



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 12 OF 2014**

**IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND OR FUNDAMENTAL FREEDOMS UNDER  
ARTICLES 28, 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF DEMOLITION NOTICE BY THE COUNTY GOVERNMENT OF KAKAMEGA DATED 4<sup>TH</sup> JUNE, 2014**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND  
ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2012**

**ERNEST IKOHA & 18 OTHERS .....PETITIONERS**

**VERSUS**

**THE COUNTY GOVERNMENT OF KAKAMEGA ..... RESPONDENT**

**RULING**

1. The petitioners have filed an amended petition dated the 4<sup>th</sup> January, 2017 seeking for:-

***(a) A declaration that the respondent's act of demolishing the petitioners' property contravened Articles 28, 40 and 47 (2) of the Constitution.***

***(b) An order that the respondent do promptly compensate the petitioners in terms of their estimated loss enumerated under paragraph 15 G of the petition or in such other appropriate amounts as may be determined by this honourable court.***

2. The petition was supported by the affidavit of the 1<sup>st</sup> petitioner, Ernest Ikoha. The petitioners contend that they were shop owners at Khayega market in Kakamega County. That they had been allowed by the defunct County Council of Kakamega, the predecessor of the respondent, to construct permanent structures commonly known as kiosks at the said market. That in a meeting held on 28<sup>th</sup> February, 2001 the defunct County Council of Kakamega vide Minute No. 3 of 2001 moved a motion to convert the permanent kiosks into shops, a process that saw the standardization and conversion of the kiosks into shops. That as a result of this the petitioners became plot owners and were allocated plot Nos. A19, A16, A01, A22, A07, A29, A10, A10, A06, A15, C20, A24, A08, A09, A21, A05, A23, A13, A14.

3. That on the 4<sup>th</sup> June, 2014 the respondent issued a demolition notice to the respondents whereby they were given 14 days to remove their structures allegedly to pave way for the construction of a modern market failing which the kiosks were to be demolished. The petitioners then moved to court and filed the original petition on the 13<sup>th</sup> June, 2014 whereby they were seeking a declaration that the intended demolition was in contravention of articles 28, 40 and 47 (2) of the Constitution. They had at the same time filed a notice of motion dated the same date under certificate of urgency seeking for conservatory orders to restrain the respondent from demolishing their shops pending the hearing and final disposal of the petition and the application. The said application was certified as urgent and an injunctive order was issued by Chitembwe J. on the 14/6/2014. The petition was however dismissed vide a ruling delivered on 17/9/14. The petitioners filed an application for stay of execution pending appeal. Mrima J. issued interim orders pending the delivery of the ruling. However on the night of 31/10 and 1/11/2014 the respondents demolished the petitioners' shops. Their appeal at the Court of Appeal ordered a re-trial of the petition which act led to the instant amended petition dated 4<sup>th</sup> January, 2014.

4. The petitioners contend that they were lawfully allotted the plots by the then County Council of Kakamega. That the shops were permanent structures that were constructed with the permission of County Council of Kakamega. That the respondents ignored the need for public participation and/or to engage the petitioners as the actual stake holders in property ownership and business. That the demolition smacked of impunity and was a violation and infringement of the petitioner's rights under Articles 28, 40 and 47 (2) of rights. That the petitioners have suffered immensely as a result of the demolition and seek for compensation as particularized in paragraph 15G of the amended petition. They contend that they were not given time to salvage their stock before demolition was done. The particulars of compensation being sought by each one of them comprises of:-

- **Pre-demolition value of the plot.**

- **Rent lost monthly during demolition.**

5. The petition was opposed by the respondent vide the replying affidavit of Joel Wamalwa, the respondent's Chief Officer in charge of Lands, Housing, Urban Areas and Physical Planning. The said officer depones that the land in issue has never been allotted, leased or granted to any private persons or its user changed from the purpose it was reserved for a market and still remains public land. That on 4/6/2014 the respondent did give notice to the affected residents to vacate, giving reasons that the same was to give way to construction of a market. That the respondent had held public participation with the affected community and gained the support of the vast majority of the kiosk/shop owners, traders and other affected members of Khayega area. That the respondent has not violated the petitioners' rights in implementing its mandate. That the petitioners have not explained how they arrived at the calculations. That since the petition is based on the alleged use and/or occupation of land it does not lend itself to the application of the provision of Article 46 of the constitution on compulsory acquisition of property for public purposes.

#### **Submissions –**

6. The advocates for the petitioners, **Nyikuli, Shifwoka & Co. Advocates**, submitted that the respondent as a county government is obligated to exercise power in accordance with the constitution. That the demolition of the petitioners' property was in disregard of the constitution and was a gross violation of the petitioners' right to equal protection of the law. That this court has power to grant damages when a constitutional right is shown to have been violated. That articles 20-23 of the Constitution empowers the court to grant relief for violation of fundamental right including compensation. That Article 40 (3) (b) and 40 (6) extends compensation to mere occupants that may not hold title to property. That the claim being sought by the petitioners is in the nature of general damages based on reasonable estimates as shown in the amended petition. That this is because the demolition was carried out at night leading to loss and destruction of all the business records. That the claim for compensation is on the basis of the petitioners' lists of loss in the amended petition and the post demolition valuation reports.

7. The advocates for the respondent, **Nyachae Ashitiva Advocates**, submitted that the matter relates to land and more specifically on issues pertaining to acquisition which are within the mandate of the Environment and Land Court. Therefore that the petition has been filed in the wrong court that has no jurisdiction to try it.

8. It was also submitted that the petitioners were occupying public property of which they had no proprietary interest. Therefore that their claim that their rights under article 40 have been violated has no basis. That they do not own the land and they therefore cannot be deprived of that which they have no rights over.

9. Further that the petitioners were licensees as opposed to allottees/proprietors to the suit property. That their licences did not convey any proprietary interest in their favour over the property. That all what they were entitled to as licensees was reasonable notice. That they have not proved that the 14 days' notice given to them was not reasonable.

10. It was also submitted that the claim for special damages was not proved.

#### **Analysis and Determination –**

11. The issues for determination are:-

a) Whether this court has jurisdiction to entertain the instant Petition.

b) Whether the petitioners' rights under Articles 28, 40 and 47(2) of the Constitution of Kenya have been violated.

12. Article 28 of the Constitution stipulates that:-

***“Every person has inherent dignity and the right to have that dignity respected and protected.”***

13. Article 40 stipulates that:-

***“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***

***(a) of any description; and***

***(b) in any part of Kenya.***

**(2) Parliament shall not enact a law that permits the State or any person—**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”**

14. Article 47 (2) stipulates that:-

**“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

**(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**

**(b) promote efficient administration. ”**

#### **Whether this court has jurisdiction to entertain the instant Petition**

15. Before delving into the crux of this petition, it is imperative to determine whether this court has the requisite jurisdiction to entertain the petition. I say this because on the face of it, there is an issue of who owns the subject land where the petitioners had set up their kiosks and whether the same was compulsorily acquired thus entitling the petitioners to compensation.

16. Jurisdiction goes into the heart and soul of any proceeding. Where there is a valid question or objection in law on a matter proceeding before a court of law, either for want of jurisdiction or for some other sufficient reason, then such objection or question should be raised at the earliest opportunity to avoid a waste of valuable judicial time.

17. This Court imports its jurisdiction from Article 165 of the Constitution of Kenya which provides that:

**“(3) Subject to clause (5), the High Court shall have—**

**(a) Unlimited original jurisdiction in criminal and civil matters;**

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

**(c) .....**

**(5) The High Court shall not have jurisdiction in respect of matters—**

*(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*

*(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).*

*(6) .....*

18. Article 162(2) and (3) of the Constitution provides as follows:

***“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—***

*(a) .....*

*(b) the environment and the use and occupation of, and title to, land.*

***(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”***

19. The ***Environment and Land Court Act, 2011(ELC Act)*** provides for the jurisdiction and functions of the Environment and Land Court contemplated by Article 162 (2) (b) in the Constitution.

20. Section 4(3) of the ELC Act provides that the *court shall have and exercise jurisdiction throughout Kenya*. Part III of the ELC Act provides for the jurisdiction of the court as follows:

***“(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes—***

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land.*

***(3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.***

*(4) .....*

***(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just, including—***

*(a) interim or permanent preservation orders including injunctions;*

*(b) prerogative orders;*

*(c) award of damages;*

*(d) compensation;*

*(e) specific performance;*

*(g) restitution;*

*(h) declaration; or*

*(i) costs.*

21. Whether a court has jurisdiction is determined from the pleadings. In the case of **Leonard Otieno –Vs- Airtel Kenya Limited [2018] eKLR**, Mativo J. was of the view that:

*“...a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, there is merit in the argument that a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. It is also correct to state that jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. This position was ably captured by the South African Constitutional Court [12] in the following words:-*

*“Jurisdiction is determined on the basis of the pleadings,... and not the substantive merits of the case... In the event of the Court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction...”*

The court has therefore to check on the pleadings to determine whether it has jurisdiction to entertain the matter.

22. The jurisdiction of the court emanates from the laid down law. This was well captured by the Supreme Court in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank and 2 others, [2012] eKLR**, where the court pronounced itself thus:-

*“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not a matter of mere technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law”*

23. In the case of **Kenya Urban Roads Authority –Vs- Ministry for Roads & Another [2017] eKLR**, E.K.O Ogola J considered whether the High Court has jurisdiction in respect to matters touching on land and environment and whether the Environment and Land Court has power to hear matters related to infringement of fundamental rights concerning land and environment and held that:-

*“It is imperative to question whether the matter before this court is a matter that relates to the environment and the use and occupation of, and title to land and whether the Environment and Land Court has the jurisdiction to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matter which fall within the realm of the Environment and Land Court.*

*Jurisdiction is everything and if a courts lacks jurisdiction it should down it tools and not take any further step, see the case of Owners of Motor Vessel “Lillian S’ versus Caltex Oil (Kenya) Limited [1989] KLR 1. If the matter before this court wholly deals with the use and occupation of, and title to land then this court does not have the jurisdiction to entertain this matter.*

26. According to the *Black’s Law Dictionary*, 10th edition, the term “use” is defined as:

*“the application or employment of something; especially a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional”.*

The term “**occupation**” is defined as:

*“the possession, control, or use of real property”*

While the term “**title**” is defined as:

*“the union of all elements (as ownership, possession and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself”.*

*In the matter herein the Petitioner claims to have legally acquired and developed the suit properties while the Respondents argue that the said suit properties were illegally acquired by the Petitioners and that the suit properties are road reserves. From this claim it is clear the occupation and title to the suit properties is disputed thus this matter falls within the jurisdiction of the Environment and Land Court as provided by Article 162 (2) of the Constitution. In the case of **Capital Fish Kenya Limited versus Monnatz***

*Limited & 2 others (2014) eKLR, Justice Mabeya stated that:*

**“...my view is that the intention in the Constitution is that if an issue arise touching on land in respect of its use, possession and occupation, then this High Court will have no jurisdiction...”**

*“...The jurisdiction of the Environment and Land Court is limited to disputes under Article 162 (2) of the Constitution and Section 13 of the Environment and Land Act. From a reading of Section 13 (3) of the Environment and Land Act it is clear that the Environment and Land Court can deal with issues relating to denial, violation, threat or infringement of rights provided that they relate to Articles 42, 69 and 70 of the Constitution of Kenya. However, none of the parties herein have cited any violation that is within the aforementioned Articles of the Constitution.*

*.....It is evident that the Environment and Land Court being a court with the status of the High Court as the Employment and Labour Relations court is, has the 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. Thus, the issues raised and remedies sought in the Petition and subsequent cross-petition herein can be dealt with by the Environment and Land Court.*

24. In the case of **Maria Jebet Arap Masoin & 2 others –Vs- Kipkoech Lagat & Another [2018] eKLR**, A. Ombwayo J. held that:

***“The jurisdiction of the Environment and Land Court in so far as a dispute revolves on land or the environment is very wide and unlimited. As to the remedies that the Environment and Land Court can grant, it will be observed that this includes an award of damages.***

***I do find that the petitioners have satisfied this court that they are in occupation and use of the land in dispute and therefore the court has jurisdiction to determine the petition as the same is grounded on the use, occupation and utilization of the land in dispute. The petitioners are seeking orders that they be protected from the respondents who are attempting to evict them from the parcel of land.”***

25. The Environment and Land Court is not precluded from determining questions touching on breaches of fundamental rights when dealing with matters relating to land and environment. In **Daniel N. Mugendi –Vs- Kenyatta University & 3 Others [2013] eKLR** the Court of Appeal held that:-

***“In the same token we venture to put forth the position that as we have concluded that the industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights and ancillary and incidental to those matters, the same should go for the Environment and Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with two subjects”.***

26. I am in total agreement with the holdings in the authorities cited above. The petitioners herein are inviting this court to determine whether the subject land in which their kiosks were demolished was private land at the time of demolition against the respondent’s contention that the same was public land. The issue at hand in the petition therefore relates to occupation and title to land. The issue of whether the petitioners are entitled to compensation or not cannot be determined without first determining the issue of ownership of the subject land. It is now settled law that issues relating to occupation and title to land fall within the ambit and jurisdictional space of the Environment and Land Court by dint of Article 162(2) (b) of the Constitution of Kenya.

27. The petitioners impliedly raise the issue of compulsory acquisition which is provided for by Section 13(2) (b) of the Environment and Land Court Act. This falls under the jurisdiction of the Environment and Land Court to the exclusion of the High Court.

28. As was held by the Court of Appeal, in the case of **Daniel N. Mugendi vs Kenyatta University & 3 Others [2013] eKLR** (supra), the Environment and Lands Court has jurisdiction to determine whether rights and freedoms provided for in the constitution have been threatened or infringed that are incidental and ancillary to land and environment. The Environment and Lands Court has further jurisdiction to award damages. It is therefore clear that the issue raised by the petitioners on breach of their fundamental rights can competently be addressed by the Land and Environment Court.

29. In light of the foregoing, I am in agreement with the advocates for the respondent that this court lacks the requisite jurisdiction to try the issues raised in the amended petition and is thereby not seized of the matter. In so finding there is no need for me to consider the second issue for determination. I accordingly make the following orders that:-

(a) This matter be transferred to the Environment and Land Court in Kakamega for hearing and final determination.

(b) Costs herein to abide by the final determination of the Environment and Land Court.

**Delivered, dated and signed in open court at Kakamega this 9<sup>th</sup> day of October, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Nyikuli for petitioners

No appearance for respondent

Parties: Petitioners – 9 present

Respondent - absent

Court Assistant - George

30 days right of appeal.