



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 25 OF 2017**

**IN THE MATTER OF: ARTICLES 10, 22, 23, 27, 28, 35, 40, 48, 50, 157 & 244 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 14 & 15 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF THE COMPANIES ACT, CAP 486 LAWS OF KENYA, THE OFFICE OF THE PUBLIC PROSECUTIONS ACT, 2013 AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

**BETWEEN**

**LUCY WANJIKU MUKU.....PETITIONER**

**VERSUS**

**1. KARL SALZMANN**

**2. DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENTS**

**AND**

**1. KARL SALZMANN LIMITED**

**2. VALERIA CHAO.....AFFECTED PARTIES**

**RULING**

**The Application**

1. By a Notice of Motion dated 23<sup>rd</sup> June, 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Affected Parties pray for orders that:

- (a) The Petition dated 5<sup>th</sup> June 2017 be struck out for being contrary to Article 165(6) of the Constitution of Kenya.
- (b) The Petition dated 5<sup>th</sup> June 2017 be struck out for want of jurisdiction pursuant to Article 162(2)(b) as read with Article 165(5) of the Constitution.
- (c) The Petition dated 5<sup>th</sup> June 2017 be struck out for being an abuse of the court process.
- (d) The costs of this motion and of the struck out petition be awarded to the 1<sup>st</sup> Respondent and the 1<sup>st</sup> & 2<sup>nd</sup> Affected Parties.

2. The motion is premised on grounds set out therein and is supported by affidavit of Karl Salzmann sworn on 23<sup>rd</sup> June, 2017.

3. The Applicant's case is that the Petitioner has by her own admission filed numerous suits over the same dispute. Specifically **Mombasa High Court Winding Up Petition Number 3 of 2015 Lucy Wanjiku Muku vs. Karl Salzmann Limited & another** seeks prayers which are effectively the prayers sought in the present petition. The Petitioner herein also filed a Notice of Motion dated 14<sup>th</sup> October 2015 where the Petitioner sought the following order among others:

That pending further orders from this Court the 2<sup>nd</sup> Respondent be restrained from interfering with the Applicant's right of access to and occupation of the residential house standing on a plot of land known as Plot No. Kwale/Diani Settlement Scheme/2792 and/or the right to run the affairs of Karl Salzmann Limited and/or the right to enjoy the use of motor vehicle Registration No. KBW 262E.

4. The Applicant states that the High Court (Justice P. J.O. Otieno), in a Ruling delivered on 7<sup>th</sup> December 2015 dismissed the application and specifically held that the Petitioner "*cannot therefore assert a right to occupy and use the company property as her residence purely because she and the 2<sup>nd</sup> Respondent have done so in the past*". The Applicant states that the Petition dated 5<sup>th</sup> June 2017 on the other hand similarly seeks prayers that would effectively overturn that finding of the High Court in Winding Up Petition 3 of 2015. The Petition herein is to that extent contrary to Article 165(6) of the Constitution which prohibits the High Court from supervising the High Court.

5. The Petitioner herein also filed **Mombasa Environment and Land Court Number 210 of 2015 Lucy Wanjiku Muku vs. Karl Salzmann Limited & another**. The 1<sup>st</sup> Respondent and the 1<sup>st</sup> Affected Party applied to strike out the suit vide their Notice of Motion dated 10<sup>th</sup> October 2016. The Ruling in Mombasa ELC Number 210 of 2015 was scheduled for delivery on 25<sup>th</sup> July 2017. It is not clear to this court whether the said Ruling was delivered. The Applicant submitted that Petition No. 3 of 2015 is awaiting fixing of a hearing date by the Petitioner. The Applicant states that given the state of facts regarding ELC Number 210 of 2015 and Winding Petition No. 3 of 2015, the Petition herein is contrary to Article 165(6) in so far as it invites the Constitutional Division of the High Court to stay or supervise the exercise of judicial power by the Environment and Land Court as well as the Commercial Division of the High Court, a jurisdiction which the High Court lacks. The Applicant states that the existence of the two aforesaid suits renders the Petition herein an abuse of the court process for the reasons that the complaints in the Petition, save for the complaints on the criminal case, are essentially a civil dispute between the Petitioner on the one hand and the 1<sup>st</sup> Respondent & 1<sup>st</sup> Affected Party on the other hand. It is not shown that the statutory regime governing the resolution of the civil dispute are incapable, insufficient or ill-suited to resolve the dispute both in the Environment and Land Court and in the Commercial Division of the High Court or that the available remedy is unconstitutional. Neither is it shown that there is some special feature in the current petition that warrants the invocation of the Constitutional jurisdiction of the High Court to the exclusion of the statutory dispute resolution mechanism known in law.

6. The Applicant states that in so far as Winding Up Petition Number 3 of 2015 and ELC Case No. 210 of 2015 have not been withdrawn, the present Petition dated 5<sup>th</sup> June 2017 is *sub judice*., and that in any event, in so far as the Petition herein touches on issues raised or seeks reliefs sought in ELC Case No. 210 of 2015; the High Court is thereby denied jurisdiction by virtue of Article 165(5) of the Constitution of Kenya. In so far as the Petition herein seeks to interfere with ongoing Kwale Criminal Case Number 996 of 2015, the same is an abuse of the court process and in violation of Article 157 of the Constitution for the reasons that there is a clear demonstration at paragraph 19 of the Petition that the Petitioner's actual complaint is that the 1<sup>st</sup> Respondent was not charged when the 1<sup>st</sup> Respondent's security guards allegedly assaulted the Petitioner. Secondly, the said complaint is an invitation to the court to superintend the manner in which the 1<sup>st</sup> Respondent arrives at the decision to prefer charges against one suspect and not the other. Further, the criminal case has been in existence for over two years with the Petitioner as recent as 6<sup>th</sup> April 2017 requesting the court to consider having the matter settled out of court. The Applicant states that it is an abuse of the court process to attempt to quash proceedings that have been in progress for two years without protest and which have been fixed for hearing on 20<sup>th</sup> July 2017 after negotiations failed.

### **The Response**

7. The Petitioner/Respondent oppose the application vide Replying Affidavit sworn on 12<sup>th</sup> July, 2017 by the Petitioner.

8. The Petitioner's case is that indeed there are cases touching on the matter raised in the petition herein, but that they do not compromise the continuation of this petition. The Petitioner states that after filing **Mombasa ELC Case No. 210 of 2015** and **Winding Up Petition No. 3 of 2015** there has been fundamental changes which make the whole matter a constitutional petition. The aforesaid fundamental changes are that when the Petitioner filed the aforesaid cases, the 2<sup>nd</sup> Interested Party had not moved in the suit property and there was nobody using her personal items which were left when the 1<sup>st</sup> Respondent allegedly kicked the Petitioner out of the suit property. Secondly, the Petitioner alleges that by then she had not been directed by the Official Receiver to provide a board resolution so that she could be issued with the compliance certificate as provided by Section 221 (v) of the (repealed) Company Act, Cap 486 Laws of Kenya. Thirdly, the dismissal of **Kwale Criminal Case No. 1069** occurred on 23<sup>rd</sup> February, 2017. As such, this is a new issue which has been done in violation of the Petitioner's constitutional rights.

9. The Petitioner states that Hon. Justice P.J Otieno in a Ruling delivered in Winding Up Petition No. 3 of 2015 appreciated the fact that the Petitioner was entitled to a right in respect of her interest which is 51 % shares in the 1<sup>st</sup> Interested Party. It was the view of the said Judge that, that could be done through a Winding Up Petition. However, due to the requirement of law for the filing of a compliance certificate before Winding Up Petition can be listed for hearing, the Petitioner states that she has not been able to do this since the Official Receiver required board resolutions which is impossible to get in this matter because parties are not talking. The Petitioner believes that this Petition is the most efficacious way of determining all the disputes ones and for all. As such, **Mombasa ELC Case No. 210 of 2015** and **Winding Up Petition No. 3 of 2015** can lawfully remain standing and abide the outcome of this petition as indeed this petition raises issues that cannot possibly be addressed through the said pending actions. The Petitioner's case is that according to **Article 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** the Court may proceed with the hearing of a petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings. As such, striking out of a Petition should always be the last result. The Petitioner urged the Court not to strike out the petition.

## Submissions

10. Parties filed submissions which I have considered. The issue raised for determination is whether or not the petition herein is a duplicate of other matters before other Courts as suggested.
11. For me the starting point is that the High Court exercising its constitutional jurisdiction has a wide latitude. That latitude is only subject to the particular jurisdiction granted to courts of equal status under the constitution. In many cases, however, there will be an overlap of jurisdiction, and in such cases it is upon the court to determine whether or not to accept jurisdiction.
12. Where there are allegations of concurrent matters in various courts, good practice would be to stay some of those matters and to proceed with one until conclusion so that the remaining ones may be determined later. An issue of striking out a suit is therefore not one to be entertained lightly.
13. In this particular case **Mr. Kongere** for the Applicant has referred to Msa ELC No. 210 of 2015, and a Winding Up Petition No. 3 of 2015, and submitted that the issues raised in this petition are the subject matter of the said ELC matter and the Winding Up petition, and that this petition is contrary to Article 165 (6) in so far as it invites the constitutional court to supervise the exercise of judicial powers by the ELC as well as the Commercial Division of the High Court, a jurisdiction which the High Court lacks. Mr. Kongere further submitted that in so far as the said Winding Up Petition No. 3 of 2015 and the ELC Case No. 2010 of 2015 have not been withdrawn, the present petition is *sub judice*.
14. **Mr. Gikandi** for the Petitioner did not agree and submitted that sometime in 2015 the Petitioner was involved in domestic problems with the 1<sup>st</sup> Respondent which culminated to a physical fight. Thereafter, the Petitioner was treated for the injuries the 1<sup>st</sup> Respondent had inflicted on her while the 1<sup>st</sup> Respondent was given first aid in the hospital and discharged. Both the Petitioner and the 1<sup>st</sup> Respondent were given P3 forms with the doctor's report (See annexure marked "**LWM-4**" in the Petitioner's supporting affidavit) and proceeded to lodge their respective complaints with the police. However, the 2<sup>nd</sup> Respondent only preferred charges against the Petitioner in **Kwale Criminal Case No. 996 of 2015** but no single charge was preferred against the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent.
15. Mr. Gikandi referred the Court to the Replying Affidavit sworn by **Charles Munyao** in which the 2<sup>nd</sup> Respondent has not denied the fact that the Petitioner sustained injuries as a result of the domestic problem with the 1<sup>st</sup> Respondent. As such, counsel submitted that the crucial question which the 2<sup>nd</sup> Respondent must answer is "Why has the 2<sup>nd</sup> Respondent not taken action against the 1<sup>st</sup> Respondent who caused the injuries sustained by the Petitioner?" Counsel submitted that this is an issue touching on the possible violation of rights of an individual under the constitution. Mr. Gikandi also submitted that record shows that after the aforesaid violence the Petitioner tried to access the suit premises, and the 1<sup>st</sup> Respondent allegedly directed his guards to beat the Petitioner up. The Petitioner sustained injuries which were treated and the Petitioner issued with a P3 form and a doctor's report. Thereafter, the Petitioner reported the matter to the police. Even though the 1<sup>st</sup> Respondent was directly involved as aforesaid the 2<sup>nd</sup> Respondent only charged the 1<sup>st</sup> Respondent's guards in **Kwale Criminal Case No. 1069 of 2015**. These are issues which prima facie establish constitutional culpability on the 2<sup>nd</sup> Respondents vis-à-vis constitutional rights of the Petitioner and which issues can best be interrogated in the petition herein, Mr. Gikandi submitted.
16. Mr. Gikandi further submitted that the Petitioner had a cordial relationship with the 1<sup>st</sup> Respondent after they met in German sometime in 2011. This relationship grew when the Petitioner moved to Kenya with the 1<sup>st</sup> Respondent so as to start joint investments and living together. The Petitioner and the 1<sup>st</sup> Respondent incorporated the 1<sup>st</sup> Affected Party whereby the Petitioner was the majority shareholder with 51% shares while the 1<sup>st</sup> Respondent had 49% shares. The 1<sup>st</sup> Affected Party acquired a parcel of land known as L.R NO. KWALE/DIANI SS/177 which was subdivided into 11 portions giving rise to L.R NOS. KWALE/DIANI SS/2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801 and 2802. Two of the plots, to wit, KWALE/ DIANI SS/2795 and 2802 were developed and sold while the others still remain undeveloped. The Petitioner and the 1<sup>st</sup> Respondent developed a house on plot no. L.R KWALE/ DIANI SS/2792 which they have been using as their matrimonial home. Further, the Petitioner and the 1<sup>st</sup> Respondent agreed to be drawing a salary of Kshs. 100,000/= for each while the rest of the money was to be retained with the 1<sup>st</sup> Affected Party to be used for the development of other plots which would be sold on time to expand business of the 1<sup>st</sup> Affected Party. However, in the cause of time the parties' relationship deteriorated and their dreams failed. This in turn resulted in the Petitioner filing **Mombasa Winding Up Petition No. 3 of 2015** and **Mombasa Environment and Land Court Case No. 210 of 2015** to secure her interest in the 1<sup>st</sup> Affected Party. Mr. Gikandi submitted that Mombasa **Environment and Land Court Case No. 210 of 2015** was dismissed by the court for, inter-alia, having been instituted by the Petitioner improperly on behalf of the 1<sup>st</sup> Affected Party. Further, the Petitioner has not been able to obtain a certificate of compliance for the 1<sup>st</sup> Affected Party from the Official Receiver because the Petitioner and the 1<sup>st</sup> Respondent are not in talking terms thus not possible to pass a board resolution to that effect. As such, the Petitioner is apprehensive that she will never be able to list Winding Up Petition because the Petitioner is not able to obtain a certificate of compliance. Furthermore, it is alleged that after the said Winding Up Petition was initiated the 1<sup>st</sup> Respondent started committing adultery in the Petitioner's matrimonial home with the 2<sup>nd</sup> Affected Party. It is alleged that the 2<sup>nd</sup> Affected Party has been using the Petitioner's personal items including the Petitioner's furniture and bed. This, it is alleged, made the Petitioner undergo a lot of mental stress as his fundamental rights have been violated by the 1<sup>st</sup> Respondent. In addition the 1<sup>st</sup> Respondent forcefully evicted the Petitioner from the house standing on plot no. L.R KWALE/ DIANI SS/2792 which they have been using as their matrimonial home. Further, even though the Petitioner is the majority shareholder in the 1<sup>st</sup> Affected Party, the 1<sup>st</sup> Respondent sold the 1<sup>st</sup> Affected Party's plots, to wit, plot nos. L.R KWALE/ DIANI SS/2795 and 2802 in a skewed manner and has not been able to account for the proceeds realized therefrom. Furthermore, the 1<sup>st</sup> Respondent has allegedly completely thrown the Petitioner from the businesses of the 1<sup>st</sup> Affected Party and the Respondent has unlawfully allowed one **Paul Van Beveren** to carry on business affairs of the said company without any authorization by the Board of Directors. As such, Mr. Gikandi submitted that the 1<sup>st</sup> Respondent has violated the Petitioner's right to property. Again, the 1<sup>st</sup> Respondent is alleged to have violated the Petitioner's right to access information by failing to account to the Petitioner whether the 1<sup>st</sup> Affected Party is making losses or profits. Further, Mr. Gikandi submitted that by locking the Petitioner out of the affairs of the 1<sup>st</sup> Affected Party, the 1<sup>st</sup> Respondent violated the Petitioner's right to work as enshrined under **Article 15 of the International Covenant on Economic, Social and Cultural Rights** which is applicable herein by virtue of **Article 2 (6) of the Constitution of Kenya, 2010**. The fact that the 1<sup>st</sup>

Respondent has thrown the Petitioner out of the matrimonial home; allowed the 2<sup>nd</sup> Affected Party to use the Petitioner's personal items; failed to account for the affairs of the 1<sup>st</sup> Affected Party; colluded with the 2<sup>nd</sup> Respondent so as not to face charges over the injuries inflicted upon the Petitioner; failed to co-operate with the Petitioner in the preparation of a board resolution so as to enable **Mombasa Winding Up Petition No. 3 of 2015** set down for hearing; clearly demonstrates how the 1<sup>st</sup> Respondent has violated the Petitioner's right to human dignity as provided for under **Article 28 of the Constitution of Kenya** and also a violation of the Petitioner's right to access justice before the Winding Up court. Mr. Gikandi urged the court to dismiss the application.

17. Mr. Jami for the DPP on his part submitted that he believes the petition is properly filed and that this court may have the jurisdiction to hear it, but that he would nonetheless be happy to have the same struck out.

18. In my view there is a thin line between this court not having, and having jurisdiction in this matter. The existing suits referred to were only mentioned by way of affidavits. None of those files were brought to court to verify the pleadings and prayers therein. However, from the pleadings herein, the Petitioner is not asking this Court to supervise any other High Court. The facts giving rise to this petition are very exceptional in that the Petitioner filed **Mombasa Winding Up Petition No. 3 of 2015** together with an application dated 14<sup>th</sup> October, 2015 seeking interlocutory orders. On 7<sup>th</sup> December, 2015 the High Court dismissed the Petitioner's aforesaid application but made a finding that the Petitioner had an interest in the 1<sup>st</sup> Affected Party. The court stated as follows:

***“In my view I think an injunction in the circumstances would not serve the interest of justice. Granted the petitioner is the majority shareholder that does not dismantled (sic) the delineation between her and there (sic) company in so far as proprietorship between her and there (sic) company is concerned.....owing to the past relationship between the Petitioner and the 2<sup>nd</sup> Respondent, the fact that prima facie the petitioner is the majority, contributory to the 1<sup>st</sup> Respondent and the prospects that the two individuals still need to meet and translate the business of the 1<sup>st</sup> Respondent..”***

19. After the aforesaid Ruling by the court the following facts transpired: the Petitioner has not been able to list down the winding up petition for hearing since the petitioner is not able obtain a certificate of compliance as no board resolution can be passed in the current relationship between the petitioner and the 1<sup>st</sup> Respondent; the 1<sup>st</sup> Respondent threw the Petitioner out of her matrimonial home and in turn brought in the 2<sup>nd</sup> Affected Party who is using the Petitioner's personal items; the 2<sup>nd</sup> Respondent failed to charge the 1<sup>st</sup> Respondent in circumstances which the Court needs to enquire into. The aforesaid facts if proved may lead to the violation of the petitioner's rights as highlighted in the petition. Even though some of the reliefs being sought by the petitioner are similar to what was being sought in the Winding Up Petition as submitted by the 1<sup>st</sup> Respondent, the grant of the same does not translate to this Court supervising a court of concurrent jurisdiction. See **Aggrey Chiteri vs. Republic [2016] eKLR** where the court stated that, ***“For starters, it is evident that the current petition cannot be deemed as an abuse of the process by reason of the existence of Criminal Misc Appl. No. 618 of 2010. The issues are patently different and could possible also not be litigated under the same cause. The mere fact that in Criminal Misc Appl. No. 618 of 2010, the Petitioner also seeks a retrial is not enough to make the two causes symmetrical. Where the principle of sub judice is being prompted, what ought to be looked at is the substance and not the reliefs.”*** (Emphasis added).

20. It is the finding of this Court that the mere fact that the Petition herein seeks some orders which are similar to the orders being sought in **Mombasa Winding Up Petition No. 3 of 2015** does not make the petition herein in violation of Article 165 (6) of the Constitution of Kenya. For, the avoidance of any doubt the petitioner has from the onset stated that she is not pursuing prayer (g) of the petition which sought the stay of **Mombasa Winding Up Petition No. 3 of 2015**. Indeed, the Petitioner will not be able to proceed with the said petition since the petitioner is not able to obtain a certificate of compliance in the existing circumstances.

21. In view of the foregoing, the option this court takes is that all the said suits have not been determined. There are cross cutting and similar issues. However, the petition *prima facie* shows constitutional issues which are not found in the other two suits and which cannot be addressed elsewhere but in this Court.

22. It is the finding of this Court that it has the jurisdiction to hear this petition and that the petition raises issues which the constitutional Court alone can handle.

23. The Notice of Motion before the Court is dismissed with costs to the Petitioner.

**Dated, Signed and Delivered at Mombasa this 1<sup>st</sup> day of April, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Isaboke for 2<sup>nd</sup> Respondent

Ms. Mwainzi holding brief Kongere for 1<sup>st</sup> Respondent and 2<sup>nd</sup> Interested Party

No Appearance for Petitioner

Mr. Kaunda Court Assistant