



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

JUDICIAL REVIEW APPLICATION NO 4 OF 2020

IN THE MATTER OF ENFORCEMENT OF A DECREE OF THIS COURT DATED THE 18TH DECEMBER 2019

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES

BETWEEN

PETER BUTALI & 34 OTHERS.....APPLICANT

VS

THE PERMANENT SECRETARY,

MINISTRY OF TRANSPORT INFRASTRUCTURE

HOUSING URBAN DEVELOPMENT

AND PUBLIC WORKS..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The Applicant moved the Court vide the Notice of Motion dated the 30/7/2020 seeking the following orders;

a. That the Applicants be granted leave to apply for an order of mandamus to compel the Respondents to pay the Applicants a sum of Kshs 3,700,000/- as awarded to the Applicants in Thika ELC No 90 of 2018 as contained in the decree of this Court dated the 18/12/2019.

b. Costs of the application.

2. In ELC NO 90 of 2018 the Applicants sued the Respondents for inter alia trespass and the Court in its judgement delivered on the 8/11/2019 decreeing Kshs 3.0 Million in favour of the Applicants being general damages for trespass.

3. The Applicants averred that they are yet to be paid by the Respondents despite their efforts to seek settlement on the 20/1/2020 and 8/6/2020 which have borne no fruits so far.

4. That the 1st Respondent is duty bound to honour the decree of the Court. That given that the Applicants have no recourse to execution against the Government, the relief of an order of mandamus is the only relief open to them.

5. The application is supported by the statutory statement of the Applicants together with the verifying affidavit sworn by Geoffrey Thiongo Advocate.

6. Opposing the application, the Respondents contend through their Grounds of Opposition that the Respondents have filed a notice of appeal on the 18/11/19; no decree has been served upon the Respondents; application is an abuse of the Court process; application is premature as taxation is pending determination.

7. Briefly the Applicants submitted that a decree was extracted on the 18/11/2019 and the same was served upon the Respondents on the 20/1/2020 and received and acknowledged on the 29/1/2020. That again on the 8/6/2020 the Applicant wrote to the Respondent to make good the decretal sum.

8. The Applicants submitted that the Respondents have not filed any appeal one year after the judgement. That the decretal sum herein does not incorporate the costs which is a separate item.

9. Finally, the Applicant submitted that the Court has jurisdiction to hear and determine the application.

10. The Respondents on the other hand submitted that the Court does not have jurisdiction to determine the matter and that the right forum should be the High Court. Relying on the case of **Republic Vs Kenya National Examinations Council Exparte Gathenji & 8 others CA 234 OF 1996**, the Respondents opined that the relief of mandamus is the preserve of the High Court.

11. Interalia, the Respondents argued that the decree of the Court has not been served upon the legal counsel of the Respondents and therefore the Applicants action of filing the application is against natural justice.

12. Submitting that the application is an abuse of the process of the Court, the Respondent stated that the Applicants have filed an application for taxation leading to a scenario where several decrees will be pursued against the Respondents in Court. They urged the Court to dismiss the application for being premature and an abuse of the process of the Court.

13. The Respondents aver that they have filed a notice of appeal and blamed the Court for declining to furnish it with the typed proceedings despite numerous follow ups. That the award of the orders sought will render the appeal nugatory as it will leave the Respondents no option but to comply hence denying them the opportunity to pursue their appeal, prejudicing their claim on appeal.

14. Issues for determination are; does the Court have jurisdiction to hear and determine the application; whether the application is competent; costs.

15. The issue of jurisdiction of a Court is central to any litigation. Where a Court finds that it has no jurisdiction, it must down its tools and take no further step. A Court of law cannot validly hear and determine any suit without jurisdiction.

16. The Supreme Court stated **in the Matter of Interim Independent Electoral Commission [2011] eKLR** as follows:

“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“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.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

17. In this case the Respondents have argued that the right forum is the High Court and not the ELC Court. The Applicants have a contrary view.

18. The jurisdiction of this Court flows from Article 162 (2) of the Constitution which states as follows;

“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.”

19. Further the jurisdiction of the Court is laid out in section 13 of the ELC Act 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 interests 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 healthy 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, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(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;

(g) declaration;

or

(h) costs.”

(i)

20. The substance of the application is the judgment in ELC Petition No 90 of 2017 which suit was anchored on a claim in land.

21. Given the provisions of the Constitution and the statute, it is clear that the Court is empowered to hear and determine the application. Among the reliefs that the Court can issue is a prerogative order.

22. Prerogative orders being administrative orders include mandamus, certiorari and prohibition. This application seeks orders of mandamus.

23. If parliament wanted to deprive this Court the power to issue prerogative writs, it would have said so expressly. Holding otherwise would lead to an absurdity as it will require litigants to seek relief in the ELC Court and then rush to the High Court to seek prerogative orders on the same judgment. Thankfully it is expressly provided under section 13(7) (b) of the said ELC Act.

24. It is the finding of the Court that it is empowered to hear and determine the same.

25. Order 53 rule 1 of the CPR provides the procedure to be followed in instituting prerogative orders. It states as follows;

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

26. According to the record the application was filed on the 5/8/2020.

It is evident that the same was served upon the Respondents. Before filing application, the record shows that the Respondents were served with the decree but failed to settle it. The Applicant has therefore taken the right route to seek the leave of the Court to initiate judicial review proceedings.

27. I wish to disabuse the notion of the Respondents that the decree herein must be dealt with together with that of costs. It is averred by the Respondents that costs are being taxed. There is nothing to bar the Applicants in pursuing leave to bring judicial review proceedings in the face on an ongoing taxation of the costs in the suit.

28. There was no evidence tabled by the Respondents to show that they have filed an appeal. He who alleges has the legal burden to proof. They did not.

29. In the end I find that the application has merit and I grant it as prayed.

30. Costs shall be in the cause.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 1ST DAY OF NOVEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Ms. Muhia for the Applicant

1st and 2nd Respondent - Absent

Ms. Phyllis Mwangi – Court Assistant