



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 5 OF 2019

IN THE MATTER OF: ARTICLES 10, 22, 23, 27, 28, 35, 40, 48 AND 50 OF THE

CONSTITUTION

AND

IN THE MATTER OF: ARTICLES 7, 75, 82 AND 84 OF THE CONSTITUTION OF

KENYA

AND

IN THE MATTER OF: SECTION 3 OF THE GOVERNMENT LAND ACT

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 75 OF THE

FORMER CONSTITUTION OF KENYA AS READ WITH ARTICLE 40 OF THE

CONSTITUTION OF KENYA, 2010 IN THE ALLOCATION OF THE PARCEL

OF LAND KNOWN AS 17835 SITUATE IN KILIFI TOWNSHIP

AND

IN THE MATTER OF: CANCELLATION OF CERTIFICATE OF TITLE FOR: -

- PLOT NO. 17835/1 REGISTERED IN THE NAME OF FULSON COMPANY LIMITED**
- PLOT NOS. 1735/2, 1735/6 AND 1735/7 REGISTERED IN THE NAME OF EDWARD MZEE KAREZI**
- PLOT NO. 1735/3 REGISTERED IN THE NAME OF KILIFI BEACH PROPERTIES LIMITED**
- PLOT NO. 1735/4 AND 1735/5 REGISTERED IN THE NAME OF CHIERA WAITHAKA**

BETWEEN

MOHAMED SHALLY SESE

(suing as the administrator of the

estate of the late SHALI SESE).....PETITIONER

VERSUS

1. EDWARD MZEE KAREZI
2. FULSON COMPANY LIMITED
3. KILIFI BEACH PROPERTIES LIMITED
4. CHIERA WAITHAKA
5. STANBIC BANK (k) LIMITED
(successor in title of CFC Stanbic Bank)
6. MINISTRY OF LANDS AND HOUSING
7. ATTORNEY GENERAL
8. EMMANUEL KAZUNGU
9. DIRECTOR OF PUBLIC PROSECUTIONS
10. ANTONIO DE GREGORGIOGETRUDO
HENRICUS ANTONIUS MARA VAN DIJCK
11. GETRUDA JOSEPHINA MARIA

CORNELIA OP HET VELD.....RESPONDENTS

RULING

The Application

1. The application before court is a Preliminary Objection dated 2/6/2020 raised by the 2nd and 3rd Respondents against the petition dated 22/1/2019. The Notice of Preliminary Objection is premised on the following grounds:

(a) This Honourable Court lacks the jurisdiction to hear and determine this suit by dint of the provisions of Section 13 of the Environment and Land Court Act Cap 12A of Laws of Kenya;

(b) The said petition contravenes the provisions of Article 40, 162 (2) (b) and 165 (7) of the Constitution of Kenya, 2010.

2. The parties did not file any responses to the Notice of Preliminary Objection. However, they filed submissions.

Submissions

Petitioner's Submissions

3. The Petitioner filed their submissions on 19/6/2020 and through his counsel Mr. Gikandi submitted that the jurisdiction of this court is conferred by Article 165 (3) (b) of the constitution, which grants the High Court the power to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened. Counsel submitted that by virtue of Article 162 (2) the High Court has no jurisdiction to entertain matters or disputes relating to environment and use and occupation of and title to land. Counsel further submitted that Article 162 as read with Section 13 (3) of the Environment and Land Court Act did not confer exclusive jurisdiction to the Environment and Land Court to determine whether a right or fundamental freedom in the Bill of Rights has been denied. Mr. Gikandi submitted that the petition rises issues of the process leading to the allocation of the suit properties to the Respondent, abuse of legal process and violation and/or threatened violation of the Petitioner's rights, and that both the High Court and the Environment and Land Court have jurisdiction to determine whether the Petitioner's rights have been violated.

4. Counsel relied on the authorities **Habo Agencies Limited v National Land Commission & others Petition No. 44 of 2018, Leisure Lodges Limited v Commissioner of Lands & 76 others [2016] eKLR, Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others [2017] eKLR and Theresia Runji & 3 others v National Land Commission [2018] eKLR** where the courts held that there exists duality or concurrence and coordinate jurisdiction of the High Court and the Environment and Land Court to determine violations and/or threatened violations of rights in relation to land disputes. Counsel further submitted that it lies upon the party moving the court to choose whether to file his petition before the High Court or before the Environment and Land Court and the Respondents have no right to choose for the Petitioner the forum to move to have his grievance determined.

2nd and 3rd Respondents Submissions

5. The 2nd and 3rd Respondents filed their submissions on 16/6/2020 and through their counsel Ms. Naliaka submitted that this court lacks the requisite jurisdiction to hear and determine the petition as framed by dint of provisions of Articles 162 (2) (b) and 165 of the constitution as read together with Section 13 of the Environment and Land Court Act Cap 12A, and that the petition ought to be struck with costs. For that submission, counsel relied on the authority **Owners of the Motor vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] KLR 1**. Ms. Naliaka submitted that the petition raises issues of use, occupation of and validity of title to land which falls under jurisdiction of the Environment and Land Court. Counsel cited **Kisauni Bridge Limited v Kenya Urban Roads Authority & Another [2019] eKLR** and **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**.

6. Ms. Naliaka submitted that the Environment and Land Court being a court with the status of the High Court has relevant jurisdiction to deal with issues relating to denial, violation or infringement of, or threat to, rights and fundamental freedom in matters envisioned by Article 162 (2) (b) and Section 13 of the Environment and Land Court Act. Therefore, counsel submitted, the issues raised in the petition can be appropriately dealt with in the Environment and Land Court.

6th and 7th Respondents’ Submissions

7. The 6th and 7th Respondents filed their submissions on 14/7/2020 and through their counsel Mr. Makuto, submitted that this court lacks jurisdiction to hear and determine the petition. Counsel relied on the authority **Owners of the Motor vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] KLR 1** and submitted that the petition as filed raises issues of use, occupation of and validity of title to land which primarily falls under Article 162 (2) (b), Article 165 as read together with Section 13 of the Environment and Land Court.

8. Mr. Makuto further submitted that the Supreme Court in **Republic v Karisa Chengo and 2 others** held that it is best that issues of use and ownership of land be taken before the Environment and Land Court as the jurisdiction of High Court is different from the specialized courts. Mr. Makuto urged the court to allow the application and strike out the petition.

10th and 11th Respondents’ Submissions

9. The 10th and 11th Respondents filed their submissions on 15th July, 2020 and through their counsel M/s. Gulenywa submitted that the dispute in these proceedings relate to the ownership and title to land and that the issues cannot be canvassed by way of constitutional petition as they require oral evidence to be adduced in court and as such the Environment and Land Court is best suited for this petition. Counsel relied on the case **The National Land Commission v Afrison Export Import Limited & others, ELC Reference Number 1 of 2018 [2019] eKLR**.

10. M/s. Gulenywa further submitted that there is no constitutional issue capable of being determined by this court as the Petitioner has placed reliance on provisions under the old constitution which are repealed and as such this court has no jurisdiction to make a determination under the repealed provisions.

Determination

11. Having considered the application before court the issue for determination is whether this court has jurisdiction to hear and determine this petition.

12. The Preliminary Objection is on the jurisdiction of this court to hear and determine the petition herein. The Respondent contends that the court lacks jurisdiction on the grounds that the matter relates to environment and the use and occupation of and title to land. The Petitioners however maintain that the court has jurisdiction because the issue before the court is on alleged violation of constitutional rights and fundamental freedoms, issues that fall within this court’s jurisdiction.

13. In the often quoted case of **The Owners of the Motor vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] KLR 1** jurisdiction is everything. Without it a court cannot make a move. Lack of jurisdiction thus renders a court’s decision void as opposed to it being merely voidable. When an act is void, it is a nullity *ab initio*. It cannot found any legal proceedings. See Lord Denning’s decision in the Privy Council case of **Benjamin Leonard Macfoy United Africa Company Limited (UK) [1962] AC 152**:

“Court has discretion in matters that are voidable not to proceedings that are a nullity for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court...”

And:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ...Any every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

14. I have looked at the prayers sought in the petition and I am inclined to the position that the petition indeed involves a dispute on ownership of land and so in my view the issues can best be canvassed by way of hearing and adducing of evidence by parties. I agree with the submissions by the Respondents that this petition would be properly handled in the Environment and Land Court as it relates to matters arising from environment and the use and occupation of and title to land. Consequently, the Preliminary Objection dated 2/6/2020 is upheld.

15. Mr. Makuto, counsel for the 6th and 7th Respondents urged the court to strike out the petition should the objection succeed. Striking out pleadings even after declining jurisdiction, is at the discretion of the court. Considering the nature of this petition I deem it appropriate to refer the matter to the Environment and Land Court for hearing and determination. I am guided by the decision in **Judicial Service Commission v Gladys Boss Shollei [2014] eKLR** where the Court of Appeal observed that:

“[40] Article 23 (1) & Article 165 (3) (b) of the constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, Article 23 (2) provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, Article 23 (3) does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers “a court” to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is Article 20 (3) that places an obligation on “any court” in applying a provision of the Bill of Rights to develop and law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other courts.”

16. From the foregoing, it is the finding hereof that this court, upon declining jurisdiction, has the residual powers to transfer this matter to the most appropriate court. I therefore hereby direct that this petition be transferred to the Environment and Land Court at Mombasa for hearing and final determination.

That is the Ruling of the Court.

Dated, Signed and Delivered at Mombasa this 6th day of October, 2020.

E. K. OGOLA

JUDGE

Judgment delivered in Chambers via MS Teams in the presence of:

Ms. Njau holding brief Mwandeje for 2nd and 3rd Respondents

Mr. Ondeng holding brief Gikandi for Petitioner

Ms. Naliaka for 1st and 3rd Respondents

Mr. Kaunda Court Assistant