



Fuks v Attorney General & another; Diani Properties Limited & another (Interested Parties) (Petition 4 of 2021) [2022] KEELC 4889 (KLR) (4 July 2022) (Ruling)

Neutral citation: [2022] KEELC 4889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
PETITION 4 OF 2021**

**AE DENA, J
JULY 4, 2022**

BETWEEN

JURGEN FUKS PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

AND

DIANI PROPERTIES LIMITED INTERESTED PARTY

COTSWOLD ESTATE LIMITED INTERESTED PARTY

RULING

The Preliminary Objection

1. This ruling is subject of the interested parties' preliminary objection dated March 2, 2022 filed before this court on March 8, 2022. It is noteworthy that the interested parties were joined to this suit in December 2021 by leave of this court. It raises the following twelve (12) grounds are listed here below; -
 - a. The petition and as amended is based on an agreement allegedly entered into between the petitioner and the 2nd interested party on December 27, 2005 that the 2nd interested party would support the allocation of 2 acres in favour of the petitioner. Any such agreement is time barred for all purposes under the provisions of section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya as 12 years from December 27, 2005 lapsed on December 26, 2017. This court has no jurisdiction to determine a dispute clothed as a constitutional petition that is time barred.



- b. The petition as amended is based on the allegation in paragraph 10 that the petitioner requested to be allocated with the property by his letter dated March 9, 2006. 12 years from then lapsed on March 8, 2018. The petition was filed out of time in 2019.
- c. Under section 3[3] of the Law of Contract Act [amended to be effective from June 1, 2003] no suit or other proceeding can be brought upon a contract for the disposition of an interest in land unless the contract is in writing and is signed by all parties thereto. The petition is brought upon an alleged oral contract between the petitioner and the 2nd interested party and is incompetent for all purposes.
- d. The commissioner for lands, the Attorney General and the National Lands Commission were not parties privy to the alleged agreement of December 27, 2005. Any alleged agreement by Cotswold Estate Ltd to assist in the allocation of 2 acres to the petitioner was a nullity as Cotswold Estate Ltd was not and still is not the registered proprietor of the property but is only proprietor of a leasehold interest.
- e. Prayer[c] in the further further amended petition is an attempt by the petitioner to compel the 2nd respondent to take away the leasehold interest from the 2nd interested party and deliver it to the petitioner. An order in those terms would constitute compulsory acquisition by taking away property in private hands and delivering it to a private individual. This honourable court has no jurisdiction under part VIII of the Land Act 2012 to exercise any such power.
- f. Prayer [c] of the further further amended petition would if granted be a violation of article 40[3] of the Constitution of Kenya 2010 and would be null and void under article 2[4] of the Constitution.
- g. The management of public land under article 67 of the constitution of Kenya is vested in the National Land Commission. This court has no power and jurisdiction to allocate or to order the allocation of public land.
- h. The evidence relied upon by the petitioner shows that the petitioner is a lessee of the interested parties. This court does not have jurisdiction to deprive a landlord of property and hand it over to the tenant.
- i. Part of the evidence relied upon by the petitioner in the affidavit in support of the petition [and the petition amended multiple times] includes a letter dated May 9, 2000 by the Commissioner of Land extending the 2nd interested party's lease by 50 years from May 1, 1999. The said evidence in support of the petition includes a receipt issued by the Ministry of Land on December 22, 2000 showing that the 2nd interested party paid Kshs 14,840 for approval fees, conveyancing fees, registration fees and stamp duty for the new lease. That lease as extended expires on April 30, 2049. The property is not therefore unalienated government land. The evidence also includes a letter from the Commissioner of Lands dated October 25, 2007 addressed to Cootow Associates confirming that extension of a lease for 50 years was approved. The lease as thereby extended will run upto 2049 and the petition is premature by 28 years.
- j. Extension of a lease in favour of the 2nd interested party was approved on May 9, 2000 more than 5 years before the alleged agreement between Gerhard Matthiessen and the petitioner.
- k. The petitioner is a German citizen. The Government of the Republic of Kenya through the National Land Commission has no national duty, constitutional or statutory obligation to provide land to foreigners.



1. The Attorney General, the Ministry of Lands Housing and Urban Development and the National Land Commission have no statutory duty to allocate land to the petitioner and cannot therefore be compelled to perform a non-existent function. article 10 and 47 of the [constitution](#) of Kenya that the petitioner relies upon do not create any such obligation.

The Petition

2. To put things into perspective, a brief summary of the pleadings herein is necessary. *Vide* a further further amended petition the petitioner herein seeks the following prayers;
 - a. The petitioner to be allocated 2 acres to be excised from the land known as Kwale/Diani/63
 - b. An order directing the Ministry of Land, Housing and Urban Development and National Land Commission to allocate 2 acres of land where the petitioner has carried out developments, to be excised from all that property known as Kwale/Diani/63 and a further order that the Ministry of Land Housing & Urban Development do register the said allocation in favour of the petitioner
 - c. An order directing the respondents to expunge the registration of the 1st and 2nd interested parties from the registration records relating to plot no Kwale/Diani/63 and in lieu thereof an order be issued directing the respondent to register the petitioner as the proprietor of the said property to wit Kwale/Diani/63
 - d. General damages for breach of the petitioner's fundamental rights
 - e. Costs of the suit
3. The petition is supported by an affidavit sworn by the petitioner Jurgen Fuks. He states that he is the proprietor of Shakatak Disco Enterprise. He has an interest in part of the suit property the same being 2 acres where he has been running his business for the past 28 years. He avers that he has reliable information of the subdivision of the suit property in two parcels being Kwale/Diani Beach Block/142 and 143[the suit properties]. That attempts to get information on these parcels from the lands office in Kwale have proved futile and hence an abuse of his rights as envisaged under articles 35 and 10 of the [constitution](#). That information belonging to the public should not be withheld by public/state officers.
4. The petitioner further filed a supplementary affidavit stating that he entered into an oral tenancy agreement with one Gerhard Matthiessen who was one of the directors of the interested parties herein. That initially his rent for the premises he operated was agreed at Kshs 60,000 per month but later in 2005 it was increased to Kshs 80,000. That he was to get a share of the property from the rent payment after the end of 15 years.

Response to the Petition

5. In response to the petition the interested parties have filed a detailed replying affidavit sworn by one Harold Kampa one of the directors of the interested parties. It is also averred that the interested parties are in possession of the suit properties. That the Shakatak Discotheque was built on the suit property in the 1990's and leased to the petitioner who pays rent intermittently. The petition is termed incompetent and an abuse of the court process for the reasons that the petitioner is a German citizen and lacks capacity to demand rights from article 35 [1] of the [Constitution](#) being a foreigner and alien. That the High Court lacked jurisdiction in Mombasa High Court Misc Appl No 13 of 2018 to deal with application on matters concerning ownership, use and occupation of land. The allegations that the petitioner's rights have been discriminated contrary to article 27 of the [Constitution](#) have not been



proved. That the government of Kenya has no obligation to provide free housing or accommodation to foreigners. The allegation that the petitioner had entered into an oral agreement with one Gerhard Matthiessen [the deponent's father-in-law] that he would be supported to get an allocation of 2 acres of the suit property subject to him paying Kshs 20,000/- per month to the 2nd interested party is denied for the reasons set out under paragraph 9[i] to [v]. The deponent raises several issues of facts in the replying affidavit which the court will not delve into at this particular time. This being a ruling on the preliminary objection filed, the court is confined to the grounds raised.

- 6 Mrs Waswa for the Attorney General intimated to this court that she would rely on the replying affidavit filed in Mombasa High Court Misc Appl No 13 of 2018 but the same was not placed on record. Mr Mbuthia for the National Land Commission has also not filed any papers in this petition though has been attending court.

Submissions of the Parties

Interested Parties Submissions

- 7 On March 10, 2022 parties were by an order of the court directed to canvass the preliminary objection by way of written submissions. The interested parties submissions dealt with each ground as stated in the preliminary objection. In summary, it is submitted that litigants cannot escape consequences of filing suit out of time by filing pleadings disguised as petitions for alleged violation of fundamental rights beyond statutory timelines. It is submitted that courts cannot resolve disputes based on alleged oral land disposition agreements. That the respondents cannot be bound by an alleged agreement between the 2nd interested party and the petitioner, it is only for the government to state whom between the parties was granted the lease. That the petitioner has confirmed that the lease for the interested parties herein is to run to the year 2049 and cannot therefore claim ownership before then. The interested parties ask that the petition is struck out with costs.

Petitioners Written Submissions

- 8 The petitioner filed written submissions dated April 6, 2022. Citing the Court of appeal decision in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* (1969) EA 696 it is submitted that the preliminary objection did not raise any points of law but highly impure points of mixed law and facts. That as such the same could not qualify as a preliminary objection able to be dealt with by the court. That this being a constitutional petition it was not permissible for the same to be struck out but should be fully heard and determined in the interests of justice so that its full judicial effects are known. Counsel pointed that the issues arising from the interested parties replying affidavit should be fully determined. Reliance was placed on several authorities Eldoret Succession Cause No 2009 of 2007 *In The Estate of Vinncent Chepkurui Chemitei[Deceased] Pauline J Chemitei & Another v Pius Kiptum Yano & Another* and Mombasa Constitutional Petition No 37 of 2020 *Disney Insurance Brokers Limited v Ali Hassan Jobo & 4 Others and Mombasa County Assembly Service Board & 4 Others*. Refereeing further to the Court of Appeal decision in *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR it was further contended that the interested party should defend his alleged ownership of the suit property as it was not enough to merely wave a document of title.

Analysis and Determination

- 9 Upon consideration of the preliminary objection, the pleadings and rival submissions this court identifies the following issues for determination: -
1. Whether this court has jurisdiction to deal with the petition



2. Whether the preliminary objection meets the threshold of being dealt with as such.

Whether this court has jurisdiction to deal with the petition

10 The jurisdiction of this court is derived from the *Environment and Land Court Act*. Section 13 provided as follows:

13 Jurisdiction of the court

1. 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

11 The broader jurisdiction of this court is further captured under article 162 of the Constitution which establishes it. It provides thus:

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.

1. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)

2. The subordinate courts are the courts established under article 169, or by parliament in accordance with that article.

12 From the pleadings before court, the gist of the petition is ownership rights over the suit property Kwale/Diani/63. The petitioner alleges that part of the suit property belongs to him by virtue of an agreement entered into between him and a director of the 2nd interested party now deceased. Further that he has made developments on the suit property and is therefore entitled to the same. The said allegations are denied by the interested parties who are the registered lease holders of the suit property. It is noteworthy that the suit property has even been subdivided by the interested parties as captured in the pleadings. The provisions of law on jurisdiction of this court are clear, that the court is vested with the authority to determine issues to do with the environment and its use, land and the process of ownership of land. Clearly this court has the requisite jurisdiction to deal with the present petition as the same touches on land and its ownership. The preliminary objection therefore fails on this limb.

Whether the instant preliminary objection meets the threshold of being dealt with as such.

13 A preliminary objection was clearly defined in the case of IN & 5 others v Board of Management St G School Nairobi & another (2017) eKLR where it was stated: -

"Definition of a preliminary objection

I find it necessary to define what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.'

14 Discussing what constitutes a preliminary objection, Law JA in Mukisa Biscuit Manufacturers Ltd vs. Westend Distributors Ltd said: -

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction



of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

15 In the words of Sir Charles Newbold P at page 701, B: -

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.'

16 From the foregoing a preliminary objection may only be raised on a "pure question of law." In order to discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record. In the present petition, several issues of fact arise. The first is the allegation by the petitioner that he is entitled to 2 acres forming part of the suit properties. The said allegation is vehemently denied by the interested parties who state that the petitioner is and has been a tenant on part of the properties. That he cannot allege to have been paying for ownership of the same through the monthly rent remittance. The parties give conflicting facts as to the use and ownership of the suit property. It is clear that the facts cannot be assumed to be correct and several issues need to be ascertained by the court in relation to the facts presented by both parties.

17 The preliminary objection also raises issues of law. Like whether the petitioner is entitled to protection of his rights as a foreigner based on the Kenyan Constitution 2010. A question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. As such the question as to who is entitled to protection of rights under the Kenyan constitution leads to interrogation of the bill of rights and the application of the same. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts for example whether the petitioner has dual citizenship or has adopted citizenship by naturalisation. This notion is informed by the facts pleaded where he alleges he has been running a discotheque in the country for over 28 years. The preliminary objection herein fails the test on being set upon pure issues of law as several factual issues have been laid bare for consideration.

18 The court in dispensation of its mandate to do justice to all parties appearing before it is inclined towards having the petition set down for hearing and determination on merit. The upshot is that the preliminary objection dated March 2, 2022 is without merit and the same is dismissed. Costs shall be in the cause.

19. It is so ordered.

DELIVERED AND DATED AT KWALE THIS 4TH DAY OF JULY 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Kiptum for the petitioner

Mr. Muthuri Holding brief for Mr. Kinyua for interested parties.

Mr. Mwandeje Holding brief for Ms. Waswa for 1st respondent



Ms. Wanini for 2nd respondent

Mr. Denis Mwakina- Court Assistant.

