



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC PETITION NO. 4 OF 2019

EVERSWEET BAKERY LIMITED.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, KISII.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

BIRIA MORAA.....5TH RESPONDENT

PACIFICA MWANGO.....6TH RESPONDENT

ESTHER KEMUNTO GICHANA.....7TH RESPONDENT

MELLEN MOOCHI ONSONGO.....8TH RESPONDENT

KENNEDY AMWOMA SIMEON.....9TH RESPONDENT

JANE MORAA SIMEON.....10TH RESPONDENT

MARICELA KERUBO NYAANGA.....11TH RESPONDENT

CLEMENSIA RUTH SIMEON.....12TH RESPONDENT

RULING

INTRODUCTION

1.The Petitioner filed this suit by way of Petition dated 28th May 2019 against the Respondents alleging that the 1st Respondent had without any notice to the Petitioner, had upon receiving complaints from the 5th to 12th Respondents cancelled the Petitioner's title comprised in land parcel number KISII MUNICIPALITY/BLOCK 111/289. After cancellation of the said title the 2nd Respondent amalgamated the suit property with land parcel number KISII MUNICIPALITY/BLOCK 111/648 and forwarded the Grant to the 3rd Respondent. The Petitioner seeks the following reliefs:

a) An order of judicial review to remove into this court the Kenya Gazette notice date 17th July 2017 and Grant dated 25th March 2019 and have the same quashed.

b) An order of mandamus to compel the Chief Land Registrar to have land parcel number MUNICIPALITY/BLOCK 111/289 registered in the name of the Petitioner by the Land Registrar.

- c) An order of rectification to remove land parcel number KISII MUNICIPALITY/BLOCK 111/648 and have it registered separately.
- d) Costs of this suit.
- e) Any other order that the court may deem fit to grant.

The 5th to 12th Respondents filed their response.

ISSUES FOR DETERMINATION

- (i) Whether the court has jurisdiction to hear and determine this suit.
- (ii) Whether Petition meets the threshold of a Constitutional Petition.
- (iii) Whether the Petitioner should be granted leave to amend the Petition.

2. There is no saying that jurisdiction is everything and once the question of jurisdiction is raised, the court ought to consider it at the earliest possible opportunity. In the celebrated case of **Owners of Motor Vessel Lillian 'S' V Caltex Oil (Kenya) Limited 1989eKLR** Nyarangi JA, as he then was stated as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for confirmation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

3. Counsel for the 6th – 12th Respondents has submitted that the Petition is a Judicial Review clothed in the manner of a Constitutional Petition as the reliefs sought arise from administrative actions of the 1st Respondent and not a violation of any right under the Constitution.

4. It is his submission that in a Constitutional Petition, the Petitioner is expected to set out with a reasonable degree of precision, that of which they complain the provisions said to have been infringed and the manner in which they have been infringed. See the case of **Anarita Karimi Njeru (supra)**. Counsel further submits that the Petitioner has failed to set out his case in line with the standards laid down in the Anarita Karimi Njeru case. It is his contention that the particulars of breach of the Constitution are not actual breaches but concerns on the decision making process of the 1st Respondent.

5. He points out that under Paragraph 15 of the Petition; the Petitioner avers that the 1st Respondent acted contrary to Section 4 of the Fair Administrative Act No. 4 of 2015 thereby admitting that this suit challenges the 1st Respondent’s actions under the said Act, which conduct attracts Judicial Review remedies. He thus submits that the instant Petition is an attempt by the Petitioner to get Judicial Review orders against the 1st Respondent by circumventing the provisions of Section 9(2) 3 of the Law Reform Act Cap 26 of the Laws of Kenya which provides as follows:

Section (2) “Subject to the provisions of Section (3) the rules under sub-section (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall in specified proceedings, be made within six months or such shorter period as may be prescribed after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for purposes of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of the judgments, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law and where that judgment, decree, order, conviction or other proceedings is subject to appeal and a time is limited by law for bringing the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

6. In its prayers, the Petitioner sought the following reliefs:

- a) An order of judicial review to remove into this court the Kenya Gazette notice date 17th July 2017 and Grant dated 25th March 2019 and have the same quashed.
- b) An order of mandamus to compel the Chief Land Registrar to have land parcel number MUNICIPALITY/BLOCK 111/289 registered in the name of the Petitioner by the Land Registrar.
- c) An order of rectification to remove land parcel number KISII MUNICIPALITY/BLOCK 111/648 and have it registered separately.
- d) Costs of this suit.

e) Any other order that the court may deem fit to grant.

7. It is clear from the above prayers that the Petitioner does not seek a declaration that its rights under the Constitution have been violated. Instead the Petitioner seeks an order of Judicial Review to quash the decision of the 1st and 2nd Respondents.

8. In its conclusion, the court noted that:

“I find that the matters contained in the Petition are purely business of the society clothed in the style of a Constitutional Petition coupled with the absence of the locus standi on the part of the Petitioners, I uphold the Preliminary Objection and order that the Petition be struck out with costs to the Respondents”.

9. I fully associate myself with the decisions cited above. However, before arriving at my conclusion, I will consider whether the Petition can be cured by an amendment. In its Draft Amended Petition annexed to the Supporting Affidavit in the application for leave to amend the Petition, the Petitioner has amended the prayers sought to read as follows:

(a) A declaration that the 1st Respondent violated the provisions of Article 47 of the Constitution and the provisions of the Fair Administrative Act 2015.

(b) That the Honourable Court decree that the Petitioner’s fundamental rights and freedoms, more particularly set out in Article 40 of the Constitution have been violated and that any revocation of the title registration No. KISII MUNICIPALITY BLOCK III/289 by the 1st Respondent and the decision of the 1st Respondent gazetted through Kenya Gazette Notice Number 6862, Volume CXIX No. 97 of 17th July 2017, purporting to revoke the Petitioner’s title and have the same vested in the 5th Respondent, Pacifica Mwangi as personal representative of the estate of Simon Kegesa and the resultant issuance of a Grant to the 5th-12th Respondents be declared null and void.

(c) An order for rectification of the register to remove Land Parcel KISII MUNICIPALITY BLOCK III/289 from Land Parcel BLOCK III/648 and have it separately registered. AND IN THE ALTERNATIVE an order adopting the Judgment in Misc. Civil Application No. 3 of 2017 (J.R) Republic V The Chairman National Land Commission & 4 Others Ex-parte Aboko John Samuel Kumenda & Another.

10. In his submissions, counsel for the Petitioner has submitted that having applied for leave to amend the Petition, the Petitioner should not be tied down to the Petition that is intended to be amended.

11. He is of the view that once an application is made, there is no need to pursue a Preliminary Objection on the Petition that is intended to be amended. Counsel submits that the Petition is based on Articles 19, 22, 40, 47, 50 and 64 of the Constitution.

12. It is his contention that Article 23 of the Constitution provides for Judicial Review under sub-article (3) (f) as a mechanism of redressing an infringement under the Bill of Rights. He submits that the limb of the Preliminary Objection that states that the Petition is incurably defective as it seeks Judicial Review orders in the manner of a Constitutional Petition, is uninformed and lacks basis as Judicial Review is an integral provision under Article 23 of the Constitution of Kenya 2010.

13. I am constrained to agree with the Applicant’s counsel that this court has the jurisdiction to grant orders of Judicial Review in appropriate cases. I am also of the view that land matters ought as much as possible to be heard on their merits in order to render substantive justice in line with order 159 2 (d) of the Constitution. As was observed by Madan JA in the case of **D. T Dobie & Company (Kenya Ltd Vs Muchina 1982 KLR 1:**

“... A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it.”

14. That decision of Madan J.A (as he then was) in the above-mentioned case has been consistently followed and is still sound law. The said decision is binding on this court and I am duly guided by it.

15. In the end, I disallow the Preliminary Objection and grant the application dated 4th August 2020 and allow the Petitioner to amend its Petition. The Draft Amended Petition is deemed as duly filed upon payment of the requisite court fees which shall be paid within 14 days.

The costs of the Preliminary Objection and the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF MARCH 2021.

J.M ONYANGO

JUDGE