



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E339 OF 2020

IN THE MATTER OF: ARTICLE 22(1), 23 AND 258(1) OF THE CONSTITUTION OF KENYA 2010;

AND

IN THE MATTER OF: ALLEGED CONTRAVENITION AND VIOLATION OF RIGHTS

AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 40, 43, 47 AND 60(1)B;

BETWEEN

KURIA KIARIE KIROMO.....PETITIONER

VERSUS

SETTLEMENT FUND TRUSTEES.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

SARAH MUGACHA.....3RD RESPONDENT

SAMMY MAGERA.....4TH RESPONDENT

RULING

THE PETITION

1. The Petitioner through a petition dated 5th March, 2020, seeks the following orders:-

i. A declaration that the Respondents breached the letter and spirit of the Constitution of Kenya 2010 and the previous one in their purport to deprive the Petitioner of his property without due compensation;

ii. A declaration that all the actions of the 1st and 2nd Respondent calculated to disposes the Petitioner of his lawful proprietorship of Plot 586 are null and void to the extent of their unconstitutionality;

iii. A declaration that the Plot 586 lawfully belongs to the Petitioner and any purport to the subdivision and/or claim to ownership be quashed;

iv. A declaration that all the actions of the 1st and 2nd Respondent inconsistent with conferring Title to the Petitioner are in contravention of article 60 of the Constitution of Kenya and hence null and void;

v. An order directed to the 1st and 2nd Respondent to compensate the Petitioner at the full market value of the subject property to-date in lieu of the subject property

vi. An order awarding cost of this Petition to the Petitioner;

THE 3RD AND 4TH RESPONDENTS' PRELIMINARY OBJECTION

2. The 3rd and 4th Respondents raised a Preliminary Objection dated 5th March, 2020 on the grounds that this Petition is Res-Judicata as the issues herein were determined in ELC No. 405/02 and Court of Appeal Civil Application No. 326 of 2017 respectively.

THE 2ND RESPONDENT'S PRELIMINARY OBJECTION

3. The 2nd Respondent raised a Preliminary Objection dated 6th November, 2020 on grounds, that the jurisdiction of this Honourable Court had not been properly invoked, in respect to the prayers sought in the Petition dated 5th March, 2020 as the issues raised fall squarely within the exclusive jurisdiction of the Environment and Land Court, by dint of **Section 13 of the Environment and Land Act, No. 19 of 2012** as read together with **Article 162(2) (b) of the Constitution**.

4. It is also averred that the Petition arose out of the revocation of the Petitioner's title to land described as **LR.No.MN/1/2411** by way of administrative fiat, which was also a preserve of the original and appellate jurisdiction of the **Environment and Land Act No. 19 of 2012**, in accordance with **Article 162(2)(b) of the Constitution**.

THE PETITIONER'S RESPONSE TO THE PRELIMINARY OBJECTION

5. The Petitioner vide his submissions dated 12th, January, 2021, opposed the Preliminary Objections raised by the 1st and 2nd Respondents, and averred that there were vertical breaches of his fundamental rights and freedoms by state actors, being the 1st and 2nd Respondents whose actions resulted in the deprivation of the petitioner's right to property as mandated under **Article 40 and 60 (1) (b)**. It is further averred that there were also horizontal claims of infringements, from fellow citizens non state actors, in the person of the 3rd and 4th Respondents as enables and/or participants.

6. The Petitioner, with regards to the issue of res judicata, averred that the 3rd and 4th Respondents failed to satisfy the required threshold by reasons, that the contraventions of the **Constitution of Kenya, 2010**, have never been pleaded and/or litigated in any other form between parties herein.

7. It is further contended that the reliefs sought in the Petition have never been pleaded and litigated in any other suit and forum between the parties herein.

8. The Petitioner stated that the suit cited as previous litigation to wit **ELC 405 of 2002** was between different parties (**Sammy Magera –vs- Kuria Kiarie & 2 others**) and that the claim therein was a claim for eviction and trespass over **L.R Nyandarua/South Kinangop/6058** a different parcel from the one in litigation herein **L.R. Nyandarua/South Kinangop/586**.

9. The Petitioner contended that the jurisdiction to hear and determine constitutional petitions with regards to infringements on fundamental rights and freedoms is donated under **Article 165 of the Constitution** and that the Environment and Land Court lacks the requisite jurisdiction to hear and determine **Article 40 and 60 (1) B of the Constitution**.

10. The Petitioner therefore prayed for the preliminary objection to be dismissed.

THE 3RD AND 4TH RESPONDENTS SUBMISSIONS IN SUPPORT OF THE PRELIMINARY OBJECTION

11. The 3rd and 4th Respondents filed written submissions dated 4th, December, 2020 and averred, that the Petitioner has been on a fishing expedition having begun litigating on the issues in the suit from as early as 1983 through HCCC No. 3776 of 1993 which he withdrew on the 7th of April, 1989.

12. It is further stated that the Petitioner participated in the hearing of ELC No. 405 of 2002 which was heard and determined by Justice Eboso, against the Petitioner who subsequently preferred, an appeal in the Court of Appeal vide civil appeal No. 326 of 2017 which was also dismissed.

13. The Respondents contended that the judgment issued by Justice Eboso, has not been set aside and, that the petition herein is Res Judicata having fully been heard and determined by the Environment and Land Court, which is a court of equal and concurrent jurisdiction.

BACKGROUND OF THE PETITION

14. The background of the Petition is, that the Petitioner averred that he was allocated **Plot No. 587** within the **Kinangop Settlement area** in the year 1963 and the adjacent Plot No. 586 was allocated to one Ngigi Wanjiu who rejected it as it was waterlogged and took up another plot.

15. The Petitioner contended that the Settlement Fund Trustees proposed to amalgamate the two plots and allocated them to the Petitioner, however, due to laxity and/or genuine mistake on the Settlement Fund Trustees, the amalgamation was never formally documented despite clear recommendations and direct instructions the same to be done.

16. It is urged that as a result of the aforementioned the plot kept showing Plot No. 586, as vacant although the petitioner was in full occupation thereof.

17. The Petitioner contended that after an alleged period of about twenty (20) years, in 1983, the Settlement Fund Trustees purported to allocate the entire Plot No. 586 to the 3rd Respondent herein despite the fact that the same was not vacant and was being fully occupied and utilized by the Petitioner.

18. The Petitioner asserted that records at the Settlement Fund Trustees revealed further that the 3rd Respondent had applied and paid only for Ten (10) acres.

19. The Petitioner submitted that he raised various complaints with the Ministry of Lands officials and the permanent secretary who found in his favour but recommended, that the 3rd Respondent be allocated only Ten (10) acres, part which the Petitioner alleges belonged to him but to which he was willing to compromise in favour of the 3rd Respondent.

20. The Petitioner stated that the ministry took too long to resolve his land issues prompting him to go to Court vide case no. 3649 of 1993 but the officials in the lands ministry prevailed on him to withdraw, the case, after which the 2nd Respondent proceeded to remove all inhibitions on the subject parcel, unilaterally and issued a Title Deed for the entire parcel to the 3rd Respondent.

21. The Petitioner insisted, that he is still in occupation of the entire parcel of land and that a search in the Lands Registry indicates, that the 1st Respondent is the registered owner and the 3rd respondent continues to subdivide his alleged parcel of land thereby violating his right to property under **Article 40 of the Constitution**, necessitating the institution of this Petition.

ANALYSIS AND DETERMINATION

22. Having carefully considered the Petition dated **5th March, 2020**, the 3rd and 4th Respondent's Preliminary Objection dated **4th December, 2020**, the 2nd Respondent's Preliminary Objection dated **6th November, 2020**, the Petitioner's response and submissions by all the parties, only one single issue arise for determination, thus:-

i. Whether this Honourable Court has jurisdiction to hear and determine the Petition herein;

23. The 2nd Respondent vide a Preliminary Objection dated 6th November, 2020, raised the issue of jurisdiction and averred that the jurisdiction of this Honourable Court had not been properly invoked in respect to the prayers sought in the Petition dated **5th March, 2020** and contended that the issues raised fall squarely within the exclusive jurisdiction of the Environment and Land Court by dint of **Section 13 of the Environment and Land Act, No. 19 of 2012** as read together with **Article 162(2) (b) of the Constitution**.

24. The Petitioner through the Petition dated **5th March, 2020**, seeks the following orders:-

i. A declaration that the Respondents breached the letter and spirit of the Constitution of Kenya 2010 and the previous one in their purport to deprive the Petitioner of his property without due compensation;

ii. A declaration that all the actions of the 1st and 2nd Respondent calculated to disposes the Petitioner of his lawful proprietorship of Plot No. 586 are null and void to the extent of their unconstitutionality;

iii. A declaration that the Plot No. 586 lawfully belongs to the Petitioner and any purport to the subdivision and/or claim to ownership be quashed;

iv. A declaration that all the actions of the 1st and 2nd Respondent inconsistent with conferring Title to the Petitioner are in contravention of Article 60 of the Constitution of Kenya and hence null and void;

v. An order directed to the 1st and 2nd Respondent to compensate the Petitioner at the full market value of the subject property to-date in lieu of the subject property.

vi. An order awarding cost of this Petition to the Petitioner.

25. On perusal of the Petitioner's prayers it turns out that, they largely revolve around **Plot 586**, which is a parcel of land, the Petitioner herein claims ownership and compensation for from the respondents. This therefore necessitates this Honourable Court to determine the critical question of jurisdiction which is challenged by the Respondents.

26. The issue relating to jurisdiction was well determined in the classical case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal 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.

27. The Courts have held that it is trite law that jurisdiction is everything and without it a court of law has no mandate to proceed further with the determination of any other matter before it. I am alive to the fact that where the issue of jurisdiction is raised, it has to be determined first and once a court of law comes to the conclusion, that it has no jurisdiction, it has to down its tools. This cardinal principle was well articulated in the case of ***Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.***

28. The Petitioner in this Petition and as per the prayers thereto he has approached this Honourable Court on the grounds, that the Respondents, acted in cohorts and conspired to defraud him of his parcel of land namely ***Plot No. 586***. He conceded that the 1st Respondent is the registered owner and the 3rd Respondent continues to subdivide his alleged parcel of land thereby violating his constitutional right to property contrary to ***Article 40 and 60 of the Constitution*** necessitating the filing of this Petition.

29. ***Article 40 of the Constitution of Kenya, 2010*** provides as follows;-

"(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified

or contemplated in Article 27 (4)."

30. Further, ***Article 60 of the Constitution*** states;

"(1) Land in Kenya shall be held, used and managed in a Principles of land manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—

(a) equitable access to land;

(b) security of land rights;

(c) sustainable and productive management of land resources;

(d) transparent and cost effective administration of land;

(e) sound conservation and protection of ecologically sensitive areas;

(f) elimination of gender discrimination in law, customs and practices related to land and property in land; and

(g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

(2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation."

31. ***Article 165 (3) of the Constitution*** confers the High Court with jurisdiction and provides thus:-

"165. High Court

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and

a) any other jurisdiction, original or appellate, conferred on it by legislation”

32. **Article 165(3) of the Constitution**, is clear that the High Court has jurisdiction to determine question as to whether a right on fundamental freedoms have been infringed. However it is instructive to note that the jurisdiction provided under **Article 165(3) of the Constitution** is subject to **Article 165(5) of the Constitution** which clearly provides as follows:-

“165. High Court

(5) The High Court shall not have jurisdiction in respect of matters—

a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

33. I find from the Constitutional provisions referred herein above that it is clear that pursuant to **Article 162(2) of the Constitution** the Parliament proceeded to enact the **Environment and Land Court Act 2011**, which clearly at **Section 13** confers the **Environment and Land Court**, with jurisdiction as follows under **Section 13(2) of the Act**.

“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 environment 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, chooses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.”

34. In addition thereto, **Section 13(3) of the Act** proceeds to state:-

“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.”

35. In the Supreme Court of Kenya decision in the case of **Republic v. Karisa Chengo & 2 others, Petition No. 5 of 2015** it was stated that:-

“...we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdiction of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdiction. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.” (Emphasis added)

36. Similarly, the Environment Court in **ELC Case Number 63 of 2017 Christopher Ngusu Mulwa & 28 others V. The County**

Government of Kitui & Another held as follows:-

“Consequently, and considering that a dispute relating to land and or the environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters. The two courts cannot have concurrent jurisdiction in such matters because they are two distinct courts”.

37. The Court of Appeal acknowledged that the ELC in dealing with disputes involving environment and land in which there is claim related to breaches of fundamental rights associated with the same subject matter nothing can stop the Court from hearing the matter. In support of this position reliance placed in the case of **Prof. Daniel N. Mugendi Vs. Kenyatta University & 3 others, Civil Appeal No. 6 of 2012**, stated as follows:-

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matter, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.” (Emphasis added)

38. I find and hold that in view of the above-mentioned Court decisions, a dispute related to land can well be commenced by way of a Constitutional Petition; laying down even claims of Constitutional violations or breach. It should be noted that, the fact that the Petitioner may be seeking Constitutional reliefs for alleged breach or violation, in itself cannot divest the Environment and Land Court of jurisdiction nor can such prayers grant High Court jurisdiction which the Constitution and Statute do not grant. I find that nothing would deny the ELC from dealing with the matter in spite of constitutional prayers in the Petition. In view of the Court decisions and statutory provisions I find that the Environment & Land Court, while dealing with disputes relating to environment and land can deal with claims of breaches of fundamental rights associated with the land related issues.

39. The Petitioner herein seeks to enforce constitutional infringements and violations with respect to land **Plot No. 586**, against the Respondents. The Petitioner further seeks to reclaim ownership of the aforementioned plot as per (prayer iii) of the Petition, as well as, compensation from the Respondents, as a result of their alleged interferences with the abovementioned plots. I note that the prayers sought by the Petitioner herein, rightly falls within the purview of **Section 13 of the Environment and Land Court Act 2011**. It is my finding that the constitutional violations averred by the Petitioner are associated with land issues, which can be sufficiently addressed by the Environment and Land Court, which is a Court of equal status to that of this Court mandated to hear and determine any constitutional violations associated with land related issues with respect to land and environment.

40. The arguments by the petitioner that **section 13(3) of the Environment and Land Court Act** has direct implication, that the Environment and Land Court Act lacks the requisite jurisdiction to hear and determine **Article 40 and 60(1) (b)**, Petitions cannot stand due to the fact, that the Environment and Land Court, being a Court of equal and concurrent jurisdiction to this court has jurisdiction to determine constitutional violations and infringements with respect to rights accrued from land in this case **Plot No. 586**, in accordance to **Article 162(2) (b) of the Constitution of Kenya, 2010**.

41. In view of the findings herein above, I find, that even though this court is vested with powers to hear and determine disputes on contraventions and infringements of constitutional rights and fundamental freedoms, the dispute herein is related to land dispute dispute and use, and as such the High Court has no jurisdiction to entertain such a matter.

42. I find from the pleadings herein that there is no doubt, the reliefs sought in the Petition are related to land dispute and applying the jurisprudence, flowing from the various decisions cited herein above, the reliefs sought, in the Petition herein are as such, that they can be granted by the Environment and Land Court which Court is clothed with jurisdiction in terms of **Article 23(3)(f) of the Constitution** as read with **Section 13 of the Environment and Land Court Act** to determine issues of land dispute and use and fundamental freedoms, in the Bill of Rights associated with land dispute.

43. I find therefore that this Honourable Court is not divested with the jurisdiction to hear and determine the instant Petition which, should be heard and determined by the Environment and Land Court.

44. There is issue of resjudicata raised by the 3rd and 4th Respondent but it will not be necessary to determine the same since, the key issue of jurisdiction has already been determined and regardless of whether, there are determined suits in other Courts, I have opined, that the proper court to hear and determine the dispute herein would be the Environment and Land Court.

45. In view of the aforementioned, I find the Preliminary Objection raised by the 2nd, 3rd and 4th Respondents is merited. The proper forum for hearing and determination of this Petition is the Environment and Land Court. Accordingly this matter is transferred to Environment and Land Court for hearing and determination.

46. **Costs be in cause.**

Dated, Signed and Delivered at Nairobi on this 10th day of June, 2021.

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J. A. MAKAU

JUDGE