



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E 299 OF 2020

IN THE MATTER OF ARTICLES 22, 23 & 24 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 40, 47 AND 50 OF

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF THE ORIGINAL SUPERVISORY JURISDICTION OF THE

HIGH COURT UNDER ARTICLE 23 AND 165 OF THE CONSTITUTION

BETWEEN

OFFSHORE TRADING COMPANY LIMITED.....PETITIONER

VERSUS

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

THE NAIROBI COUNTY GOVERNMENT.....2ND RESPONDENT

THE NAIROBI WATER AND SEWERAGE COMPANY LIMITED.....3RD RESPONDENT

RULING

BACKGROUND

1. The Petitioner vide an Application and Petition both dated 25th September 2020 prays for the Court to grant the following orders:-

a) A declaration that the Petitioner is entitled to quiet and peaceful possession, use and exercise of full propriety rights over its land L.R. No. 12979/3 I.R. No. 61844 without any interference, hindrance or permission of the Respondents save as stipulated in the subject Title lease registered as I.R. 61844.

b) A permanent order of injunction restraining the Respondents their Agents, servants or any other persons acting under their direction from interfering with the Petitioner's ownership, possession and use of all that property comprising L.R. No. 12979/3 I.R. 61844.

c) A declaration that the Respondents can only deprive the Petitioner of its property through the exercise of the powers of

compulsory acquisition subject to due process as stipulated in the Constitution and applicable law.

d) The Honourable Court do grant General Damages to the Petitioner of its property through the exercise of the powers of compulsory acquisition subject to due process as stipulated in the Constitution and applicable law.

e) The Honourable Court to grant General Damages to the Petitioner against the 1st and 3rd Respondents for contravention of the Petitioner's rights.

f) An order quashing Kenya Gazette Notice No. 3829 of 3rd June 2020 in so far as it declares the Petitioners Land L.R. No 12979/ 3 I.R. 61844 as a protected area.

g) A mandatory injunction directing the Respondents, their Agents, servants and any other persons acting under their direction to vacate the Petitioners property L.R. No. 12979/3 I.R. 61844 and grant the Petitioner quiet possession.

h) Any other or further order that this Honourable Court may deem fit to grant.

RESPONDENTS RESPONSE

2. The 3rd Respondent filed a Preliminary Objection dated 7th October 2020 in opposition to the Petitioner's Application and Petition dated 25th September 2020. The Preliminary Objection is premised on grounds that the Honourable Court lacks jurisdiction to hear the Petitioner's Application and Petition in the first instance in line with the provisions of **Section 13 (1) of the Environment and Land Court Act No. 19 of 2011**.

3. The 3rd Respondent further contends that the Application and Petition offend the established and mandatory provisions of **Order 4 Rule 1 (4) and (6) of the Civil Procedure Rules, 2010** as no resolution authority of the Petitioner Company to institute the suit of authorising the Deponent has been exhibited. The 3rd Respondent asserts that the Application and Petition are an affront to the Constitutional dispensation, the Protected Areas Act and seeks to enjoin this Honourable Court to give effect to illegalities against the deeply rooted public policy doctrines of *ex turpi causa non oritur action* and or *ex dolo malo no oritur action*.

4. The 1st Respondent filed a Preliminary Objection dated 19th October 2020 asserting that the Petition discloses a purely ordinary land dispute which is disguised as a constitutional issue contrary to statutory procedures laid down in the Civil Procedure Act and it is an abuse of the Court process. Moreover, the Petition hinges principally on matters related to management, usage and determination of title to land and therefore should be filed in the Environment and Land Court.

5. The 2nd Respondent also filed a Preliminary Objection dated 4th December 2020 to oppose the Petitioner's Application and Petition. The Preliminary Objection is based on the grounds that this Honourable Court lacks jurisdiction to hear and entertain the Application and Petition in the first instance in line with the provisions of **Article 162 (2) of the Constitution of Kenya** as read with **Section 13 (1) and (2) of the Environment and Land Court Act No. 19 of 2011**.

PARTIES SUBMISSIONS

PETITIONER'S SUBMISSION

6. The Petitioner filed submissions dated 28th March 2021 on the 3rd Respondent's Preliminary Objection dated 7th October 2020. On the issue of jurisdiction, the Petitioner submits that the jurisdiction of the Environment and Land Court to address complaints of infringement of constitutional rights is limited. The Petitioner relies on the decisions of the Court in **Constitutional Petition No. 43 of 2018 Cyber Access Limited v National Land Commission and 3 orders [2018] eKLR; Patrick Musimbi v National Land Commission & 3 others** on the concurrent jurisdiction of the High Court and the Environment and Land Court (ELC).

7. The Petitioner asserts that the Petition touches on **Article 10, 28, 35, 39, 40 and 47 of the Constitution of Kenya**, which have nothing to do with Land and Environment Court. Alternatively, the Petitioner submits that if the Court finds that it does not have jurisdiction to determine the issues in this Petition it would still be duty-bound to transfer the Petition to the appropriate Court. This is supported by the case of **Constitutional Reference No. 531 of 2016 David Ramogi & 4 others v The Cabinet Secretary Ministry of Energy & Petroleum [2017] eKLR**.

8. On the claim that the Petition offends mandatory provisions of **Order 4 Rule 1 (4) and 6 of the Civil Procedure Rules**, the Petitioner submits that the ground does not lie as a pure point of law as it calls on the Court to make an enquiry of fact as to whether the Petitioner passed a resolution to file this Petition. Additionally, the Petitioner asserts that the Civil Procedure Rules are not applicable in the filing of Constitutional Petitions. According to the Petitioner, the **Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013** have no requirement that the Petitioner must exhibit a Board Resolution or swear a verifying affidavit. This is supported by the decision in **Redempta Igwatai Imoo v Moses Omuse Ekabten & 2 others [2019] eKLR** where a similar objection was dismissed. Further reliance is placed on the case of **Mavuno Industrial Limited & 2 others v Keroche Industries Limited [2012] eKLR** where the Court held that failure to file a resolution does not invalidate the suit.

9. On the third point of objection by the 3rd Respondent, the Petitioner submits that the Respondent has made no submissions in support of this ground and that the ground is not a pure point of law and does not lie as a preliminary objection.

1ST RESPONDENT'S SUBMISSIONS

10. The 1st Respondent filed Written Submissions on 10th February 2021 on the Preliminary Objection identifying two issues to be determined thus:-

Whether this Court has jurisdiction to hear this case; and if the Court finds that it does not have jurisdiction can it transfer the matter to the Environment and Land Court?

11. On the first issue, the 1st Respondent submits that in reliance on the decisions in *The Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Limited 1989 KLR 1653*; and *Honey Creepers Investment Limited v Cab Investments Company Ltd & 4 others [2020] eKLR* that the Petition belongs to the Environment and Land Court on account that the dominant cause of action that it entails is the current occupation and ownership of **L.R. No. 12979/3 I.R. 61844**.

12. On the second issue, the 1st Respondent asserts that the Court lacks the requisite jurisdiction to entertain the Petitioner herein and that it equally lacks the jurisdiction to transfer the same to another Court. Thirdly the suit should be struck out at the first instance. The Respondent places further reliance on the decision in *Honey Creepers Investment Limited Case*.

2ND RESPONDENT'S SUBMISSIONS

13. The 2nd Respondent filed Submissions on its Preliminary Objection dated 15th February 2021. It submits that this Court does not have the requisite jurisdiction to determine this matter as the Petition discloses a cause of action that should by law be placed before the Environment and Land Court.

14. The 2nd Respondent asserts that the Petition raises issues about fair administrative action, due process, forceful acquisition of land without compensation which makes it a land dispute between themselves and the Respondent on the ownership of the **Land Reference No. 12979/3 I.R. 61844**. The 2nd Respondent relies on the decision of the three-judge bench in *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others [2016] eKLR* where the Judges held that according to **Article 165 (5) of the Constitution of Kenya**, the High Court shall not have jurisdiction over matters falling within the jurisdiction of the Environment and Land Court.

15. The 2nd Respondent contends that although this Court has jurisdiction to determine the constitutional aspect of the suit, the Constitution bars under **Article 165 (5)** entertaining matters falling within the jurisdiction of the Environment and Land Court. The Respondent prays that the suit is struck out with costs to the 2nd Respondent.

3RD RESPONDENT'S SUBMISSIONS

16. The 3rd Respondent filed Written Submissions dated 8th February 2021 on its Preliminary Objection. The 3rd Respondent submits that in deciding whether or not the Petition has merit the Court will delve into the procedure of land acquisition, the validity of title and interest in land, and will go into the question of whether or not the Petitioner's title and interest claimed in the suit property are impeachable. The Respondent contends that these are questions reserved for the Environment and Court. Furthermore, the reliefs sought are available before the Environment and Land Court thus the Petitioner will not be prejudiced should the Petitioner not succeed. The Respondent buttresses this with the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR*; *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others [2016] eKLR*; and *Pepe Limited v Kenya Railways Corporation & 3 others; Kenya Revenue Protection Services & another (Interested Parties) [2019] eKLR*.

17. On the second issue, the 3rd Respondent submits that the Petition is defective for want of resolution authority on commencement of the instant proceedings or swearing of the Affidavit. This is in reliance on the decisions in *East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR* and *Directive Assurance Company Limited v Tomson Ondimu [2019] eKLR*, where it was determined that a board resolution must be produced before a company institutes proceedings in Court.

BACKGROUND

18. The Petitioner's Petition is premised on the facts and grounds that by a pronouncement in the print and digital media the Government of Kenya through the principal Secretary Water Sanitation and Irrigation, Principal Secretary land and Physical Planning and the Cabinet Secretary Interior and Co-ordination of National Government proclaimed the repossession and seizure of the Petitioner's property L.R. 12979/3 original 12979/1/4 comprising 404.58 Hectares of hereabouts situated in Ruai Area Nairobi County claiming it as part of the Dandora Estate Waste Management Plant. The Petitioner land Is identified by a New number as L.R. No.28707.

19. It is further stated that by a proclamation by Special Kenya Gazette Notice No.3829 of 3rd June 2020 the Cabinet Secretary Interior and Co-ordination of National Government proclaimed the Area comprising the Petitioner's Land to be a protected Area and proceeded to evict all persons including the Petitioner's Agents from the said Land, posted security forces and apparatus thereon to occupy the land and prohibited the Petitioner from setting foot on the land.

20. The Petitioner urge that its constitutional right to property guaranteed by **Article 40 of the Constitution of Kenya 2010** has been infringed. That it's constitutional right to fair administrative action guaranteed by **Article 47 of the Constitution of Kenya 2010** has been infringed. The Petitioner further stated that the aforesaid actions were undertaken without any Notice or hearing and the Petitioner's right to be heard has been infringed. The Petition further complains that its right to access of information has been infringed. The Petitioner fears that the Respondents action are an actual/constructive annulment of the Petitioner's title and right to property without due process. Further

Petitioner complains that the 1st Respondent is in breach of Consent Orders entered between the Petitioner and the 1st Respondent in **Constitutional Petition No. 51 of 2011, Offshore Trading Company Limited vs. George G. Gachihhi and the Attorney General** which orders are still subsisting.

21. The Petitioner therefore prayed for several reliefs as set out in the Petition among them an order quashing Kenya Gazette Notice Number 3829 of 3rd June 2020 in so far as it declares the land comprised in the Petitioner's title L. R. No. 12979/3 I.R. 61844 as a protected Area.

ANALYSIS AND DETERMINATION

22. I have very carefully considered the Petition, the Responses from the Respondents., the parties rival submissions as well as respective authorities and from the same, I find that the following issues arise for consideration:-

a) Whether Order 4 Rule 1(4) of the Civil Procedure Rules are applicable in the circumstances of this Petition.

b) Whether the High Court has jurisdiction to hear and determine this matter.

c) Whether the court has jurisdiction to transfer this matter to the Environment and Land Court.

A. WHETHER ORDER 4 RULE 1(4) OF THE CIVIL PROCEDURE RULES ARE APPLICABLE IN THE CIRCUMSTANCES OF THIS PETITION.

23. The 3rd Respondent contended that the application and Petitioner offends the established and mandatory provisions of **Order 4 Rule 1(4) and (6) of the Civil Procedure Rules 2010** as no resolution authority of Petitioner Company to institute the suit or authorize the deponent has been exhibited. Similarly the 2nd Respondent reiterates the same ground urging the Petition is defective for want of resolution authority on commencement of the instant proceedings or swearing of the affidavit.

24. To buttress the aforesaid proposition the Respondents placed reliance in the case of **East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR** where while striking out a Petition for want of authority to institute it, held as follows:-

“in Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC No. 524 of 2004, Njagi J observed that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers...The Court (Njagi J) observed that it was common ground that there was no authority from the Board of Directors to institute the suit, and consequently, he held as follows:

“The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reasons, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff.”

25. The 3rd Respondent averred that the instant Petitioner, is a Limited Company, and urged that there is no evidence of a board or members resolution sanctioning institution of the Petition. None has also been exhibited to the effect that Shakhhalaga Khwa Jirongo is authorized to swear the Affidavit and depose information on behalf of the Petitioner. It is therefore urged that from the authorities cited above, the overall effect on an action brought without such resolution is striking out for want of resolution.

26. In view whereof the 3rd Respondent contends that the Petition and the Petitioner are not properly before this Honourable Court. Therefore, the same should be struck out with costs for want of resolution authorizing its institution and swearing Affidavits by Shakhhalaga Khwa Jirongo.

27. The Petitioner is opposed to the Respondents ground on lack of resolution authority of the Petitioner Company to institute or authorise the deponent to swear an affidavit in support. It is contended that the ground does not lie as pure point of law as the basis of the objection would call or calls on the Court to make an enquiry of fact as to whether the Petitioner has passed a resolution to file this Petition. Secondly it is urged the objection is based on **Order 4 Rule 1(1), and (6) of the Civil Procedure Rules 2010**.

28. Upon consideration of the objection herein, I am satisfied that the preliminary objection does not raise pure point of law, as it cannot be determined without calling evidence to confirm whether Petitioner passed a resolution or not to file the instant Petition. In such circumstances I find that this is not a pure point of law.

29. Secondly the matter pending before this Court is a Constitutional Petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional Petitions. The applicable law and procedure of filing Constitutional Petitions is provided for under **“The Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013**, otherwise known as **Chief Justice Mutunga Rules** which provide the procedure for filing of Constitutional Petitions and which have no requirement that the Petitioner must exhibit a board resolution or swear a verifying Affidavit. In addition thereto the Constitution abhors Technical objections of this nature expressly at **Articles 22, 3(b)(d) and 159 of the Constitution**.

30. To buttress the above mentioned proposition reliance is placed in the case of **Redempta igwatai Imo vs. Moses Omuse Ekabten & Others 2019 eKLR** where Court dismissed a similar objection while observing that:-

“The Second objection is that the Petition was not accompanied with a verifying affidavit. This is a Technical objection that can be cured by Amendment and this cannot be a ground for striking out the Petition. Further there is no procedural requirements cited by the 1st Respondent that a constitutional Petition must be accompanied with a verifying affidavit.”

31. In the instant Petition, I note that the deponent of the Supporting Affidavit has expressly deponed at paragraph 1 of the supporting affidavit that he is duly authorized by the Board of Directors of the Petitioner to swear the Affidavits. The 3rd Respondent cannot question that averment without offering contrary evidence. The Turquand Rule in Company Law enjoins third parties dealing with a company to presume that the company has complied with all its internal requirements and procedures. There is therefore no basis for the 3rd Respondent’s objection in the absence of evidence to the contrary.

32. Reliance in support the above-mentioned proposition is placed in the case of *Masole Enterprises Limited & 7 others vs. Shakhalaga Jirongo & Another (unreported)* where the Court while dealing with a similar objection observed that:

“In the supporting Affidavit Harun Omeke Mokomba disclosed the fact that he is a director of the 2nd Defendant Company and was duly authorised to swear the affidavit. That to my mind would suffice for purposes of the Notice of Motion. As to whether he was indeed authorized would not only involve an inquiry with facts but would also be an abrogation of the Turquand Rule.

33. In view of the *Mutunga Rules* and authorities cited herein above, I find that even if the filing of Resolution was a requirement in Constitutional Petition, I would find that it would be against **Article 48 of the Constitution** on access to justice, if Court would be striking out Petitions on the said ground, which can be rectified through amendment of the pleadings or through filing of the resolution. In the case of *Mavuno Industrial Limited & 2 others vs. Keroche Industries Limited (2012) eKLR*, Odunga J., held that:-

“Nowhere is it stated that such Authority or resolution must be filed. The failure to file may be a ground for seeking particulars... of course if a suit is filed without a resolution of a corporation it may attract some consequences. ...The failure to file the same with the plaint or with the Registrar of Companies ... does not invalidate the suit. I associate myself with the decision of Kimaru J in Republic vs. Registrar General and 13 others Misc Application No. 67 of 2005 eKLR and hold that the position in Law is that such a Resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is therefore not fatal to the suit at least not at this stage.”

34. I find that, if the resolution is necessary there would be no prejudice to the Respondents if the Petitioner is thereafter allowed to file a resolution of the required document, rather than striking out the Petition, which may thereafter result to a similar Petition being filed as on the matter on being struck out, that does not bar a party from filing a fresh suit rectifying the errors.

B. WHETHER THE HIGH COURT HAS JURISDICTION TO HEAR AND DETERMINE THIS MATTER.

35. The Respondents contended that jurisdiction of Courts in Kenya is donated by the Constitution or statutes. Courts cannot arrogate themselves jurisdiction beyond that which is conferred upon them (see *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR at paragraph 68*).

36. The Respondents place reliance in the case of *The Owners of Motor Vessel Lillian “S” v Caltex Oil Kenya Limited 1989 KLR 1653* where the Court of Appeal held as follows:-

“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 its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction.”

37. The Respondents further contended that the factual basis of the Petition discloses a cause of action that should bylaw be placed before the Environment and Land Court.

38. The Respondents placed reliance under **Article 162 (2) of the Constitution** which mandates Parliament to enact laws establishing specialized Courts that deal with specific issues, that relate to it, environmental issues being one of them. In line with this the parliament enacted *Environment and Land Act, 2011* wherein **Section 13** provides inter alia:-

“(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...

(c) Relating to land administration and management

(e) Any other disputes relating to environment and land

(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.”

39. It is clear that Courts have previously pronounced themselves on the issue of the extent to which the Environment and Land Court and the High Court can exercise its jurisdiction over land disputes requiring enforcement of human rights. For instance, the Court of Appeal rendered itself in the case of *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others [2016] eKLR* where it was stated that: -

“The Constitution has therefore created a specific court, with equal status to the high Court and conferred on it the jurisdiction to hear and determine disputes relating to, among others, use, occupation, title to land and “any other dispute relating to land”. It cannot be gainsaid that when the Constitution has created a specific mechanism for redress of particular grievances, that mechanism must be resorted to.... Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant’s claim that the ELC lacks jurisdiction to enforce constitutional rights to totally bereft of merit.” (Emphasis added)

40. Similarly Court faced with similar matter in Machakos in *Pepe Limited v Kenya Railways Corporation & 3 others; Kenya Revenue Protection Services & another (Interested parties) (2019) eKLR* dismissed a preliminary objection contesting its competency to hear and determine a Petition before it on ground that it raised constitutional issues. It thus held:-

“The jurisdiction of this Court also extends to the hearing of claims of violation of constitutional rights and fundamental freedoms relating to the environment and land.

28. The Petitioner’s cause of action is founded on the Petitioner’s right to protect its interests in and rights concerning the use of L.R. No. 337/196 from the alleged unconstitutional, unfair and arbitrary deprivation and interference of the said use. From the averment of the Petitioner, it has alleged that after its land was gazetted as a Transit Shed by the 2nd Respondent, with the approval of the 3rd Respondent, the said Respondents have been interfering and threatening the Petitioner with the use of L.R. No.337/196...

39. To the extent that the Petition raises issues of denial, violation, infringement and threat of the Petitioner’s constitutional rights and freedoms in relation to the occupation and use of L.R. No. 337/196, it is this Court, and not the High Court, that has the requisite jurisdiction to deal with those issues.” (Emphasis added)

41. The Petitioner in response contended that the jurisdiction of Environment and Land Court to address complaints of infringement of constitutional rights is limited. **Article 13(3)** states that:-

“Nothing in this Act shall preclude the court from hearing and determining applications of redress of a denial, violation or infringement of, or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

42. The Petitioner in urging that this Court has jurisdiction to hear and determine the matter averred that the petition herein is not just about the Environment and Land. The Petition raises substantial, issues about due process, fair Administrative Action, denial of access to information, forceful acquisition of Land without compensation, Refusal to acknowledge the Petitioner as proprietor of the land and undermining of the Judicial Authority of this Court by ignoring its orders.

43. In support of the above proposition the Petitioner relied in the decision of Ogola J in Constitutional Petition No. 43 of 2018 *Cyber Access Limited vs. National Land Commission and 3 Others 2018 eKLR*.

“This is a scenario where both the High Court and the Environment and Land Court have concurrent jurisdiction. However even where the Court finds both courts have jurisdiction the court must still determine which of the two courts appears to have grater or more abundant jurisdiction. It must be understood that the jurisdiction of the High Court is always more robust being that the High Court under Article 165 has the jurisdiction to deal with all threats to the Bill of Rights or fundamental Freedoms when it comes to pronouncing a right protected under the bill of Rights the high Court cannot shy away. It has the first duty to protect that right or fundamental freedom that means that no litigant shall come to the High Court claiming that his right under

the Bill of Rights or a fundamental right is threatened and the High Court will point him to another Court from which to seek redress.

A 5 bench Court in ***Patrick Musimba vs. National Land Commission & 3 Others*** observed that:-

“While the High Court jurisdiction is founded under Article 165 of the Constitution it is certainly not erroneous to argue that the jurisdiction of the courts established pursuant to Article 162 (2) of the Constitution are mainly statutory...”

The Court cited the Amendment to ***the Land and Environment Court Act vide Act No. 12 of 2012 at paragraph 57*** of its decision and observed that:-

“By the Amendments in 2012 Parliament took away the supervisory jurisdiction of the ELC over sub ordinate, judicial and quasi-judicial tribunals under Article 165 (6) and also the jurisdiction to determine matters of a constitutional nature involving environment and Land generally”

“Parliament clothed the ELC with jurisdiction to deal with constitutional matters touching on a clean and healthy environment only but no other constitutional matters including matters touching on other fundamental rights.”

After analyzing the Court of Appeal decisions in ***United States International University vs. Attorney General and Daniel Mugendi vs. Kenyatta University*** the Court came to the conclusion that:

“The above analysis lead us to the conclusion that both the High Court and the ELC Court have a concurrent and or coordinate jurisdiction and can determine matters when raised and do touch on the environment and Land. Neither the Constitution nor the ELC Act limit the High Court’s jurisdiction in this respect.”

44. It is therefore Petitioner’s argument that the Petition herein raises wide fundamental issues of constitutional rights and fundamental freedoms that have been breached and threatened by the Respondents. It is urged that this Petition is not simply about environment and land as there are questions of limitation to freedom of movement by an arbitrary declaration of the Petitioner’s land as a protected area, denial of due process, affront to right to property, denial of fair administrative action, compulsory acquisition without compensation, denial of right to be heard, Abuse of power and undermining of judicial authority.

45. The Petitioner further laments, that there has been no response by the Respondents to the substance of the Petition despite the period of 6 months since the filing of these proceedings. It is urged that this Court has therefore no basis to determine whether the Respondents are asserting any legal claim on the Petitioner’s land calling for adjudication. It is further averred that this Petition touches on ***Articles 10, 28, 35, 39, 40 and 47 of the Constitution of Kenya***, which Articles it is stated have nothing to do with Land and Environment.

46. The Petitioner urged that without prejudice to the foregoing in the alternative that even if the Court find that it had no jurisdiction, to determine the issues in this Petition, it would still be duty bound to transfer the Petition to the appropriate Court for hearing and disposal while maintaining the status quo as happened in ***Constitutional Reference No. 531 of 2016 David Ramogi & 4 Others vs- The Cabinet Secretary Ministry of Energy & Petroleum 2017 eKLR***. The preliminary objection herein is therefore not dispositive of this matter and should be dismissed.

47. In the instant Petition there is no doubt that there are Constitutional issues raised and which this Court has jurisdiction to hear and determine. I find despite the present claim having Constitutional. Connotation the predominant issue raises issues touching on Land, use, management, as well as title amongst other land related issues which should be determined by the Environment and Land Court, which is clothed with the requisite jurisdiction to deal with both constitutional issues related and connected to issue of Land and legislation. I find that the instant Petition predominantly raises issues of land acquisition, ownership, occupation and use. The Petitioner, contends that its agents have been unlawfully evicted and the 3rd Respondent taken over the suit property. I find that in deciding the aforesaid issue and whether the Petition has merit the Court will be no doubt delve into the procedure of land acquisition, validity of title and interests in land. From the facts stated by the Petitioner, a determination of this Petition will eventually go to the question of whether or not his title and interests claimed in the suit property are impeachable.

48. Further upon considering the reliefs sought by the Petitioner herein, that is, injunctions, declarations, damages and quashing of the Gazette Notice are in my view, available before the Environment and Land Court. Thus, the Petitioner will not be prejudiced should its Petition succeed before the Environment and Land Court.

49. In view of the reliefs sought and in view of Constitutional provisions as well as the provisions of the Environment and Land Act, stated herein above, I have no doubt that despite the present claim by Petitioner having raised constitutional issues related to dispute to land, I find the Petitioner’s constitutional claim can be determined by the Environment and Land Court as it determines Land related claims therein. I further have no doubt that since this Court has jurisdiction only to deal with constitutional issues raised in this Petition but not the predominant issues related to land, the Environment and Land Court is best equipped to deal with both issues and I find that it is the Court that is best placed to deal with all issues in this Petition. In view whereof I do not find that this Petition can be dismissed for want of jurisdiction as such but should be transferred to the Court that has jurisdiction to determine all claims rather than having this Court deal with the matter partially or in piece meal.

C. WHETHER THE COURT HAS JURISDICTION TO TRANSFER THIS MATTER TO THE ENVIRONMENT AND LAND COURT.

50. The Respondents contend that in view of the nature of the claim the court has no jurisdiction to hear and determine this Petition nor does

it have jurisdiction to transfer the Petition but to strike out the same.

51. The Petitioner in response urged that the instant Petition is not just about the Environment and Land as the petition also raises substantial issues about the process, fair Administrative action, denial of access to information. It is further Petitioner's position that the Petition raises wide fundamental issues of constitutional rights and fundamental freedoms, that have been breached and threatened by the Respondents. I agree with the Petitioner that this Petition is not simply about environment and land as there are clear pleadings on questions of limitation to freedom of movement by an arbitrary declaration of the Petitioner's land as a protected Area, denial of due process, affront to right to property, denial of fair administrative action, Compulsory Acquisition without compensation, denial of right to be heard, Abuse of power and undermining of judicial authority.

52. In view of the Constitutional issues raised one can rightly aver that this Court has jurisdiction to deal with constitutional issues raised in the Petition but not on land related claims which can also be determined by Environment and Land Court, a Court of equal status to this Court. However as the High Court cannot determine land related issues raised herein, I find instead of breaking this case into two or hearing the same in piece meal, the best suited Court is the Environment and Land Court, which is the Court, that can deal with the predominant issues raised in the Petition together with the constitutional issues related to the land thereto. I find as the High court cannot determine all issues in Petition, the transfer of the Petition to Environment and Land Court to be most appropriate, so that all issues can be heard and determined together therein.

53. I have found that this Court has no jurisdiction to determine land related claims but can determine constitutional claims inspite of the fact that all the claims in the Petition can be determined by Environment and Land Court. In my view, transfer of the Petition is an administrative matter, which is aimed at facilitating the speedy disposition of the case at hand. It has nothing to do with jurisdiction. All what the Court is saying is that **"you have come to the wrong forum in respect of predominant issues, please take your file to the correct forum in which all prayers can be dealt with"**. I don't think such an order needs jurisdiction or can be held as null and void. This is my honest view. Further, I do opine that the contrary view will be running against the provisions of **Article 159 of the Constitution** in relation to procedural technicalities. Justice should not be made expensive to litigants. Striking out the matter would lead to the filing of a fresh suit before the Court with proper jurisdiction on all issues raised in the Petition. This entails the typing of fresh pleadings, filing the same in Court and paying Court fees afresh. Thereafter service has to be effected upon all the respondents and interested parties. On the other hand, when the matter is referred to the proper Court, the proceedings will start afresh and the file will be allocated a fresh Court, file number and parties will be heard faster. I believe such process saves litigants time and money and is in line with the spirit of the Constitution and affords access to justice and ensuring substantive justice is done to all parties in respective of their status.

54. The upshot is that the preliminary objections partially succeeds as this Court has jurisdiction to deal with Constitutional claims raised in Petition but not the predominant issues related to land as raised in the Petition. However all claims in the Petition can be heard and determined by Environment and Land Court.

55. **I proceed therefore to allow the preliminary objections partially and direct as follows:-**

- a) The proper Court with full jurisdiction on all claims in the Petition herein is the Environment and Land Court.**
- b) The Petition is accordingly transferred to Environment and Land Court for hearing and determination.**
- c) Costs in cause.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JULY, 2021.

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J. A. MAKAU

JUDGE