



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 88 OF 2020**

**PAMELA KAWIRA ARUNGA (Suing on her own behalf and as a next friend to EMMANUEL ARUNGA, LEON ARUNGA & JORDAN ARUNGA).....PETITIONER**

**VERSUS**

**NCBA BANK KENYA PLC.....1<sup>ST</sup> RESPONDENT**

**MICHAEL ANGAYA ARUNGA.....2<sup>ND</sup> RESPONDENT**

**ATHINYA MUTHURI HARON.....3<sup>RD</sup> RESPONDENT**

**LYDIA WAWERU T/A PURPLE ROYAL AUCTIONEERS.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner is Pamela Kawira Arunga. She has named NCBA Bank Kenya PLC, Michael Angaya Arunga, Athinya Muthuri Haron, Lydia Waweru T/A Purple Royal Auctioneers, and the District Land Registrar Kiambu as the respective 1<sup>st</sup> to 5<sup>th</sup> respondents.

2. Through the notice of preliminary objection dated 7<sup>th</sup> March, 2020 the 3<sup>rd</sup> Respondent challenges the jurisdiction of this Court on the grounds that:-

**“a) This Honourable Court lacks jurisdiction to hear and determine this matter within the meaning of Article 162(2)(b) of the Constitution of Kenya.**

**b) This Petition does not raise any constitutional issue for determination and the same ought to have been filed by the Petitioner by way of a Plaint in the Environment and Land Court of Kenya.**

**c) The Petitioner has not sued or sought orders against any public body that guarantees her the purported constitutional rights.**

**d) The Petition is a gross abuse of the Court process because the Petitioner is guilty of instituting multiple suits in pursuit of similar orders in respect of the same subject matter.**

**e) The said application and the entire Petition ought to be dismissed with costs to the Respondents.”**

3. The 3<sup>rd</sup> Respondent also filed another notice of preliminary objection dated 21<sup>st</sup> May, 2020 raising grounds similar to those found in the first notice of preliminary objection.

4. Through a replying affidavit sworn on 18<sup>th</sup> March, 2020 by Dr. Jacob O. Ogola, the 1<sup>st</sup> Respondent's General Manager Credit Risk Management, the 1<sup>st</sup> and 4<sup>th</sup> respondents also raise the question of jurisdiction at paragraph 3 of the affidavit as follows:-

**“3. That I am advised by our advocates on record which advice I verily believe to be true that:**

- a. The Application is bad in law and an abuse of the Court process and should be struck out *in limine*.**
- b. The issues raised in the instant Petition are also directly and substantially in issue in ELC Cause No. 4 of 2018 between the same parties and which suit is pending hearing and determination before the Environment and Land Court at Nairobi....**
- c. That the applications dated 17<sup>th</sup> and 21<sup>st</sup> February 2020 filed by the Petitioner and the 2<sup>nd</sup> Respondent unsuccessfully sought to stop the public auction that took place on 20<sup>th</sup> February 2020 and the transfer of the Property to the Purchaser (the 3<sup>rd</sup> Respondent) respectively but which Orders were declined by the Court on 25<sup>th</sup> February 2020 in light of the fact that the Property had already been sold.**
- d. The Petitioner and the 2<sup>nd</sup> Respondent were then directed by the Court to review their position in the matter.**
- e. Following the Court’s directions aforementioned the Petitioner filed the Application dated 2<sup>nd</sup> March 2020 to amend the Plaint and the same was filed for hearing on 9<sup>th</sup> March 2020.**
- f. That ELC No. 4 of 2018 was last in Court on 9<sup>th</sup> March 2020 wherein leave was granted to amend the Plaint in terms of the draft Amended Plaint attached to the Application dated 2<sup>nd</sup> March 2020 bespoken herein above.**
- g. The Amended Plaint seeks in all fours reliefs similar to those presented in the instant Petition and Application notwithstanding that they are craftily framed as constitutional and human rights matters.**
- h. That the issues raised at paragraphs 7, 8, 9, 10, 11, 15, 16 and 17 of the Supporting Affidavit challenging the exercise of the 1<sup>st</sup> Respondent’s statutory power of sale on grounds inter alia, the opening of a joint mortgage account, issuance of statutory notices and/or statements of accounts, activation of the mortgage insurance cover after retrenchment of the 2<sup>nd</sup> Respondent and non-payment of loan arrears were heard and fully determined by the Honourable Court in ELC Cause No. 4 of 2018 and a Ruling delivered on 24<sup>th</sup> January 2019 wherein no appeal was preferred therefrom and are therefore *res judicata*....**
- i. In light of the foregoing, the instant Application and Petition offends Sections 6 and 7 of the Civil Procedure Act, Cap 21 Laws of Kenya and ought to be struck out.”**

5. The Petitioner’s opposition to the notice of preliminary objection is by way of her further affidavit sworn on 7<sup>th</sup> April, 2020. In specific response to paragraph 3 of the replying affidavit of Dr. Jacob O. Ogola she contends that Article 23 of the Constitution grants this Court jurisdiction to hear and determine matters involving violation of rights under the Bill of Rights. Further, that the jurisdiction of the High Court to deal with issues of violation of fundamental rights is further cemented by Article 165(3)(b) which gives the Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

6. The Petitioner avers that her application and petition dated 3<sup>rd</sup> March, 2020 are properly before this Court as the issues raised in this case are distinct and different from the issues raised before the Environment and Land Court in Cause No. 4 of 2018. It is her averment that in the case before this Court she is seeking redress for a violation of her rights under the Bill of Rights.

7. It is also the Petitioner’s case that Article 22(1) of the Constitution provides that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. She additionally deposes that Article 23(1) of the Constitution provides that the High Court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It is her case that the Environment and Land Court has no jurisdiction to adjudicate and determine matters of violation of rights except issues arising under Articles 42, 69 and 70 of the Constitution.

8. In support of the two notices of preliminary objection, counsel for the 3<sup>rd</sup> Respondent filed submissions dated 26<sup>th</sup> May, 2020 and submits that the subject of the dispute is land and Article 162(2)(b) of the Constitution mandates the Environment and Land Court to hear and determine the dispute. According to counsel, the Petitioner is abusing the court process by seeking similar reliefs in various courts through multiple suits.

9. Through submissions dated 15<sup>th</sup> May, 2020, counsel for the 1<sup>st</sup> and 4<sup>th</sup> respondents support the 3<sup>rd</sup> Respondent’s notices of preliminary objection. As to whether this Court has jurisdiction to hear and determine the petition herein, counsel submits that it does not and points to Article 165(5)(b) as expressly denying this Court jurisdiction in respect of matters reserved for the Courts established under Article 162(2) of the Constitution. In support of this argument, reliance is placed on the decisions in **Omar Tahir Said v Registrar of Titles & another [2013] eKLR** and **Mohammed Said v County Council of Nandi [2013] eKLR**. Further reliance is also placed on Section 90(2) and (3) of the Land Act, 2012 and the Land Registration Act, 2012. Section 103 as read with Section 105 of the Land Act is quoted as expressly stating that any challenge against the statutory power of sale shall be made to the Environment and Land Court exercising its civil jurisdiction.

10. Counsel for the 1<sup>st</sup> and 4<sup>th</sup> respondents exits the stage on the issue of jurisdiction by asking the Court to down its tools in compliance with the edict in Owners of the **Motor Vessel “Lilians S” v Caltex Oil (Kenya) Ltd (1989) KLR 1** that a court without jurisdiction has no power to take one more step.

11. The second issue identified by counsel for the 1<sup>st</sup> and 4<sup>th</sup> respondents is that this petition is an abuse of the court process. Counsel submits that the issues raised in the instant petition are also directly and substantially in issue in **Nairobi ELC Cause No. 4 of 2018** between the same parties which is pending hearing and determination before the Environment and Land Court.

12. It is the 1<sup>st</sup> and 4<sup>th</sup> respondents' case that attempts by the Petitioner to stay the public auction of the land in the ELC matter had failed and the auction had taken place and the suit property had been transferred to the 3<sup>rd</sup> Respondent. Further, that all the issues raised in this petition were argued before the Environment and Land Court and a considered ruling delivered on 24<sup>th</sup> January, 2019.

13. It is the 1<sup>st</sup> and 4<sup>th</sup> respondents' case that this petition is *sub judice* and should be struck out as it offends Section 6 of the Civil Procedure Act, Cap 21. Reliance is placed on the decision in **Maggie Mwauki Mtalaki v Housing Finance of Kenya [2015] eKLR** in support of the proposition that the *sub judice* rule applies to constitutional petitions.

14. A question has been raised as to whether this Court has jurisdiction to hear and determine the Petitioner's case. The Court of Appeal addressed the issue of jurisdiction of the Environment and Land Court in the context of a mortgage in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (2017) eKLR** and held that:-

**“41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. In Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,**

**“The origin of the dispute between the 1<sup>st</sup> respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1<sup>st</sup> respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately.”**

**By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.”**

15. In **Musk Deer Limited v Benjamin K. Kipkurui & another [2017] eKLR**, the Court of Appeal had the following to say on the issue of jurisdiction:-

**“[17] On the overall issues of jurisdiction, it is clear by dint of Article 22(1) of the Constitution, every person has the right to institute court proceedings claiming that a right or freedom guaranteed in the Bill of Rights has been denied, violated, infringed or threatened. As a corollary, Article 23(1) confers on the High Court jurisdiction to hear and determine applications where a party alleges denial, violation, infringement, or threat to a right or freedom guaranteed by the Bill of Rights....**

**The 1<sup>st</sup> respondent approached the High Court because he had a mixed bag of issues that touched on fair hearing, the principles of fair administrative action, abuse of the court process and finally a declaration that he was deprived proprietary and possessory rights of his property arbitrarily. To us the germane issue that cuts across the entire spectrum of the petition was the allegation of breach of fundamental rights to a hearing and therefore to say the matter should have been filed before the ELC is like splitting of hairs. Supposing the 1<sup>st</sup> respondent did so and he was met with another objection that ELC had no jurisdiction to rule over such matters as fair hearing, lack of service and denial of information. This is what we would term a procedural technicality because the 1<sup>st</sup> respondent was predominantly challenging a court order issued *ex parte* and a null and void sale that resulted in the vesting of his property by a subordinate court that had no jurisdiction and the ultimate loss of his property. This ground of appeal therefore is without merit.”**

16. From the cited decisions it is clear that whenever a matter raises issues cutting across the jurisdictions of the High Court and the Courts established under Article 162(2) of the Constitution, any of those Courts has jurisdiction to handle the matter.

17. There are also many authorities that have held that constitutional matters arising within matters before the Courts established under Article 162(2) of the Constitution are to be dealt with by those Courts. See for example **Daniel M. Mugendi v Kenyatta University & 3 others [2013] eKLR** and **Judicial Services Commission v Gladys Boss Shollei & another [2014] eKLR**. In my view, it amounts to an abuse of the court process for a party to pick what he or she thinks are constitutional issues and file a petition before the High Court even as the Environment and Land Court is dealing with the core dispute being the question of “*environment and the use and occupation of, and title to land.*” All the issues should be raised in one pleading and placed before one Court. Splitting issues and arguing them before different judges may result in embarrassment to the justice system stemming from issuance of conflicting decisions.

18. As already indicated, this Court does indeed have jurisdiction to hear the issues raised in the petition. However, there is pending before a competent Court with jurisdiction a matter between the same parties touching on the same land title that has given rise to the alleged constitutional issues. The matter before Nairobi Environment and Land Court was filed in 2018 whereas this petition was filed in 2020. The appropriate order is therefore to transfer this matter to Nairobi Environment and Land Court for purposes of merger with **Nairobi ELC**

**Cause No. 4 of 2018 Michael Anganya & Pamela Kawira Arunga v Commercial Bank of Africa Limited** so that the matter can be held and determined as one case. That is the order of this Court. The Deputy Registrar of the Constitutional and Human Rights Division is directed to comply with the order forthwith.

**Dated, signed and delivered through video conferencing/email at Nairobi this 4<sup>th</sup> day of June, 2020.**

**W. Korir,**

**Judge of the High Court**