any constitutional issues.**

The Petition clearly asserts the Petitioner's ownership of the suit property and pursuant thereto seeks various declarations including that it is the lawful registered owner of the property; that private property cannot be acquired under the Kenya Constitution 1969 or 2010 for private gain to private individuals; that the suit land was not unalienated Government land and could not be allocated; that creation of Diani Complex Settlement Scheme sheet 4 and adjudication of land **over the Petitioner's** parcels is null and void, and cancellation of the survey plan in favour of RIM No. 201/3/2; that sub-division and reparation of suit land is unlawful, breach of Petitioner's rights and amounts to acquisition without compensation. That is clearly a claim that the constitutional right to property under Article 40 of the Constitution in respect to the Petitioner has been violated or infringed and threatened with further violation or infringement. In the circumstances, the Petitioner has a constitutional right to institute court proceedings for enforcement of the Bill of Rights under Article 22 (1) which provides:

***“Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”***

8) **How may constitutional issues be litigated.**

I accept the submissions by counsel for the Petitioner that the case law cited by the Respondents in support of the objection that the issues herein should have been litigated through ordinary civil suits and not constitutional Petition and specifically particularized are distinguishable as having been made under the Old Constitution and have no application in interpreting the Constitution of Kenya 2010. Under Article 22 (3) (b) the Rules to be made by the Chief Justice providing for court proceedings for the enforcement of the Bill of Rights shall satisfy criteria that: -

***“Formalities relating to the proceedings, including commencement of proceedings, are kept to the minimum, and in particular that the court shall, if necessary entertain proceedings on the basis of informal documentation.”***

Moreover, Article 22 (4) has a default clause in terms that: -

***“The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.”***

In view of Article 22 (4) a constitutional issue could have been raised and determined in any court proceedings concerned through any of the prescribed methods of approaching the court, that is to say, the Plaint, Originating Motion or Summons and even Order 53 Procedure. However, the Transitional and Consequential Provisions of the Constitution provides by Clause 19 thereof that:

***“Until the Chief Justice makes the rules contemplated by Article 22, the Rules for the enforcement of 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 them***

***into conformity with Article 22.”***

Significantly, Rule 23 of the Rules made under section 84 of the Old Constitution empowered any High Court to deal with a question of constitutional interpretation as it arose in the proceedings before it. In my view, therefore, a question of constitutional enforcement of the Bill of Rights or interpretation of the Constitution may be raised and determined in any court proceedings before the High Court. It is clear that the jurisdiction of the High Court in the enforcement of the Bill of Rights under the Constitution of Kenya 2010 is given in permissive terms to permit unhindered access to the court for the determination of claims relating to violations, infringements or threats thereof with respect to the Bill of Rights. Moreover, the general principle of the Constitution under Article 159 that justice shall be done without undue regard to technicalities of procedures, dictates that the court entertains and determines the Petitioner’s claims to violation and its right to property without undue regard to the procedural requirements relating to the division of the Court, the method of pleading and its specific content and the existence of similar or related claims before the court in other proceedings.

Indeed, section 84 of the Old Constitution for which the new Constitution’s, provisions of enforcement of the Bill of Rights can only be an improvement in view of its elaborate chapter on the Bill of Rights, provided that the right to approach the High Court for enforcement of fundamental rights and freedoms **was without prejudice to any other action lawfully available to the Applicant.** It is inconceivable that the new Constitution of Kenya 2010, could design an enforcement procedure for the Bill of Rights that is more restrictive than the outdated provisions of the Old Constitution.

9) As regards the Respondents’ claim to the suit property, the court will have opportunity to determine the validity of the competing claims to title to suit property by the parties, in accordance with the constitutional injunction under Article 40 (6) that:

***“the rights [acquire and own property and protection against deprivation and limitation or restriction on enjoyment of property] under this Article do not extend to any property that has been found to have been unlawfully acquired.”***

The court shall upon hearing the Petitioner’s Petition herein and any responses that the Respondents may be minded to make determine the validity of the titles to the suit property presented by the parties and no issue of deprivation of titles of Respondents to the suit property will arise: the same will have been determined by lawful court process upon hearing of all the parties to the dispute.

It is significant to observe that the scope of remedies under the constitutional litigation procedure is wider than the ordinary civil suits and the constitutional procedure is therefore, in my view, suitable for a matter where, as in the present Petition, there are multiple competing claims.

10) Accordingly, for the reasons set out above, I dismiss the Preliminary Objections taken by the Respondents in this Petition and direct that the Petition proceeds to hearing on such dates to be fixed by the court in consultation with the parties. Costs in the cause.

11) With a view to expedited hearing of the Petition, I direct that the parties attend court on the 15<sup>th</sup> October 2012 for taking directions as to any necessary consolidation of suits, stay of suits and the hearing of the interlocutory application together with, or separately from, the Petition herein.

**EDWARD M. MURIITHI**  
**JUDGE**

**Dated and delivered this 28<sup>th</sup> day of September 2012.**

**F. TUIYOTT**

**JUDGE**

In the presence of:

Mrs. Kibe for the Applicant

No appearance for the Respondents

Miss Moriasi - Court Clerk