



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

E.L.C. CONSTITUTIONAL PETITION NO. 2 OF 2020

IN THE MATTER OF ARTICLE 40 (1) (2) (3) OF CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

FREEDOMSS UNDER ARTICLE 40 (1) (2) (3) OF THE CONSTITUTION

WANJIRU CARARA KAHIRA.....PETITIONER

VERSUS

EPHANTUS NDERITU (Sued on his behalf and as the Legal Administrator of the

Estate of the lateKAMAU WAITHAKA).....1ST RESPONDENT

WANG'URU MAGISTRATES COURT.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This Honourable Court has been called upon to determine the 2nd and 3rd Respondent's Preliminary Objection dated 4th March, 2021 whereby they're praying that the Petition be dismissed with costs to the 2nd and 3rd Respondents'.

2. The 2nd and 3rd Respondents have raised the following grounds in objection thereof: -

a. THAT this Court lacks jurisdiction to entertain this suit as provided under Section of the Environment and Land Court Act.

b. THAT the petition is fatally defective for it lacks the mandatory specificity required of the constitution petitions as outlined in the case of *ANARITA KARIMI NJIRU VS ATTORNEY GENERAL [1979] KLR 54* where it was held that any petitioner who seeks redress under the constitution must state his claim with precision by reference to the provisions of the constitution allegedly violated and explain how the provisions were violated. The case of *MUMO MATEMU VS REPUBLIC [2004] 1 E.A 124* were cited in support of the argument.

c. THAT the entire suit is frivolous, vexatious and misconceived as against the 2nd and 3rd Respondents.

d. THAT the entire suit is an abuse of court process as the issues raised herein can be determined through filing for revocation of grant in the succession trial court and not in a separate suit.

3. When the petition came up for mention for directions on 13th May, 2021 the parties herein through their advocates on record agreed to dispose of the said Preliminary Objection by way of written submissions.

2ND AND 3RD RESPONDENTS' SUBMISSIONS

4. The 2nd and 3rd Respondents filed their submissions dated 6th July, 2021 on 16th September, 2021.
5. They submitted that this Honourable Court does not have jurisdiction to hear and determine this suit as the Petitioner seeks orders to have this Honourable Court set aside the decision of the Wang'uru Magistrate's Court in Succession Cause No. 28 of 1978.
6. They submitted that the Petitioner had failed to exercise her right of appeal and even so this Honourable Court cannot act as an appellate court over a succession matter. They relied on **Section 13 of the Environment and Land Court Act and Article 162 (2) (b) of the Constitution of Kenya, 2010** and the case of **Phoenix of E.A Assurance Company Limited V S. M. Thiga t/a Newspaper Service [2019] e K.L.R.**
7. They further submitted that there is a clear remedy provided by **Section 76 of the Law of Succession Act, Chapter 160** for beneficiaries aggrieved by grants issued through fraud or making false statements or concealment.
8. They submitted that the Law of Succession allowed the application of customary law to persons who died prior to the commencement of the law in 1981 and most communities in Kenya were patriarchal and denied women the right to inherit land and property.
9. They submitted that the petition is fatally defective for it fails to meet the threshold required in filing constitutional petitions as the petitioner had not demonstrated how her fundamental rights have been infringed by the 2nd Respondent with a reasonable degree of precision. They relied on the case of **Anarita Karimi Njiru Vs Attorney General [1979] KLR 54 and Mumo Matemu Vs Republic [2004] 1 EA 124.**
10. They submitted that the 2nd Respondent acted in accordance with provisions of the applicable law by appointing a successor of the estate of the deceased as agreed by the beneficiaries before her and that she was not in a position to know of the existence of a second family.
11. They further submitted that the law does not apply retrospectively as the Petitioner alleged violation of Articles of the Constitution of Kenya, 2010 which did not exist as at the time the Wang'uru Court Succession Cause was being heard and determined. They relied on the case of **Golden Line International Limited Vs Bluesea Shopping Mall Limited & 3 others [2016] e K.L.R.**
12. In conclusion they prayed that their preliminary objection be allowed and the petition be dismissed and costs be awarded to them.

PETITIONER'S SUBMISSIONS

13. The Petitioner filed her submissions dated 8th July, 2021 on 16th September, 2021.
14. She proposed the following as probable issues for determination;
 - a. Whether the 2nd Respondent had jurisdiction to hear and determine claims and interest in rice holdings through succession proceedings.
 - b. Whether the court violated the constitutional rights of the applicant by failing to give her a hearing and a fair administrative justice.
15. She submitted that she had specified the legal principles under which the petition is brought under paragraph 3 – 13 of the petition and violations of the rights under paragraph 14 – 19 of the petition and the reliefs sought.
16. She submitted that the respondents are aware of the case facing them from the pleadings and there is no generality in the pleadings. She relied on the case of **Kevin Turunga Ithangi Vs Hon Justice Fred Ochieng & others (2015) e K.L.R** whereby the court stated that the principles espoused and championed in **Anarita Karimi Njiru Vs Republic** (supra) must be applied with adequate caution to ensure deserving parties are not denied justice, or access to justice, without adequate hearing and consideration of their cases on merit.
17. She submitted that the threshold of competency has been met as the court can painlessly identify from the Petition the Articles allegedly violated and also the alleged manner of violation.
18. She urged that the court dismisses the preliminary objection with costs as it has no merit.

ANALYSIS

19. I have considered the Preliminary Objection and the rival submissions by the parties herein.
20. *What constitutes a Preliminary Objection was discussed in the case of Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696, where it was held as follows:*

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point 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...

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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

21. The Respondents have raised a preliminary point on the issue of jurisdiction. The issue of jurisdiction has been described as a pure point of law that ought to be raised at the very first instance. It should be the first business of the court because jurisdiction is everything and without it, the Court has no power to make one more step. This position was held in the locus classicus case of ***The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR 1***, where ***Nyarangi J.A.*** held 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 a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

22. In determining the issue of jurisdiction, the Supreme Court in the case of ***Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others*** held as follows:

“..... a court can only exercise jurisdiction that has been donated to it by either the constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

23. The jurisdiction of this Honourable Court is outlined under ***Section 13 of the Environment and Land Court Act No.19 Of 2011*** which provides that:

“(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 interests in land; and (e) any other dispute relating to environment and land.”

24. The 2nd and 3rd Respondents have submitted that this Honourable Court does not have jurisdiction to determine the petition herein as the same involves a succession cause whereby the petitioner is seeking the setting aside of the decision in Wang’uru Magistrate’s Court in Succession Cause No. 28 of 1978.

25. I have looked at the petitioner’s petition. The Petitioner is seeking the following orders: -

- a. A declaration that Wang’uru Succession Cause No. 28 of 1978 giving rice holding No. 188 to the 1st Respondent is null and void for breach of rules of natural justice and breach of *Article 47 of the Constitution of Kenya* and be set aside,
- b. A declaration that the Petitioner’s right to fair trial protected under *Article 48 of the Constitution and 50 (1) of the Constitution* has been violated by the 1st Respondent.
- c. A declaration that PMC Wang’uru Succession Cause No. 28 of 1978 is null and void for want of jurisdiction and nullification of the proceedings for the Petitioner was condemned unheard.
- d. That rice holding No. 188 be reverted back to ex-tenant Kamau Waithaka alias Kamau Manyagi and relevant Succession Cause to commence afresh in accordance with the Law and in involvement of the Petitioner herein.
- e. Any other relief this court may deem fit.

26. It is trite law that Rice Holdings which are the subject of this Petition are properties of the National Irrigation Board under the ***National Irrigation Act, Cap 347 laws of Kenya***. It is also to be noted that the Irrigation Board has the absolute duty in the management of the rice holding including determining the number of persons to be admitted, approval of successor(s), issuance of license and rent cards. It is imperative to note that the statute (National Irrigation Act) does not permit external interference in its management and any person aggrieved by any of their administrative decisions may challenge in judicial review proceedings under the ***Fair Administrative Actions Act***.

27. The 2nd & 3rd Respondents in their Notice of Preliminary Objection dated 04/03/2021 stated that this petition offends the provisions of ***Section 13 of the Environment and Land Court Act No. 19 of 2011*** on grounds the Court lack jurisdiction to grant the orders sought in the petition.

26. Whereas this court lack jurisdiction to set aside decisions and/or orders issued by a Magistrate Court under the Probate and Administration Law, the ***Irrigation (National Irrigation Scheme) Regulations, 1977*** gives the Magistrate Courts jurisdiction only limited to inquiring and identifying beneficiaries of a deceased licensee under customary law applicable. The decision by the magistrate is merely advisory and not binding on the Advisory Committee of the National Irrigation Board. Unless and until the impugned orders of the

Magistrate Court are formally produced and subjected to cross-examination, it cannot be determined at this stage whether the alleged orders offend the Constitution or any written law.

28. The upshot of my analysis is that the Preliminary Objection dated 4th March, 2021 is premature. Consequently, the same is hereby disallowed. Costs in the case.

RULING READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 29TH DAY OF NOVEMBER, 2021

.....

HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Asimwe holding brief for Ann Thungu for Petitioner

2. Ms Chege holding brief for Nyawira for Respondents

3. Kabuta, Court clerk.