



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 466 OF 2018

IN THE MATTER OF ARTICLES 22, 23, 24, 40, 47 (1) AND 50 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 24(1), 27(1), 40(2) (3) AND 50 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

MABROUKIE TEA AND COFFEE

ESTATES LIMITED.....PETITIONER/APPLICANT

VERSUS

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

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

RULING

PETITION

1. The Petitioner through a Petition dated 20th December 2018 and filed on the even date seek the following reliefs:-

a) This Honourable Court be pleased to declare that Sections 15(3) (b)(i) and Section 15(3)(b) (ii) NLC Act are null and void for being contrary to Articles 24, 27(1), 40, and 50(1) of the Constitution.

b) This Honourable Court be pleased to declare that it is unlawful and contrary to Article 50(1) of the Constitution for the National Land Commission to hear, determine and/or make recommendations on historical land injustice claims in the absence of legally enacted regulations to this effect.

c) Such other orders as this Honourable Court shall deem just.

APPLICATION

2. The Petitioner through a Notice of Motion dated 13th March 2020 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 Freedom) Practice and Procedure Rules, 2013* (otherwise referred to as “*The Mutunga*” Rules) seek the following orders:-

a) Prayer no. 1 spent.

b) That this Honourable Court do transfer Nairobi Constitutional Petition 466 of 2018 Mabroukie Tea and Coffee Estate Limited vs. The Honourable Attorney General & the National Land Commission to the Malindi Environment and Land Court for further directions.

c) That costs of this application be provided for.

3. The application is premised on the ground on the face of the application and supporting affidavit by Lydia Musili sworn on 13th March 2020.

RESPONDENTS' RESPONSES

4. The Respondents have not filed any response to the Petitioner's application herein.

THE PETITIONER'S SUBMISSIONS

5. The Petitioner herein filed submissions in support of the application dated 14th August 2020.

RESPONDENT'S SUBMISSIONS

6. The Respondents were given upto 24/8/2020 to file their submission which they have not complied with to date.

ANALYSIS AND DETERMINATION

7. I have very carefully considered the Petitioner's application seeking transfer and grounds in support as well as the Petitioner's submissions and from the above the issue arising for consideration is one thus:-

a) Whether the Petitioner has met the threshold to justify the transfer of this petition as sought in the application dated 13th March 2020?

8. The Petitioner seeks transfer of the instant Petition to the Malindi Environment Land Court for further directions. It is Petitioner's case that on 28th February 2020, 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. The Court held that it did not have jurisdiction to transfer a pending Constitutional Petition in the High Court to 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.

9. The Petitioner herein seeks transfer arising out of the said ruling. The Petitioner seeks to have the instant Petition transferred 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***.

10. Under ***Rule 8(1) 7 (2) of the Mutunga Rules, 2013*** provides 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, 2013*** states 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. It therefore follows that a High court has jurisdiction to transfer a suit pending before it as provided under ***Rule 8(1) & (2) of the Mutunga Rules, 2013***.

11. The Petitioner seeks transfer of the Petition, following a ruling in 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***. The Petitioner aver that it is important that the Malindi ELC deals with the instant Petition to prevent conflicting decisions on the same legal issues. It is further averred that the costs of transfer of the case to Malindi does not arise, as the proceedings can be handled virtually, as it is the present practice. It is argued that infact online/virtual proceedings will minimize the legal and travel costs.

12. It is further pointed out that no prejudice will be suffered by the Respondents or any party as the Malindi ELC is yet to deliver the Judgment and that it would be possible to arrest the judgment so that all the issues can be addressed holistically instead of dealing with piece-meal litigation. A piece-meal approach on ***Section 15 of the NLC Act*** which is the main issue in this Petition and the others; would be highly detrimental to all parties, who are affected by the said Section and would most likely lead to conflicting decisions on the very same issue. I find that the issue of constitutionality of ***Section 15 of NLC Act*** raises an important public interest issue, as it appears as if the issue of sanctity of title is no longer guaranteed, hence the same should be seriously considered and dealt with once and for all, rather than dealing with piece-meal litigation on the said Section.

13. The Petitioner in seeking transfer of this Petition is concerned with other additional issues, that the Malindi ELC would need to consider, other than what has been raised in the Malindi Petition. Such additional issues which the Petitioner herein is concerned with are set out in the supporting affidavit of Lydia Musili of 13th March 2020 under paragraph 7 thereof.

14. It is Petitioner's contention that it will suffer grave prejudice if the application for transfer to Malindi ELC is denied, as the additional issues it raises, as stated herein above, and more specifically in the Amended Petition would not be considered in the Judgment as they have not yet been pleaded in the Malindi Petition. Further any Judgment delivered by the three Judge bench in the Malindi ELC will be Judgment in rem and the Petitioner as well as many others will suffer prejudice; as the Petitioner's Constitutional right to a fair hearing under ***Article 50(1) of the Constitution*** would be severely hampered and it would be impossible and also costly to raise any new issues at the appeal stage, if need to appeal any resultant Judgment arise. It is apparently clear that at the appellate stage, new legal arguments cannot be entertained or raised, which may result into hardship to the Petitioner herein.

15. The Transfer of the Petition, it is argued, that it will facilitate the just determination of all issues concerning the constitutionality of ***Section 15 of NLC Act*** in a holistic manner; and prevent conflicting court decisions, which may arise on the same issue, if the matter proceeds before different Courts. This will also save on valuable Judicial time. It is of great importance, if the parties who are directly affected and impacted and have pending claims before NLC are given an opportunity to be heard in the Malindi Petition. The Petition herein

involves an issue on land, which is a sensitive and an emotive issue in this country. It is therefore important that parties are given a hearing especially where a Section of a statute is challenged in more than one case. I find that it is important that the Court handling the Malindi Petition do consider the importance of hearing this case and related cases as one matter so as to avoid conflicting decisions being given by different Courts.

16. In the instant application, the Respondents did not file any response nor any submissions, though there was an appearance on their part, when the date for hearing was being given. They were given an opportunity to file submissions but failed to do so. I therefore find that the Petitioner's application is unopposed and ought to be granted as prayed for the reasons stated hereinabove.

17. The upshot is that the Petitioner's application dated 13th March 2020 is meritorious. I proceed to make the following orders:-

a) The Nairobi Constitutional Petition No. 466 of 2018 Mabroukie Tea & Coffee Estate Limited vs. The Hon. Attorney General & The National Land Commission Board is HEREBY transferred to Malindi Environment and Land Court for further directions.

b) Costs 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