



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT BUSIA

CONSTITUTIONAL PETITION NO. 2 OF 2017

IN THE MATTER OF: THE JURISDICTION OF THE HIGH COURT UNDER ARTICLES 22, 23 AND 165 OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 AND THE CONSTITUTIONAL RIGHT TO BE HEARD.

AND

IN THE MATTER OF: THE REGISTERED LAND ACT 300 (REPEALED) THE REGISTRATION OF LAND ACT 2012

AND

IN THE MATTER OF: SOUTH TESO/OSURRETE/180

AND

IN THE MATTER OF: THE BUSIA CHIEF MAGISTRATE COURT CIVIL CASE NO. 40 OF 2006.

AND

IN THE MATTER OF: APPLICATION FOR CONSERVATORY AND DECLARATORY ORDER TO PRESERVE THE RIGHT TO OWNERSHIP OF PROPERTY DUE PROCESS AND FAIR HEARING.

BETWEEN

REDEMPTA IGWATAI IMOOPETITIONER

VERSUS

MOSES OMUSE EKABTEN 1ST RESPONDENT

THE CHIEF MAGISTRATE, BUSIA LAW COURT2ND RESPONDENT

HON. THE ATTORNEY GENERAL

(Enjoined to represent the 2nd defendant and for the

Purposes of implementations of reliefs against the 2nd Respondent)....3RD RESPONDENT

RULING

1.The 1st Respondent filed a preliminary objection to the petition on 22/1/2019 raising the following grounds:

1) That this court lacks the jurisdiction under articles 165(3)(b) to deal with matters on the constitutional interpretations and violations of bill of Rights under rules 4 and 7 of the constitution of Kenya (protection of rights and fundamental freedoms)

Practice and Procedure rules 2013. This is the preserve of the constitutional human Rights Division of the High Court. While agreeing with the creation of the environmental court as a court of equal status as a High Court, its jurisdiction did not encompass the dealing with constitutional petitions. This is clearly demonstrated under Section 13 of the Environment and Land Court Act (which clearly states the jurisdiction so created does not extend to the protection of rights guaranteed under article 40 of the Constitution, parties cannot create such jurisdiction by implication. This court can only deal in matter touching in articles 42, 69 & 70 of the Constitution 2010.

2) The Honourable Court lacks the requisite jurisdiction to hear and determine the petition and notice of motion as filled herein as it contravenes Article 22 & 23 of the Constitution of Kenya and does not disclose any violation of the constitutional rights or fundamental freedom in the bill of rights to warrant the orders sought by the petitioner.

3) The jurisdiction of the Environment and Land Court is only limited to the disputes contemplated under Article 162(2)(b) of the Constitution and Section 13 of the Act.

4) The petition is not proper before court as the petition is not accompanied by a verifying affidavit, by the petitioner.

5) The supporting affidavit of the petitioner dated 30th October 2017 was commissioned by a stranger, the petition is null and void and the same is not proper before the court.

6) The supporting affidavit of the amended petition dated 30th October 2017, sworn by the counsel was commissioned by a stranger, the petition is null and void and the same is not proper before court. The petition should be dismissed and/or expunged from the court records, under Section 2 of the Oath's and statutory declaration Act, only practicing advocates may be appointed as commissioner for oath by the Chief Justice under the Advocates Act in Section 5 a person cannot be a qualified to be a practicing Advocate unless:

(a) He has been admitted as an advocate

(b) His name is for the time being on the roll and

(c) He has in force a practicing certificate

The respondent avers that the possession of a practicing certificate is a constant condition precedent before one can qualify to act as an advocate in any respect including as a commissioner for Oaths.

(7) The petitioners further amended petition dated 21st November 2017, is null and void and the subsequent order's the court may have given on 8th November 2017 should be vacated/or reviewed and the amended petition should be expunged from the court records as the same is a product of invalid petition.

(8) An affidavit commissioned by an unqualified advocate is as good as an affidavit not commissioned at all, it not complete without the attestation clause and is therefore void. The petition should therefore be struck out with costs. The 1st respondent prays to be awarded the costs of the petition.

2. The parties agreed to argue the preliminary objection by way of written submissions. I have had occasion to read the written submissions filed. In brief, the 1st Respondent submits that this court lacks jurisdiction to hear and determine a suit commenced as a constitutional petition. He further submitted that the jurisdiction given to this Court does not extend to deal with rights guaranteed under article 40 of the Constitution. That this Court can only deal with matters touching on article 42, 60 and 70 of the Constitution 2010. The 1st Respondent also stated that the affidavit in support of the motion was commissioned by a stranger and/or an unqualified person thus should be expunged. He relied on the case of *The Owners of Motor Vessel Lilian "S" Vs Caltex Oil (K) Ltd (1989) KLRI* and articles 165 of the Constitution and Sections 33, 31 & 34 of the Advocates Act.

3. The preliminary objection is opposed by the submissions of the petitioner filed on 9th July 2019. The petitioner quoted the provisions of article 162 and 165 of the Constitution, more particularly 165(5)(b) which ousts the jurisdiction of the High Court in respect of matters falling within the jurisdiction of the Environment & Land court. He cited *Kisii ELC Petition No. 9 of 2017 (2019) eKLR between Samwel D. Omwenga Vs NLC & 2 others* that was determined without the issue of jurisdiction being raised. On the affidavit, the petitioner submitted that constitutional matters are not governed by the Civil Procedure Act and Rules as it is given a special jurisdiction under article 23 and the special rules made by the Chief Justice which rules do not provide for a verifying affidavit.

4. The three questions for my determination as contained in the preliminary objection is:

(a) Whether or not the Environment and Land Court is clothed with jurisdiction to hear suits commenced as Constitutional petitions.

(b) Whether or not a petition should be accompanied by a verifying affidavit.

(c) Whether the affidavit in support of the petition is defective for being commissioned by an unqualified person and if it should be expunged from the record.

5. The 1st Respondent concedes from his pleadings that the violations complained of arise from rights guaranteed in article 40 of the

Constitution. Article 40(1) provides that **“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.”

6. The rights under article 40 all refer to right to property and in particular for this case the property is land. It is not indicated in any of the provisions of the law cited by the 1st Respondent that the Environment and Land Court cannot handle violations of rights relating to property/land and that it can only handle the violations relating to the environment provided under article 42, 69 and 70 of the Constitution which relates to the environment. Some of the petitions under article 40 handled by the Environment and Land Court includes but not limited to the following cases:

1) Constitutional Petition No. 7 of 2015; Nicolaas Hendrick Claasen Vs Commissioner of Lands & 4 others (2016) eKLR.

2) Constitutional Petition No. 100 of 2017; Mwangi Stephen Murithi Vs National Land Commission & 3 others (2018) eKLR.

3) Constitutional Petition No. 14 of 2017; Okiya Omtata Okoiti Vs Kenya Power & Lighting Company & 10 others (2018) eKLR.

7. The second objection is that the petition was not accompanied with a verifying affidavit. This is a technical objection that can be cured by way of amendment and thus cannot be a ground for striking out the petition. The holding in **DT Dobie (K) Ltd Vs Muchina (1982) KLRI** stated that a defect that can be cured by amendment cannot form a basis for striking out a suit.

8. Further there is no procedural requirement cited by the 1st Respondent that a Constitutional Petition must be accompanied with a verifying affidavit. The petition as filed had an affidavit sworn in support which is within the provision of the rules (protection of Rights and Fundamental freedoms, Practice and Procedure Rules 2013) governing procedures in Constitutional Petitions. This line of objection is both misplaced and unfounded in law.

9. The third ground was given that the supporting affidavit was commissioned by an unqualified person. The 1st Respondent in an effort to prove this averment filed together with the preliminary objection what he called a further replying affidavit. In the case of **Mukisa Biscuits Vs West End Distributors (1969) EA 696**, it was held that a preliminary objection must not require that it be proved by adducing of evidence. The mere filing of the affidavit to support this ground disqualifies it from meeting the threshold of a preliminary objection.

10. The affidavit in support of the petition was commissioned on 22nd September 2017 by a Mr. David Were advocate/commissioner for oaths. In the letter annexed to the further replying affidavit of the 1st Respondent, the Law Society of Kenya confirmed that Mr. David Were advocate was licenced/qualified to practise for the year 2017. Similarly in the amended petition dated 21/11/2017 and filed on the same date, the affidavit in support was commissioned by the said Mr. David Were advocate. Once a pleading is amended, what forms the basis of a suit is the amended claim/pleading. Since the 1st Respondent's own document from the Law Society of Kenya is self-explanatory, I find that this limb of objection amounts to abuse of court process by wasting judicial time.

11. In conclusion, I find the entire grounds of the preliminary objection filed on 22/1/2019 to be without merit. The same is dismissed with costs to the petitioner.

Dated, signed and delivered at BUSIA this 5th day of November 2019.

A. OMOLLO

JUDGE