



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Constitutional Petition 59 of 2011**

**IN THE MATTER OF: CHAPTER FOUR OF THE CONSTITUTION OF KENYA  
AND**

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 30, 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: PETITION BY ABDULLAH MANGI MOHAMED CHALLENGING  
INFRINGEMENT OF HIS CONSTITUTIONAL RIGHTS BY THE ISSUE, EXISTENCE AND  
CONTINUED EXISTENCE OF TITLE DEED HELD BY THE 4<sup>TH</sup> RESPONDENT DATED  
10TH JANUARY 2006 OVER PLOT NO. 696 ORIG. 539 SECTION III MAINLAND NORTH**

**BETWEEN**

**ABDULLAH MANGI MOHAMED ..... PETITIONER**

**AND**

**LAZARUS BEJA ..... 1<sup>ST</sup> RESPONDENT**

**DOMINIC LIVU IVULI ..... 2<sup>ND</sup> RESPONDENT**

**OMAR ABUBAKER ZUBEDI ..... 3<sup>RD</sup> RESPONDENT**

**SMIN SHALA OUDE ..... 4<sup>TH</sup> RESPONDENT**

**THE SENIOR REGISTRAR OF TITLES, MSA ..... 5<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

(1) Preliminary Objection has been taken by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, represented respectively by Mr. Opolu and Mr. Mulwa, that the court has no jurisdiction as a constitutional court to determine the matters raised in the Petition on three principal grounds, as follows:

(a) That there is a statutory procedure for determination of the dispute which essentially involves a determination of two titles to the suit property is genuine and no constitutional issue;

(b) That the determination of the dispute would require viva voce evidence to be taken and the procedure for litigation of constitutional applications by way of Petition supported by affidavits does not permit the use of viva voce evidence, and that therefore the Petition ought to have used the normal way of suit by Plaintiff; and that the Respondents are not able to raise counter-claims to the property under the Petition procedure;

(c) That the Constitution ousts the jurisdiction of the court in matters relating to land which should be dealt with by the Environment and Land Court established under Article 162 (2) of the Constitution.

(2) In reply, Mrs. Umara advocate for the Petitioner, urged the court to proceed to determine the dispute by way of Petition pointing out that Article 22 of the Constitution gave the court power to entertain the dispute as it gives every person a right to come to court where his rights are infringed or likely to be infringed. Moreover, she argued, Article 159 of the Constitution required the court to do justice without regard to technicalities. She also pointed out that under Article 22 (3) of the Constitution the rules contemplated to be made by Hon. The Chief Justice would give the court power to order that the Petition be heard by viva voce evidence so that the Petition may properly proceed as drawn.

(3) Properly understood, Article 159 of the Constitution does not cure defects on jurisdiction; it only excuses **“undue regard to technicalities of procedure”** in the interest of justice. Jurisdiction of the court must therefore be established before the invocation of Article 159 principle to excuse strict compliance with the technical procedure for the exercise of such jurisdiction. Accordingly, the issue of the constitutional court's jurisdiction over the matter set out in the Petition is of primary consideration.

(4) In the advent of the new Environment and Land Court which was established under Article 162 (2) of the Constitution (by Act No. 19 of 2011) with exclusive jurisdiction over “the environment and use and occupation of, and title to, land”, the matter of jurisdictional boundaries of the High Court and the Environment and Land Court, which has the status of the High Court, is crucial. Article 165 (3) (b) and 5 (b) of the the Constitution demarcates the High Court's jurisdiction on enforcement of the Bill of Rights and excludes the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162 (2) of the Constitution. In any given case, therefore, it is a question of determination as to whether the matter is one in respect of **“the environment and use and occupation of, and title to, land”** over which the High Court has no jurisdiction or whether it relates to a **“determination of the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened”**, in which case the High Court has jurisdiction.

(5) In my view, in determining which of the two courts has jurisdiction over a matter, the court must examine the whole circumstances surrounding the case including the law alleged to have been breached or interfered; the reliefs sought; the determinations/declarations sought to found the claim for the reliefs; the defences offered and contentions made by the Defendants or Respondents. The object of the examination is to discover the true subject matter of the court proceedings to identify it either as a land matter or a constitutional matter for the enforcement of the Bill of Rights. The determination of title to land must be made by the Environment and Land Court which has jurisdiction on the question of title to land. The constitutional court would only have jurisdiction in cases where the Applicant's title to the land is established so that the owner of the title is seeking to protect his undisputed right to the property from infringement real or threatened. Where the title to land of the Petitioner has to be established the proper court to deal with the matter is the Environment and Land Court. That the protection is for the true owner of the right is emphasized, in the case of right to property by Article 40 (6) of the Constitutional which provides that **“the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”** The issue of enforcement of Bill of Rights should not be a collateral question in the words of the Supreme Court in **ICJ (K) v. A.G. & 2 Others S.C. Cri. Appeal No. 1 of 2012** of 15<sup>th</sup> November 2012, discussing the appellate jurisdiction of the Supreme Court to deal with appeals as of right in respect to a question of interpretation of the Constitution.

(6) The Petitioner's claim against the Respondents is set out in paragraphs 2-4 of the Petition dated 15<sup>th</sup> September 2011 as follows:

**“2. Your Petitioner was given as part of his inheritance plot No 696 (orig. No. 539) section III Mainland North measuring approximately 0.2157 hectares by his late grandmother, one Kobana Binti Salim Hamisi Kombo. This allocation and subsequent transfer was lawful and constitutional and conferred upon the Petitioner with constitutional rights to own property.**

**3. Your Petitioner has discovered from the offices of the 5<sup>th</sup> and 6<sup>th</sup> Respondents the existence of a parallel file which shows the possible existence of another new title deed over the same suit property. From this 2<sup>nd</sup> file, your Petitioner has been able to establish as follows:**

**(a) On 10<sup>th</sup> January 2006, it is alleged that the suit property was registered by way of a transfer in the name of the 1<sup>st</sup> Respondent.**

**(b) It is also shown that on 19<sup>th</sup> January 2006 the suit property was transferred to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent.**

**(c) On 12<sup>th</sup> February 2009 the Respondent transferred the property to the 3<sup>rd</sup> Respondent.**

**(d) On 2<sup>nd</sup> July 2009 the 3<sup>rd</sup> Respondent transferred the suit property to the 4<sup>th</sup> Respondent. Your Petitioner is apprehensive that the 4<sup>th</sup> Respondent may during the existence of his Petition transfer the suit property to a 3<sup>rd</sup> party hence the reason for seeking conservatory orders.**

**4. Your Petitioner has further established that in acquiring the suit property, the 1<sup>st</sup> Respondent did not comply with the law and even if he did, which is disputed by Your Petitioner, any law used to grant the 1<sup>st</sup> Respondent title over the suit property is unconstitutional. In this regard, Your Petitioner challenges the route of title stating from 10<sup>th</sup> January 2006.”**

(7) Even without looking at the affidavits in reply filed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, in deference to the authority of **Mukisa Biscuits Ltd v. West End Bakery Ltd (1969) EA 694**, it is clear from the Petition and its supporting affidavit that the dispute relates to the existence of two titles over the same property, the one by the Petitioner issued on 21<sup>st</sup> September 2010 and the one of the 1<sup>st</sup> Respondent issued on 10<sup>th</sup> January 2006 and subsequently transferred through the 2<sup>nd</sup>, 3<sup>rd</sup> to the 4<sup>th</sup> Respondent. Both the transfers of the property leading to the titles held by the Petitioner and the 1<sup>st</sup> Respondent were purportedly executed by the Petitioner's grandmother on 23<sup>rd</sup> July 2002 and 2<sup>nd</sup> March 1978, respectively. Paragraphs 4-6 of the Petitioner's affidavit of 15<sup>th</sup> September 2011 in support of the Petition sets out the factual background from the petitioner's perspective as follows:

**“4. THAT I am the registered proprietor of Plot No. 696/III/MN registered as CR No. 49623.**

**5. THAT Plot marked AMM-2 in the affidavit in support of the petition shall hereafter be referred to as the suit property. I acquired this suit property from my grandmother by way of transfer dated 23/7/2002. Further,**

**i. My grandmother died on 26/5/2005 after she had already executed the transfer marked as “AMM-3” in the affidavit in the support of the Petition.**

**ii. During the lifetime of my aforesaid grandmother, I remember that in the year 2002, the 1<sup>st</sup> Respondent Mr. Lazarus Beja came to see my grandmother and requested her to sign a transfer in his favour. In my presence, my aforesaid grandmother declined to sign and informed the Respondent that she never sold the suit property to the 1<sup>st</sup> Respondent or any other person and that the suit property had been bequeathed to me. On that day I took a copy of the transfer which came with the 1<sup>st</sup> Respondent.**

- iii. *I further recall after the 1<sup>st</sup> Respondent went away, my late grandmother informed me that she had tried to locate the original Deed plan for the suit property but she could not get it.*
- iv. *I recall that my late grandmother handed to me an original affidavit she swore on 24/2/1994 where she explained that she had lost several deed plans. Out of this, lost deed plans, one of them was that of the suit property.*
- v. *My late grandmother also gave to me a copy of a letter she wrote to the Registrar of Titles on 10/2/2000 explaining that the suit property had not been sold to anybody.*
- vi. *I have in my custody a letter written by the 3<sup>rd</sup> Respondent dated 10/9/2009 explaining that the original deed plan to the suit property got lost and requesting the director of surveys for a certified copy of the Deed Plan.*
- vii. *I also have in my custody a certificate of postal search done by my late grandmother over the original Mother Title to the suit property dated 28/8/1996.*
- viii. *Upon application to the 3<sup>rd</sup> Respondent on 21/9/2010, I was issued with a certificate of title to the suit property.*

6. ***THAT*** *sometimes this year, I saw some people attempting to develop the suit property. I proceeded to the Lands Registry and noted that there is in existence another file over the same suit property From this second file, I made copies of the following being the only documents in this file Certificate of Title C.R No. 40149 registered on 10/1/2006 in the name of he 1<sup>st</sup> Respondent. Further,*

- i. *It is shown that on 19/1/2006 the property was transferred to Dominic Livu Ivuli the 2<sup>nd</sup> Respondent.*
- ii. *On 12/2/2008 the property was transferred to Omar Abubaker Zubedi the 3<sup>rd</sup> Respondent.*
- iii. *On 2/7/2009 the property was transferred to Smin Shala Oude the 4<sup>th</sup> Respondent.*
- iv. *I also made a copy of a purported transfer allegedly executed by my late grandmother on 2/3/1978. This transfer is alleged to have been executed before a Kadhi whose name is not disclosed and registered as C.R No. 9087/253 on 10/1/2005. This is the same alleged transfer which I had photocopied from the 1<sup>st</sup> Respondent in the year 2000 as explained above.”*

(8) Indeed, the Petitioner confirms that there is an issue as to which of the two titles is valid when he depones at paragraphs 9 and 10 of the supporting affidavit that:

***“9. That as I have shown above, my late grandmother when she was alive dismissed the alleged transfer marked “AMM-11” in the affidavit in support of the Petition and I confirm that she had given the suit property to me.***

***10. That as I appear in court, there are two Title deeds over the same suit property whose effects is to interfere with my fundamental rights to own the suit property.”***

Clearly the issue of interference with the Petitioner's **“fundamental rights to own the suit property”** will only arise after a determination by the court that his title, as against that of the 1<sup>st</sup> Respondent, is the valid one. The issue is not even a collateral issue within the meaning of the Supreme Court decision in the ICJ case, supra; it is a conditional issue which may not arise if a determination is made against Petitioner's title.

(9) The determinant factor is that the matter of determination of title to land, which is the central dispute here, is within the exclusive jurisdiction of the Environment and Land Court established under Article

162 (2) of the Constitution of Kenya, 2010 by Act No. 19 of 2011 which came into force on 30<sup>th</sup> August 2011.

(10) Having reached the conclusion that it is the Environment and Land Court that has jurisdiction on this matter, I do not have to determine the issues of the appropriateness of the Petition procedure in accommodating the need for viva voce evidence and the impact of the availability of alternative remedy under the Registered Titles Act Cap. 281 (repealed by the Land Registration Act No. 3 of 2012) for the resolution of disputes relating to registration of titles and rectification thereof.

I may however observe the High Court sitting as a constitutional court on the hearing of a Petition under Article 22 of the Constitution must be able to give such directions including directions for the taking of viva voce evidence, as may be necessary for the effectual determination of the dispute before it. Such interpretation accords with the overriding objective of the Civil Procedure Act as well as the rationale for the provisions of Article 22 (3) criteria for rules to provide access to the court for enforcement of the Bill of Rights without unreasonable restriction by procedural technicalities. Such a course of action has analogy in Order 37 Rules 18 and 19 of the Civil Procedure Rules which provide for additional evidence to be taken in cases commenced by Originating Summons supported by affidavit and for the court to order the proceedings to be continued as if the case had been begun by a Plaint. Order 37 Rules 18 and 19 provide as follows:

***“18. At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the Judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.*”**

***19. (1) Where, on an Originating Summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the case had been begun by filing a Plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to or to apply for particulars of, those affidavits.”***

I also observe that the Registered Titles Act Cap. 281 and the Land Registration Act No. 3 of 2012 which replaced the former Act have provisions for the rectification of the land register by the Registrar in specific cases and by order of the court **“if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”** under s. 80 of the latter Act.

(11) I would agree with the counsel for the Respondents that where there is a dispute as to the Applicant's entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, that statutory procedure should be utilised in the determination of the Applicant's claim to the property rather than clog the Constitutional Court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for the enforcement of the constitutional right to property should be discouraged.

(12) For the reasons set out above, I find merit in the Preliminary Objection raised by the Respondents which I uphold with costs to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents only.

(13) However, since the Petition was filed before the Environment and Land Court was operationalized, I do not propose to strike out the Petition. I would rather refer the matter to the Environment and Land Court for directions as to the hearing of the dispute or further orders. See CJ's Circular GN. No. 16268 of 9<sup>th</sup> November 2012 at paragraph 4 thereof (Practice Directions Proceedings Relating to the Environment and the use and occupation of and Title to Land).

(14) The matter will be mentioned before the Environment and Land Court on 10<sup>th</sup> December 2012 for such directions as that court may deem appropriate.

**EDWARD M. MURIITHI**

**JUDGE**

**Dated and delivered this 30<sup>th</sup> day of November 2012.**

**F. TUIYOTT**

**JUDGE**

In the presence of:

Mrs. Umara for the Petitioner

Mr. Ngige for Mr. Opulu for 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Mr. Ngige for 2<sup>nd</sup> Respondents

Mr. Mulwa for 4<sup>th</sup> Respondents

No appearance for 5<sup>th</sup> and 6<sup>th</sup> Respondents

Miss Moriasi - Court Clerk