



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

PETITION NO. 5 OF 2020

IN THE MATTER OF ARTICLES 60, 61, 62, 63, 40, 67(E) 28, 27, & 38 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ACT NO 6 OF 2012

AND

IN THE MATTER OF THE COMMUNITY LAND ACT NO 27 OF 2016

AND

IN THE LANDS REFERENCE NO 10731 & 11674 (21211) KAKUZI

BETWEEN

KAKUZI DIVISION DEVELOPMENT ASSOCIATION.....PETITIONER

VS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION2ND RESPONDENT

AND

KAKUZI PLC.....INTERESTED PARTY

RULING

1. The Interested Party / the Applicant filed the instant Notice of Motion seeking orders that;

- a. THAT this Honorable Court does not have jurisdiction to deal with this Petition.
- b. THAT this Honorable Court be pleased to strike out the Petition and Application filed on 2nd November 2020.
- c. THAT costs of the application be in the cause.

2. The Application is based on the grounds on the face of it that are reiterated in the Supporting Affidavit of Denis Gitaka, the Applicant's Legal Manager. He deponed that there are various complaints against the Applicant before the National Land Commission alongside ongoing Court cases to wit Nairobi Constitutional Petition 255 of 2018 Kakuzi PLC vs NLC and others later consolidated with Malindi Constitutional Petition 11 of 2020, Nairobi JR ELC 4 of 2020 and Nairobi Petition 167 of 2019. That in light of the foregoing cases, the instant petition offends the provision of Section 6 of the Civil Procedure Act as the subject matter is subjudice. He further averred that the instant petition is thus an abuse of the Court process requiring the Applicant to defend itself in multiple cases in breach of its right to a fair hearing.

3. The Application is opposed by the Petitioner vide the Replying Affidavit sworn by its Secretary, **Stephen Kuria Mbugua** on 8/12/2020.

He deponed that the Applicant is a lessee of **LR. Nos. 10731 and 11674** (*hereinafter referred to as the suit properties*) from the Government of Kenya for a period of 99 years. That accordingly the suit properties belong to the people of Kenya and held by the Respondents on their behalf. On the issue of subjudice, he avowed that all the aforementioned cases touch on distinct subject matters and therefore the plea of subjudice does not arise. He maintained that the Petitioner herein is seeking relief under Article 40 of the Constitution of Kenya. He pointed out that indeed the petition alleges infringement of rights by the Respondents and not the Applicant.

4. Further, the Petitioner filed its Supplementary Affidavit and reiterated that the matter is not subjudice thus this Court has jurisdiction to entertain the petition.

5. On behalf of the Respondents, the 1st Respondent's Deputy Director, Legal Affairs and Enforcement, **Edmond Gichuru** supported the Application through an undated Replying Affidavit. While acknowledging the aforementioned complaints before the 2nd Respondent involving the parties herein, he averred that this Court lacks jurisdiction to hear the petition as the parties have not exhausted all avenues accorded to them which includes submitting the complaint for determination by the National Land Commission.

6. Directions were taken to canvass the application by way of written submissions with brief highlights on 26/7/2021. The Applicant filed its written submissions dated 19/2/2021 whereas the Petitioner's submissions are dated 24/2/2021. The Respondents did not file any submissions.

7. The Applicant submitted that the issues and subject matter raised in the instant petition are the same as those in **Nairobi ELC Constitutional Petition 21 of 2020, Nairobi JR ELC 4 of 2020, NLC /HLI/006/2017** and **Malindi ELC Constitutional Petition 11 of 2020**. That the Petitioner's NLC/HLI/006/2017 was under Articles 40 and 67 of the Constitution of Kenya via a petition dated 13/4/2018. Moreover, that in the Malindi ELC CP 11 of 2020, there is stay of the Petitioner's National Land Commission's proceedings vide a Court order dated 24/7/2018. The Applicant added that **Nairobi ELC JR 4 of 2020** sought stay of the 2nd Respondent's recommendation to have the Applicant surrender all public utilities on their land to the National and County Governments.

8. That the upshot of all these cases is that the claims are substantially similar and deal with the same subject matter. More particularly, the aforementioned cases were said to have been filed earlier than the instant petition in Courts of concurrent jurisdiction. The Applicant urged the Court to find this matter subjudice robbing it of jurisdiction to hear the Petition. Reliance was placed on the cases of **Republic v Paul Kariuki and others [2020] eKLR** and **Ali Baraki vs Chairman County Service Board of Garissa [2014] eKLR**.

9. On the other hand, the Petitioner enumerated the background of its Petition that *inter alia* touches on acquisition of the suit property, whether adequate compensation was paid prior to the acquisition, whether the Applicant continued use of the suit property infringes the Petitioner's right to ownership of land and whether the Petitioners should be restituted by returning the land to the community.

10. The Petitioner maintained that this Court's jurisdiction stems from Article 162(2)(b) of the Constitution as read with Section 13 of the Environment and Land Court Act. That its grievance as per their Petition deals with contravention of Articles 40, 28, 27 & 38 of Constitution of Kenya squarely under this Court's Jurisdiction. The Supreme Court case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd 7 2 others, Application No. 2 of 2011** was cited in support.

11. In denying that the Petition is subjudice, the Petitioner highlighted that the main factor for consideration is whether the '**matter in issue**' as opposed to '**subject matter**' is also **directly and substantially in issue in a previously instituted suit**. The Petitioner distinguished the cases referred to by the Applicant and while admitting that they touch on the same subject matter (being the suit properties), urged the Court that the issues raised therein are fundamentally distinct and diverse.

12. The Petitioner concluded that the Applicant has not proven that the said cases and matters in issue are directly and substantially the same and that the parties are the same for subjudice to be sustained. Reliance was placed on the cases of **Republic v Paul Kariuki (supra)** and **Safepak Limited v Henry Wambega & 11 others [2019] eKLR**. The Petitioner urged the Court not to strike out the petition but allow them to be heard on merits but prayed for dismissal of the Applicant's application with costs.

Analysis & Determination

13. The main issue for determination is whether the suit is subjudice and if yes whether it should be struck out.

14. Section 6 of the Civil Procedure Act provides as follows:

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

15. In the case of **Edward R. Ouko v Speaker of the National Assembly & 4 Others [2017] eKLR** it was held as hereunder: -

“..... For the doctrine to apply the following principles ought to be present: (1). There must exist two or more suits filed consecutively. (2). The matter in issue in the suits or proceedings must be directly and substantially the same. (3). The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title. (4). The suits must be pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

16. It is paramount to glean over the impugned suits that have been highlighted that are said to offend Section 6 of the Civil Procedure Act. They are; -

a. **Nairobi Constitutional Petition 255 of 2018 (Kakuzi PLC v Attorney General & 2 others)** vide its amended petition dated 30/7/2019 the Petitioner *inter alia* sought a declaration that Section 15 of the NLC Act is null and void and stay of the complaints proceedings before NLC against it. The parties and the subject matter are similar in all respects.

b. **JR Misc. No. 94 of 2019 (now Nairobi JR ELC 4 of 2020 – Kakuzi PLC v Attorney General & 2 others)** the Applicant sought Judicial review proceedings to stay the implementation of the NLC directives contained in Gazette Notice dated 1/3/2019 directing the Interested Party to relinquish the public utilities to the public.

c. **Nairobi ELC 21 of 2020 (formerly Nairobi Petition 167 of 2019 -Kakuzi Division Development Association v Attorney General & 2 others)** Petitioner sought implementation of NLC directives contained in the Gazette notice dated 1/3/2019. This petition was stayed pending the determination of Nbi JR ELC 4 of 2020 above.

d. **Malindi ELC CP 11 of 2020 (Kakuzi PLC v Attorney General & 2 others)** Applicant challenging constitutionality of Section 15 of NLC Act vis-à-vis historical injustices claims against it before the NLC.

17. In all the above cases, it is Nairobi **ELC CP 21 of 2020 (formerly Nairobi Petition 167 of 2019 - Kakuzi Division Development Association v Attorney General & 2others), JR Misc. No. 94 of 2019 (now Nairobi JR ELC 4 of 2020 – Kakuzi PLC v Attorney General & 2 others and Petition 255 of 2018** whereby the parties are the same as in the Petition herein. The subject matter of the suits are the suit properties herein. In all these cases the claims are anchored on whether or not the Petitioners were deprived of the land by way of historical land injustices, communal deprivation of land, violations of constitutional rights to land and whether or not they ought to be compensated or restitution should ensue.

18. Guided by the decision of the Court in **Thika Hydro Co Limited v Josphat Karu Ndwiga (2013) eKLR** that it is not the form in which the suit is framed that determines whether it is subjudice, rather it is the substance of the suit looking at the pleadings in both cases.

19. The Petitioners claim in NLC/HLI/006/2017 mirrors the claim as set out in this suit word for word with a slight tweak on the prayers which have a constitutional angle. In the National Land Commission complaint the cause of action is premised on historical land injustices while in the current petition the claim is on violation of certain disclosed constitutional provisions.

20. Noting that a number of these cases have been stayed pending the hearing and determination of the Malindi Petition, it would be an abuse of the process of the Court if this suit is allowed to proceed.

21. In the end the Court is satisfied that the substance of the claims in all the cases are substantially between the same parties and concern the same subject matter.

22. In the case of **Republic v Paul Kihara Kariuki (supra)** the Court held that:-

“this means that when two or more cases are filed between the same parties on the same subject matter before Courts with jurisdiction the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.”

23. The cases are all pending before Courts of concurrent jurisdiction that is to say Malindi ELC and Nairobi ELC.

24. The Interested Party urged this Court to strike out the petition on account of subjudice. To the contrary the cure for a suit deemed subjudice is to stay the current suit to allow the trial of the previously filed suits to be heard. In my view striking out the petition in its infancy would be a draconian route to take.

25. In the end the application partially succeeds. The finding of the suit is that the suit is subjudice and the same is stayed pending the hearing and determination of the **Nairobi ELC Constitutional Petition 21 of 2020, Nairobi JR ELC 4 of 2020, NLC /HLI/006/2017 and Malindi ELC Constitutional Petition 11 of 2020.**

26. Each party to meet the cost of the application.

27. **It is so ordered.**

DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 7TH DAY OF OCTOBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ambaru for Petitioners

1st Respondent – absent

2nd Respondent – absent

Mrs. Opiyo – Interested Party

Ms. Phyllis Mwangi – Court Assistant