



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 255 OF 2018

KAKUZI PLCPETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION2ND RESPONDENT

AND

KAKUZI DIVISION DEVELOPMENT

ASSOCIATION.....INTERESTED PARTY

RULING

APPLICATION

1. The Petitioner through an application dated 13th March 2020 filed on the even date brought pursuant to **Article 22(1) (4), 23(1) of the Constitution of Kenya 2010 and Rule 4 and 8(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (otherwise referred to as the “The Mutunga Rules”)** seeks the following orders:-

a. Prayer No. 1 spent.

b. That this Honourable Court do transfer Nairobi Constitutional Petition 255 of 2018 Kakuzi PLC vs. The Honourable Attorney General, the National Land Commission & Others to the Malindi Environment and Land Court for further directions.

c. That costs of this application be provided for.

2. The Application is premised on the ground on the face of the application and further supported by supporting Affidavit by Denis Gitaka sworn on 13th March 2020.

PETITIONER’S CASE

3. The Petitioner state that on 25th February 2020 the three Judge Bench in Malindi ELC Petition No. 19 of 2016 consolidated with 291 of 2016; Malindi Law Society vs. The Hon. AG; National Assembly and NLC dismissed the Petitioner’s application for consolidation, holding that it did not have jurisdiction to transfer a pending Constitutional Petition in the High Court to the ELC. It also made a finding that Kakuzi PLC and Del Monte had not filed an application for transfer before the High Court seized of the matter. The Petitioner was opposed against the decision.

4. It is noted that arising from the said ruling, the Petitioner seeks to transfer the present Petition to Malindi ELC which is currently dealing with Malindi ELC Petition No. 19 of 2016 which inter alia; deals with the Constitutionality of Section 15 of the NLC Act.

5. The Petitioner/Applicant have admit that on 28th February 2020, the Malindi ELC indicated that the Judgment will be issued on notice. It further urges that it is imperative that the Court urgently deals with the application for transfer to Malindi ELC; whereupon the Petitioner will prefer an application for consolidation under certificate of urgency so that the Petitioner can be heard before the delivery of judgment in the

Malindi Petition.

6. The Petitioner contend that a piece meal approach on **Section 15 of NLC Act** would be highly detrimental to all parties who are affected by the said section. It is further the Petitioner's case that it would be just and fair that the present case be transferred to the Environment and Land Court in Malindi which is currently dealing with the issue of inter alia; the constitutionality of **Section 15 of the NLC Act**. The issue of the constitutionality of **Section 15 of the NLC Act** it is urged, that it raises important public interest issues, as it seems that the issue of sanctity of title is no longer guaranteed.

7. The Petitioner urge further that there are other additional issues that the Malindi Environment and Land Court would need to consider other than, what has been raised in the Malindi Petition which are set out in the supporting affidavit of Denis Githaka.

8. The Petitioner/Applicant state that it will suffer grave prejudice if the application for transfer to the Environment and Land Court; – Malindi, is not granted due to the fact that if the additional issues raised in the Amended Petition are not dealt with in the Judgment; the Petitioner's constitutional right to a fair hearing under **Article 50(1) of the Constitution** would be severely hampered as it would be impossible to raise any new issues at the appeal stage, if need to appeal any resultant judgment arose, at the appellate stage, as new legal arguments cannot be raised. This it is averred will result in hardship to the Petitioner. The transfer and eventual consolidation of the constitutional petitions will facilitate the just determination of all issues concerning the constitutionality of **Section 15 of the NLC Act**, in a holistic manner and prevent conflicting court decisions on the same issues. This would in turn save on judicial time and prevent piece-meal litigation on the constitutionality of **Section 15 of NLC Act**.

9. The Petitioner urge that it is imperative that those parties who are directly affected and impacted and having pending claims before the NLC are heard in the Malindi Petition.

RESPONDENTS RESPONSE

10. The Respondents did not file any response nor submissions to the Application inspite of having been given upto 24th August 2020 to do so by this Court.

INTERESTED PARTY'S RESPONSE

11. The Interested Party is opposed to the Petitioner's application for transfer and relies on the Replying Affidavit by Stephen Kuria Mbugua.

12. The Interested Party comprising of 3681 members all citizens of the Republic of Kenya claim is on the basis of provisions of **Article 67(1) (e) of the Constitution and Section 15 of the National Land Commission Act**. The Interested Party aver that in 2017 they filed a claim with the National Land Commission being NLC/HLI/006/2017 to which the Ex-parte Applicant was invited by the Commission and filed a response to the Interested Party's claim. The parties went through pre-trial process and the matter was set down for hearing. Subsequently Kakuzi PLC, the Petitioner herein, filed the instant Petition, in which the Court stayed the proceedings at the National Land Commission.

13. The Interested Party filed a response and submissions however as the issues raised in the Petition were similar to the ones in ELC Petition No. 19 of 2016 – Malindi case, the Court directed that this case do await the determination of the Malindi case.

14. The Petitioner herein filed an application dated 11th October 2019 seeking to be enjoined to ELC Petition No. 19 of 2016 – Malindi case, and also to have the same reopened, before a three Judge bench; which application was declined.

15. The Interested Party contend the Petitioner/Applicant filed this matter in a Court with no jurisdiction as the issue raised in the Petition are issues within the jurisdiction of the Environment and Land Court. It is therefore contended that this Court cannot transfer this matter as it has no jurisdiction over the same.

16. It is further urged that the suit property herein L.R. No. 10731 and L.R. No. 11574 (21211) is in Muranga and the decisions made by the 2nd Respondent ought to be challenged by the Petitioner were made in Nairobi. It is the interested Party's position that the Court with jurisdiction to handle the Petition is either the ELC Court at Nairobi or Muranga.

17. The Interested Party contend the proceedings in ELC Petition no. 19 of 2016 – Malindi case, have closed and pending judgment and the three (3) Judge bench declined to reopen the matter and therefore it is contended transferring the matter to Malindi will be superfluous as the parties will not be heard. Further it is averred the suit in Malindi has been heard, submission made and therefore allowing the transfer of this Petition at this stage, to that court only serves to stall the matter further and delay a determination of the issues raised. It is not indispute that the issues raised in Malindi Petition are similar to the issues raised in this Petition; thus challenging Section 15 of the National Land Commission Act. The Interested Party therefore aver that the matter can be stayed pending the delivery of judgment in ELC Petition No. 19 of 2016 – Malindi.

ANALYSIS AND DETERMINATION

18. I have considered the Petitioner's application, the affidavit in support, the Interested Party's Replying Affidavit and submissions on record, and from the above the issue arising for considerations can be summed up as follows;-

a) Whether the Petitioner has met the threshold for the Petition here to be transferred as sought?

b) Whether Court has jurisdiction to entertain the present application?

A. WHETHER THE PETITIONER HAS MET THE THRESHOLD FOR THE PETITION HERE TO BE TRANSFERRED AS SOUGHT?

19. The jurisdiction of the Constitutional court to transfer a Petition is well set out under **Rule 8(1) of the Mutunga Rules**, where it is clearly provided that every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place. **Rule 8(2) of the Mutunga Rules** provides that despite **sub Rule (1)**, the High Court may order that a Petition be transferred to another Court of competent jurisdiction either on its own motion or on the application of a party.

20. The Petitioner herein is seeking the transfer of this Petition to ELC Malindi Petition on several grounds on the face of the application and as already set out herein above. The Interested Party though opposed to the transfer admit, that the issues raised in Malindi Petition are similar to the issues raised in the instant Petition as the two Petitions challenges the provision of **Section 15 of the National Land Commissions Act**.

21. The Petitioner contend that the piece-meal approach on **Section 15 of the NLC Act** would be highly detrimental to all parties who are affected by the said section. It should be noted that the issue of the constitutionality of **Section 15 of the NLC Act** is of great importance to public interest as the issue of sanctity of title is in question. It is also noted that the Petitioner has raised additional issues, that the Malindi Environment and Land Court would need to consider, other than, what has been raised in the Malindi Petition and which are clearly set out in the Petitioner's affidavit of Denis Githaka.

22. It is Petitioner's contention that it will suffer great injustice if the application for transfer as sought is denied. It is Petitioner's position that the refusal to transfer this matter to Malindi Petition, the Petitioner's Constitutional right to fair hearing under **Article 50 (1) of the Constitution** would be severely hampered as it would be impossible to raise any new issues at the appeal stage, if need to appeal, any resultant Judgment arise, as at the appellate stage, new legal arguments cannot be raised. I am alive to the fact that the right to fair hearing under **Article 25 (c) of the Constitution** is one of the fundamental rights and freedoms that may not be limited despite any other provision in the constitution.

23. In the case of **Daniel Mugendi vs Kenyatta University & Others, Civil Appeal No. 6 of 2012** the Court of Appeal rendered itself thus:

"...the order to do justice in the event where the high court, the industrial court or the environment and land court division comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar and equal status should in the spirit of harmonization effect the necessary transfers among themselves..."

24. The Interested Party contend, that even through the law allows this honourable Court to transfer a matter before it, to another Court, it does not dictate that the suit be transferred to a specific Court as prayed for in the Petitioner's application but to a court competent to handle the matter. The Interested Party urge that the transfer should conform to **Section 12, 13, 14 and 15 of the Civil Procedure Act**.

25. The Interested Party further submit the land to which Petitioner's stakes a claims are L.R No. 10733 and L.R. No. 11674 (21211) situated within Kakuzi area Muranga County and as such urges, if the Petition herein was to be transferred, then pursuant to **Section 12 of Civil Procedure Act**, it should be transferred to the Court within the local limits, whose jurisdiction the property is situate, thus, either Environment and Land Court, Muranga, Thika or Nairobi and not Malindi.

26. The proceedings against the Petitioner's lands was instituted by the Interested Party vide NLC/HLI/006/2017 at NLC Nairobi. The Respondent's land offices are in Nairobi whereas the Interested Party's are from Kakuzi in Muranga. Pursuant to **Section 15 of the Civil Procedure Act**, it is Interested Party's position, that the Petition should be transferred to the place of business of the Respondent and/or where the cause of action arose; that is the Environment and Land Court in Nairobi and not Malindi.

27. The Interested Party in support of their proposition urge that in **Malindi Law Society v. Attorney General & 2 Others (2020) eKLR**, the three Judge bench in determining the issue of transfer and consolidation of the Petition before it, stated that:-

"while the matters in issue appear on the surface thereof to be matters falling within the jurisdiction of this Court in accordance with Article 162(2) (b) of the Constitution and Section 13(2) of the Environment and Land Court Act, this Court as we have seen, does not have the jurisdiction to direct transfer of the said matters to itself from the High Court and any attempt to do so may precipitate judicial anarchy."

28. **Section 18 of the Civil Procedure Act**; on power to transfer suits which may be instituted in more than one Court is inapplicable to Constitutional Petitions as **Rule 8(1) of Mutunga Rules** deals with the issue of transfer as regards Constitutional Petitions.

29. In the case of **Pamoja Women Development Programme & others v. Jackson Wangombe and others [2016] eKLR. The Court of Appeal in Prof. Mugendi vs. Kenyatta University and Others** held that the Court of Appeal stated that courts of equal status can have direct transfer of matters amongst themselves. The key port here is court must be of competent jurisdiction. The Malindi Court declined the Petitioner's application for transfer and consolidation, and stated it has no jurisdiction to transfer a pending Constitutional Petition in the High Court to ELC. The Court further noted that Petitioner/Applicant herein and Del Monte had not filed an application for transfer before the High Court seized of the matter.

30. The present application for transfer is based on the fact, that the Malindi Court, is currently dealing with the Malindi ELC Petition No. 19 of 2016 which inter alia; deals with the Constitutionality of **Section 15 of NLC Act**. The Interested Party in it's submission seek that this

Petition be transferred to ELC Court in Nairobi or Muranga. The Interested Party's submissions have good intentions herein and would appear to be the position as regards **Rule 8(1) of the Mutunga Rules**, had the situation in the Malindi cases been different from the contention by the Petitioner.

31. The Interested Party fails however to consider, that the Malindi ELC is already dealing with the Constitutionality of **Section 15 of the NLC Act**, and that the issues in the current Petition and Malindi Petition are similar. I find that it is crucial and very important that the two Petitions and the issues thereto be considered together, and the Malindi Court deal with the three Petitions to prevent conflicting decisions on the same legal issues, which may embarrass the Court. The Interested Party objection to transfer the Petition on the issue of costs does not arise as proceedings can be handled virtually as is the present practice. I find that the online/virtual proceedings will minimize on legal and travel costs to all parties. The issue of great concern herein as provided by the Constitution, is to ensure litigants get fair trial in all matters presented before a Court.

32. This Court has not been informed that the Malindi ELC has delivered its judgment nor has the date for judgment been disclosed to this Court. It is in view of the above, possible, in the interest of doing substantive justice and this being a land matter, that is of great importance and emotive not only to the litigants but all Kenyans; to give all parties an opportunity to ventilate their issues before a Court of law. It is in view of the nature of the case, possible, for the Court seized with the Malindi case to arrest the Judgment, so that all the issues can be addressed holistically, instead of dealing with piece-meal litigation. I have no doubt that a piece-meal approach on **Section 15 of the NLC Act** would be highly detrimental to all parties who are affected by the said Section and most likely, would lead to conflicting decisions on the very same issue. I have no hesitation in stating that the issue of the constitutionality of **Section 15 of NLC Act**; If not properly dealt with, being one of the most important public interest issue, may lead to great challenges in this Republic; as regards an issue of sanctity of title being no longer guaranteed.

33. I have considered that the Petitioner urges that there are additional issues that the Malindi Environment and Land Court would need to consider, other than, what has been raised in the Petition before it, which in my view can only be dealt with once this matter is before the Malindi Court.

34. The Applicant/Petitioner herein has demonstrated, that if the application for transfer is declined, will stand to suffer grave prejudice, as it has raised additional issues in the amended Petition, which would not be addressed in the Judgment as they have not yet been pleaded in the Malindi Petition and further any Judgment delivered by the three Judge bench in Malindi ELC will be a Judgment in rem. Further the Petitioner's Constitutional right to fair hearing under **Article 50(1) of the Constitution and Article 25 (c) of the Constitution** would severely be hampered as it would be impossible to raise any new issues at the appeal stage if need to appeal any resultant judgment arise. This will prejudice the Petitioner/Applicant. I find however the transfer sought herein will facilitate the just determination of all issues concerning the constitutionality of **Section 15 of the NLC Act** by one bench in an holistic manner and prevent conflicting decisions on the same issues and save on judicial time. I find that substantive justice shall be done, if all parties, who are directly affected and impacted and having pending claims before the NLC are given an opportunity to participate and are heard in the Malindi Petition. I find that it is not proper to shut a litigant out of the corridors of justice on a mere technicality of whatsoever nature as justice is supposed to be done to all without due regard to procedural technicalities.

A. WHETHER COURT HAS JURISDICTION TO ENTERTAIN THE PRESENT APPLICATION?

35. The Petitioner contend contrary to the Interested Party's submissions, that the High Court has no jurisdiction to deal with the present Petition is a nullity, erroneous and without legal basis. In support of this proposition the Petitioner/Applicant seek reliance from the decision in **Petition No. 48 of 2015 Del Monte Ltd vs. NLC & others** where it was held that the High Court had jurisdiction to deal with the petitions in respect of **Article 165 (3) of the Constitution**. The Petitioner's Amended Constitutional Petition was filed before the High Court pursuant to **Article 165 (3) (d) (i) of the Constitution. Article 165 (3) (d) (i) of the High Court** provides that the jurisdiction to hear any question respecting the interpretation of the constitution including the question of whether any law is inconsistent with or in contravention of the Constitution lies with the High Court. Further, the cause of action and/or the violation of the Petitioner's rights arose in Nairobi after the filing of the proceedings NLC/HLI/006/2017, NLC/HLI/069/2017, NLC/HLI/049/2017, NLC/HLI/052/2017, NLC/HLI/054/2017, NLC/HLI/176/2018, NLC/HLI/170/2018, NLC/HLI/168/2018, NLC/HLI/530/2018, NLC/HLI/063/2017 in Nairobi. **Rule 8(1) of the Mutunga Rules** provides that the petition should be instituted in the High Court within whose jurisdiction the alleged violation took place.

36. **Rule 8(1) of the Mutunga Rules** provides where the Petition is supposed to be filed, **Rule 8(1)** states that a Petition should be instituted in the High Court within whose jurisdiction the alleged violation took place. From the contents of the pleadings herein it is my view that both the Environment and Land Court and High Court have congruent and concurrent jurisdiction to deal with Constitutional Petitions touching on Land matters and constitutionality of land statutes (See the case of **Patrick Musumba vs. NLC & 4 others (2015) eKLR**).

37. On review of prayers sought in the Amended Constitutional Petition herein, it is clear that the core/dominant issue is in respect of constitutionality of **Section 15 of the NLC Act** in respect of historical land injustice claims vis a vis the breach of the Applicants (Kakuzi's) various Constitutional rights under **Articles 27, 46, 47, and 50(1) of the Constitution**.

38. The upshot is that the Petitioner's/Applicant's application is meritorious. I proceed to grant the following orders:-

a) The Nairobi Constitutional Petition No. 255 of 2018 Kakuzi PLC vs. the Honourable Attorney General, the National Land Commission & Others be and is HEREBY transferred to Malindi Environment and Land Court for further directions;

b) Costs of the application be in the cause.

Dated, Signed and Delivered at Nairobi on this 1st day of October, 2020.

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J. A. MAKAU

JUDGE