



**Asaa & 61 others v O. C. S, Malindi Police Station & 2 others; Said & another (Interested Parties)
(Environment & Land Petition 21 of 2021) [2022] KEELC 3141 (KLR) (7 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 21 OF 2021**

MAO ODENY, J

JUNE 7, 2022

**IN THE MATTER OF: VIOLATION OF THE CONSTITUTION OF KENYA, 2010
AND IN THE MATTER OF: ARTICLES 22 & 23 OF THE CONSTITUTION OF
KENYA, 2010 AND IN THE MATTER OF: VIOLATION AND/OR THREATENED
VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS OF ARTICLES 10, 25,
27, 29, 40, 47, 50, 157 AND 245 OF THE CONSTITUTION OF KENYA, 2010 AND IN
THE MATTER OF: THE VIOLATION OF SECTION 4 AND 6 OF THE OFFICE OF
THE DIRECTOR OF PUBLIC PROSECUTIONS ACT AND IN THE MATTER OF:
SECTIONS 10 AND 24 OF THE NATIONAL POLICE SERVICE ACT AND IN THE
MATTER OF: SECTIONS 7(2) OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

BETWEEN

ASSA TABU ASAA & 61 OTHERS PLAINTIFF

AND

O. C. S, MALINDI POLICE STATION 1ST RESPONDENT

SUB COUNTY CRIMINAL INVESTIGATION OFFICER (SCCIO)

MALINDI 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECTIONS 3RD RESPONDENT

AND

SAID SULEIMAN SAID INTERESTED PARTY

JAMAL HAFIDH MOHAMED INTERESTED PARTY

RULING

1. This ruling is in respect of a Preliminary Objection dated 29th September 2021 by the 3rd Respondent on the following grounds: -



- a. That Article 162 (2) (b) of *the Constitution* as enabled by Sections 13 (1), (2), (3) & (7) of the *Environment and Land Court Act* No. 19 of 2011 bars the Environment and Land Court from hearing and determining applications for redress on violation and/or infringement of fundamental rights and freedoms arising from criminal proceedings.
 - b. That the Environmental and Land Court lacks supervisory powers over subordinates Court, Local tribunals, persons or authorities in accordance with Article 165 (6) of *the Constitution*.
 - c. That mere linkage of a subject matter or a criminal charge/Criminal trial or investigation does not qualify to be a land dispute as envisaged under Section 13 (2) (e) of the *Environment and Land Court Act*.
 - d. That Article 165(2) (b), (d), (i), (d)(iii) as read with Articles 22 & 23 of *the Constitution* ousts jurisdiction of the Environment and Land Court from addressing issues of violation and/or infringement of fundamental rights and freedoms.
 - e. That concurrence of civil proceedings with Criminal Disputes is not ipso facto a bar to criminal prosecution and emphasis is on Section 193 of the Criminal Procedure Code.
 - f. That the application and the Petition offends *the Constitution* and should be dismissed summarily.
2. The Petitioners filed this Petition dated 2nd September 2021 seeking the following prayers and/or reliefs: -
- a. A declaration that the Petitioner's rights and freedoms as envisaged and/or provided under *the Constitution* and in particular the aforementioned Articles in paragraph 48, above have been violated and/or infringed by the Respondents.
 - b. A permanent injunction against the Respondents, restraining them and/or any other person(s) acting on their behalf from assaulting and/or torturing and/or arresting and/or detaining and/or charging and/or prosecuting any of the Petitioners herein or any of the Petitioners' relatives or family members over any claim touching on the ownership and/or proprietorship of the suit premises being Plot No. 102 Malindi, including subdivision Nos. 11020-Malindi, 1021 Malindi and 11021-Malindi.
 - c. All pending criminal cases commenced against any of the Petitioners and/or any of their relatives and/or family members in occupation of the 11020-Malindi, 102/1 Malindi and 11021- Malindi be stayed pending the determination of ELC No. 54 of 2020 (OS) Malindi and/or be quashed, forthwith.
 - d. An order(s) for compensation in form of punitive and/or exemplary and/or general damages be made for the assault and/or torture and/or mental torture and/or anguish and/or psychological injury suffered by the Petitioners as a result of the Respondents' actions herein.
 - e. Any other relief and/or remedy the Honourable Court may deem fit and just to grant in the circumstances.
 - f. Costs of the Petition.
3. The Petitioners contemporaneously filed an application dated 2nd September 2021 seeking the following orders: -
- a. Spent



- b. That a temporary injunctive order and /or conservatory orders be issued against the Respondents, restraining them and/or any other person(s) acting on their behalf from assaulting and/or torturing and/or arresting and/or detaining and/or charging and /or prosecuting any of the Petitioners herein or any of the Petitioners' relatives of family members over any claim touching on the ownership and/or proprietorship of the suit premises, being Plot No. 102 Malindi including subdivision Nos 11020-Malindi, 102/1- Malindi and 11021-Malindi pending the hearing and determination of this Application.
 - c. That a temporary injunctive order and/or conservatory order be issued against the Respondents, restraining them and/or any other person(s) acting on their behalf from assaulting and/or torturing and/or arresting and/or detaining and/or charging and/or prosecuting any of the petitioners herein or any of the petitioners' relatives of family members over any claim touching on the ownership and/or proprietorship of the suit premises, being Plot No. 102 Malindi including subdivision Nos. 11020-Malindi, 102/1- Malindi and 11021 Malindi pending the hearing and determination of the Petition.
 - d. That all pending criminal cases commenced against any of the Petitioners and/or any of their relatives and/or family members in occupation of the suit premises, being Plot No. 102-Malindi, including subdivision Nos. 11020-Malindi, 102/1 Malindi and 11021- Malindi be stayed pending the determination of the Petition.
 - e. That costs of this application be borne by the Respondents.
4. Counsel agreed to canvas the application together with the Preliminary Objection vide written submissions which were duly filed.

3rd Respondent's Submissions

5. Counsel relied on the cases of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) EA 696, *The Owners of Motor Vessel "Lillian s" Vs. Caltex Oil Kenya Ltd* (1989) on jurisdiction and preliminary objections and submitted that this court does not have power to interfere in a supervisory role with the functions of the DPP.
6. It was counsel's further submission that the Environment and Land Court established under Article 162 (2) (b) of *the Constitution* as enabled by Sections 13 (1), 13(2), 13(3) and 13(7) of the *Environment and Land Court Act* No. 19 of 2011 lacks jurisdiction to hear and determine applications for redress of a denial, violation or infringement of or threat to rights under the Bill of Rights arising from criminal proceedings either within the ambit of the DPP under Article 157 of *the Constitution* or Police Investigations under Article 244 and 245 or pending trial and determination before the subordinate courts exercising their jurisdiction Article 169 (1) (2) as enabled by Section 6 of the Magistrate Court Act 26 of 2015 and other written law.
7. Mr. Jami submitted that the Environment and Land Court lacks the supervisory authority over the Director of Public Prosecution when exercising its mandate under Article 157 of *the Constitution* which jurisdiction is exclusive to the High Court exercising its function under Article 165 (6) of *the Constitution* and therefore the orders sought in the applications herein cannot issue. Further that the mere linkage between land as a subject matter of a criminal charge / criminal trial or investigation does not qualify a case to be a land dispute as contemplated by Section 13(2) (e) of the ELC Act.
8. Counsel submitted that the deletion of the words "the environment and Land" in section 13(3) ELC Act and the substitution with the words "a clean and healthy environment" through Schedule 2 of The Statute Law (Miscellaneous Amendments) Act 2012 clearly left the court with the jurisdiction



to hear matters relating to violations in respect to clean and healthy environment. Further that the concurrency of civil proceedings with criminal disputes is not a bar to or a reason to suspend, stay or delay criminal prosecutions as per Section 193 of the Criminal Procedure Code.

9. Counsel relied on the cases of *Benard Nyamanya Mogaka & 2 others v Peter Momanyi Kebati & another; D. C. I Kisii (Interested Party)* (2021) eKLR, *Patrick Musimba v National Land Commission & 4 others* (2015) eKLR, *Sabina Nyambura Githina & another v Land Registrar, Thika Land Registry & 3 others; Real Capital Ltd (Interested Party)* (2021) eKLR and submitted that the ELC court does not have jurisdiction to hear and determine disputes relating to criminal investigations and violations of such rights.
10. On the application counsel submitted that the High Court dismissed a similar application arising from the same series of transactions being Malindi CMs CRC No. 1022 of 2018 R V Salim who is a Petitioner No. 58 herein in Judicial Review *Republic v Director of Public Prosecutions & another, Chief Magistrates' Court at Malindi & another (interested parties) Ex Parte Salim Omar Mohammed* [2020] eKLR.
11. Counsel relied on the doctrine of Constitutional avoidance which states that a court should not determine a constitutional issue when a matter may properly be determined on another basis and cited the cases of *Garder General Trading Limited v County Government of Kilifi, Department of Lands, Housing and Physical Planning & another* [2018] eKLR and *Communications Commission of Kenya & 5 others vs Royal Media Services & 5 others* [2014]

1st & 2nd Interested Parties Submissions

12. Counsel submitted that Section 13(3) of the *Environment and Land Court Act* clearly stipulates that the Environment and Land Court does not have jurisdiction to entertain claims for redress of violation of fundamental rights that fall outside Articles 42, 69 and 70 of *the constitution*. That the allegations of violations rights contained in the Applicant's application and petition do not relate to the right to a clean and healthy environment under Articles 42,69 and 70 of *the Constitution*.
13. Mr. Ojwang stated that it follows that this Honourable court does not have supervisory authority over the Director of Public Prosecution when exercising its mandate under Article 157 of *the Constitution* which give the DPP the mandate to exercises state powers of prosecution and in that capacity, may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. That the court can only interfere with this mandate if it is sufficiently established that it acted in contravention of *the Constitution* and relied on the case of *Iddi Ramadhan & 5 others vs Director of Public Prosecution & Another* (2020) eKLR.
14. Counsel further submitted that the fact that any matter in issue in civil proceedings is also directly or substantially in issue in any pending criminal proceedings should not be a ground for any stay, prohibition or delay of the criminal proceedings as provided for under Section 193 A of the *Criminal Procedure Code*.
15. Mr. Ojwang also submitted that the Applicants have also not demonstrated that there is any law or regulation that has been breached by the Respondents in execution of their duties and urged the court to uphold the Preliminary Objection.
16. On whether the Applicants have met the threshold for grant of injunctions or conservatory orders, counsel relied on the cases of *Judicial Service Commission Vs Speaker of the National Assembly & Another* (2013) eKLR And *Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others*(2015) eKLR and urged the court to dismiss the application for injunction.



Petitioner's submissions.

17. Counsel submitted that the Petition involves issues which can partly be heard by either court as the particulars captured vide paragraph 48 of the Petition contain matters that can be heard by the Environment and Land Court.
18. However, counsel admitted that the issues captured in Paragraph 48(iv), (v), (vi) & (vii) read together with prayer (iii) of the Petition are matters that should be heard by the High Court. That the Environment and land Court is established under Article 162(2) (b) of *the Constitution* and has equal status with the High Court but on matters touching on environment and the use and occupation of, and title to land. That these powers include the jurisdiction to enforce the application and/or implementation of the Bill of rights under Chapter 4 of *the Constitution* in so far as the matters in issue relate to land.
19. Mr. Kenga relied on the case of *Offshore Trading Company Limited vs The Attorney General & Others* Constitution Petition No. E299 of 2020 where the court held that it cannot determine land related issues raised herein and instead of breaking the case into two or hearing the same piecemeal, and that the best suited court is the Environment and land Court which is the court that can deal with the predominant issues raised in the Petition together with the constitutional issues related to the land thereto.
20. Counsel further submitted that the Interested Parties applied to be joined in the suit on the basis of being the registered owners of the suit premises and the implication of their joinder in the suit was that the matter involved issues of ownership of the suit premises.
21. On the issue of transfer of proceedings from one superior court to another, counsel relied on the case of *Mohamed Shally Sese vs Edward Mzee Karezi & others* and urged the court to transfer this matter to the High Court for determination.

Analysis and Determination.

22. The issue for determination is whether the Preliminary Objection on the jurisdiction to hear this petition has merit and if so whether the court should transfer this matter to the High Court for hearing and determination.
23. When an issue of the jurisdiction of the court to hear and determine a matter is raised, the court has to deal with that issue first and if the court rules in the negative then it should not move an inch as jurisdiction is everything in a case.
24. When parties are considering filing a suit, the issues that they must look at first is the forum to file the suit, does that court have the requisite jurisdiction to hear the matter be it, pecuniary, geographical, hierarchical meaning original or appellate jurisdiction, subject matter in terms of the specialized courts or Tribunals, right parties to be sued and the remedies sought if the same can be granted by a court. The parties must also be concerned with the nature of their claim, whether it is through a plaint, petition or originating Summons. These are very important considerations that a party must look into before filing a claim.
25. I will therefore start with the issue of the jurisdiction of the Environment and Land Court. Article 162 of *the Constitution* which establishes Kenya's Superior Courts provides as follows: -
 - 1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)



- 2) 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.
 - 3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)
 - 4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.
26. The Constitution donated the power to Parliament to enact the specific provisions in the *Environment and Land Act* which captures the mandate of the Environment and Land Court under Section 13 as follows: -

The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) b of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

- 2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes-
 - a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
 - b) relating to compulsory acquisition of land;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
 - e) any other dispute relating to environment and land.
- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of *the Constitution*.
- 4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court
- 5) Deleted by Act No. 12 of 2012
- 6) Deleted by Act No. 12 of 2012
- 7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-
 - a) interim or permanent preservation orders including injunctions;
 - b) prerogative orders;



- c) award of damages;
- d) compensation;
- e) specific performance;
- f) restitution; or
- g) declaration; or
- h) costs

27. The Constitutional and statutory framework on the jurisdiction of the Environment and Land Court is to the effect that the Environment and Land Court as under Article 162 (2)(b) of *the Constitution* has a constitutional jurisdiction to hear and determine disputes relating to the environment and the use, occupation and title to land. The Act also provides that the court is not precluded from hearing and determining applications for redress of denial, violation or infringement of or threats to rights or fundamental freedom relating to clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.

28. In the case of *National Land Commission v Afrison Export Import Limited & 10 others* [2019] eKLR Eboso J held as follows:

A plain reading of the above constitutional and statutory framework on the jurisdiction of the Environment and Land Court reveals that the Environment and Land Court which is the court contemplated under Article 162(2)(b) of *the Constitution*, has a broad constitutional jurisdiction to hear and determine disputes relating to the environment and the use, occupation, and title to land. *The Constitution* donated powers to Parliament to legislate a legal framework elaborating on that broad constitutional framework. In so doing, Parliament at Section 13(7) of the *Environment and Land Court Act* empowered the Court to make any order or grant any relief as the Court deems fit and just, including interim and permanent preservation orders. Parliament did not limit the jurisdiction to grant interim or permanent preservation orders to civil processes only. It simply gave the Court jurisdiction to issue preservation orders. It is therefore my view that, if Parliament wanted this particular jurisdiction to be restricted only to civil processes, it would have done so. In its wisdom, it did not restrict the court's jurisdiction to grant preservation orders to civil processes alone.

29. I am in agreement with Eboso J. on the issue of jurisdiction of the court as this court also handles matter which are of a quasi-criminal nature especially when the court is asked to determine fraud in land matters and contempt of court. However, issues have to be determined on a cases to case basis and not a blanket check to deal with criminal matters.

30. Looking at the Petition and the orders the Petitioners are seeking for, it is evident that the Petitioners want an open check to bar any current or future prosecution of any activities that they have or may engage in which are of a criminal nature. This court cannot grant such orders as they are not related to use and occupation of land.

31. It is also on record that the Applicants want a second bite of the cherry as they had filed application in respect of the same issues being Malindi CM's CRC No 1022 of 2018 R v Salim who is a Petitioner No. 58 herein in Judicial Review Republic v Director of Public Prosecutions & another, Chief Magistrates' Court at Malindi & another (interested parties) Ex Parte Salim Omar Mohammed [2020] eKLR which applications were dismissed. The applicant did not appeal the dismissal decision therefore it is still



subsisting and binding. The best that the Applicants can do is to await the hearing and determination of the case that they had filed in Malindi ELC No. 54 of 2020 (OS). The fact that any matter in issue in civil proceedings is also directly or substantially in issue in any pending criminal proceedings should not be a ground for any stay, prohibition or delay of the criminal proceedings as provided for under Section 193 A of the *Criminal Procedure Code*. The civil case cannot therefore be a bar to continuance with the criminal proceedings. I have also perused some of the charge sheets and one of the charges is threatening to kill contrary to Section 223 sub Section (1) of the *Penal Code*. The other charges are incitement to violence and the only relevant to this case is forcible detainer.

32. Even though the Petition is pegged on the Originating Summons seeking to be declared as having acquired the suit land by way of adverse possession, the prayers in the Petition predominantly fall within the ambit of the High Court on issues for compensation in form of punitive and/or exemplary and/or general damages for assault and/or torture and/or mental torture and/or anguish and/or psychological injury suffered by the Petitioners as a result of the Respondents' actions. This is not within the jurisdiction of this court as was held in the Court of Appeal Case of *Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others* [2019] eKLR which upheld this court's finding that the Environment and Land Court did not have jurisdiction to deal with issues of torture, mental anguish and compensation for character assassination.
33. The fact that the Petitioners are urging the court to transfer the case to the High Court is an admission that the orders sought for predominant fall within the ambit of the High Court as this court cannot issue orders compensation for torture which is an infringement of the bill of right not within this court's jurisdiction to grant. The charges are also largely within the High Court's jurisdiction. If the same was purely on forcible detainer, then this court would have acted with jurisdiction to stay the proceedings pending the hearing of the ownership dispute.
34. I find that the Application for injunction lacks merit and that the Preliminary Objection succeeds to the extent that the prayers the Applicant is seeking in the Petition predominantly fall within the ambit of the High Court. It follows that the Petition is therefore struck out for lack of jurisdiction with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

