



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

PETITION CASE NO. 1 OF 2019

DR. SAMSON K.A TIM.....PETITIONER

VERSUS

NELSON ODHIAMBO.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

[1] This is a ruling on a Preliminary Objection dated 18th March 2019 taken by the Respondent to this proceedings as follows:

“PRELIMINARY OBJECTION

TAKE NOTICE THAT the respondents herein shall arise a Preliminary Objection challenging the competence of the petition dated 4th January 2019 and seek an order that the said petition be struck out and or dismissed with costs on the grounds:

- 1. That the petition herein is fatally defective, incompetent, and untenable as the petition filed in Court is sub-judice as there is a pending ongoing suit in Eldoret Environment and Land Court Case No. 346 of 2013 seeking similar orders.***
- 2. That the petition is brought before a wrong forum as the Court lacks the jurisdiction to hear and determine the subject matter raised in the petition herein as it is outside the Court’s Constitutional scope and mandate.***
- 3. That the petition is misconceived and incompetent as it offends provisions of the Government Proceedings Act Cap 40 Laws of Kenya, more specifically section 12 of aforementioned Act.***
- 4. That the petition is misconceived, untenable and bad in law and an abuse of the Court process as the prayers sought are untenable to be granted by this Court of law.***
- 5. The petition does not meet the thresholds of a Constitutional petition as clearly adumbrated in the celebrate case of Anarita Karimi Njeru-versus-Republic (1976-1980) KLR 1272.***
- 6. That the petition is an abuse of the Court process and as such should be dismissed with costs to the respondents.”***

[2] The Petitioner field a response to the Preliminary Objection by way of a Replying Affidavit sworn on 18th June 2019 setting out his defence to the objection as follows:

“Replying Affidavit to 2nd & 3rd Respondents Preliminary Objection

- 1. That the 2nd and 3rd respondent preliminary is opposed and the Petitioner deny that this petition is fatally defective, incompetent and untenable as stated in the respondents Preliminary Objection the said objection has nothing to hold water in this petition their objection lacks merit thus it is only available for dismissal.***
- 2. That 2nd & 3rd respondents needs only to mislead this honorable Court to belief that the suit before Eldoret Environmental and lands Court case no. 346 of 2013 is similar with this Petitioner, which is not true the said suit was filed way back on 18th June, 2013***

against the 1st and 3rd respondent for the action arising out of the 1st respondent action of impunity.

3. That when the 1st respondent after he have been sued and 3rd respondent he came out of the suit and proceeded again and on 5th August, 2014 he placed another different caution the issue that I can't belief that the 1st respondent was made and fail to understand that he was acting with the matter before Eldoret ELC Court the issue of this petition now before Court.

4. That the 1st respondent on 7th August 2014 with surprise addressed a letter to the Petitioner notifying that there were caution placed on his properties known as Lembus/Torongo/721, 790, 791 & 792 respectively and enclosed with the said caution and notice of removal to the caution if no objection within 30 days the issue that had never happen to date now occasioning these petition necessary.

5. That the 2nd & 3rd statement in Preliminary Objection that this Court lacks jurisdiction is denied and petitioner wish to states that the issue before this Court is a Constitutional Petition which this Court has constitution mandate to hear and determine all Constitutional matters being brought before thus this Court has jurisdiction contrary to the respondents statement.

6. That the 1st respondent is to blame for he is the one who maliciously used the public office to oppress the Petitioner and lastly constituted the filing of Eldoret E.L.C No. 346 of 2013 together with this petition for his action of undermining the Petitioner properties the 1st respondent is sued for the caution dated 5th August 2014 and the 2nd & 3rd are sued over the 1st respondents actions.

7. That the petitioner has constitutional rights to be heard and the 2nd & 3rd respondent objection intentions are to deny the petitioner the said rights to be heard which should be avoided and this Court do proceed to hear this petition and grant orders as prayed.

8. That the petitioner during the filing of this petition has followed all the requirement lay down more so in the provisions of government proceeding Act Cap 40 laws of Kenya more specifically section 12 of aforementioned act thus the petitioner pray that the respondents objection lack merit and the same be dismissed with costs and have the petitioner, petition proceed.

9. That the petition have been filed properly and in good faith and had not offended any provision of the government proceeding act or any other law as stated by the respondents and the petitioner pray that the respondents objection is contradictory, full of lies and is only intents to deny the petitioner opportunity to be heard thus this Court is a Court of law and cannot tolerate such but only to dismiss forthwith and the petitioner, petition to proceed and orders sought be granted as prayed.

10. The petitioner is further apprehensive that if the 1st, 2nd & 3rd respondent are allowed to stagnate the process the petitioner stand to suffer irreparable damage and loss."

Determination

[3] The Court has considered the matter and the submissions made by the petitioner and the Counsel for the respondents. While the Petitioner has a right to have this dispute heard by a Court under Article 50 (1) of the Constitution, the very Constitution has made provisions for the determination of the nature of the dispute presently before the Court, and this Court is enjoined to give effect to the constitutional provisions on the jurisdiction of this Court.

[4] The Supreme Court has settled the question of the jurisdiction of the Court over matters reserved for Courts of equal status in the Petition No. 5 of 2015, **Republic v Karisa Chengo & 2 others** [2017] eKLR, as follows:

*"[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from **Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters "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)."***

[5] At paragraph 110 of the Judgment, the Supreme Court reiterated the importance of jurisdiction as the basis of a valid judicial proceedings as follows:

*"[110] None of these foreign cases, attractive their reasoning is related to the issue of the jurisdiction of the Courts that determined the cases under review. As we know, jurisdiction goes to the root of any litigation. This position was forcefully reiterated in the locus classicus decision of Nyarangi, J.A in **The Owners of Motor vessel Lilian "S" v. Caltex Oil Kenya Ltd. [1989] KLR 1** that "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** and Lord Denning's decision in the Privy Council case of **Benjamin Leonard Macfoy United Africa Company Limited (UK)[1962] AC 152** succinctly makes this point. He stated thus:*

"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. ... And 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.”

(Emphasis mine)

The present Petition

[6] The Petitioner’s cause of action as set out in paragraphs 5 - 8 of the Petition dated 4th January 2019 is as follows:

“PETITION dated 4th January 2019 paragraphs 5-8

5. On 8th February, 2011 the 1st respondent allowed Collins Bitok whom he don’t know to pace a caution on parcel number LEMBUS/TORONGO/790, 791 and 721 all registered in the name of SAMSON K.A. TIM which the said cautions were later withdrawn by the 1st respondent when he realized that he was to be sued he withdraw the caution without no cautions hearing took place and thereafter place again the same caution in the same lands through other deferent cautioner.

6. On the same date 8th February 2011 the 1st respondent allowed Thomas Kiptim to place a caution in land parcel number LEMBUS/TORONGO/721 registered in the name of SAMSON K.A. Tim for the 1st respondent own known reasons.

7. On 7th June, 2011 petitioner had one friend who was being arrested namely MARTIN PHILEMON OUKO whereby the petitioner wanted to bail him out where he was given land parcel LEMBUS/TORONGO/791 with clean search by the 1st respondent assuring the petitioner that just bail out your friend then I shall remove the caution later no problem for that.

8. On 29th August, 2012 the petitioner went to the 1st respondent land registrar’s office and asked him to withdraw the said caution as he promised the petitioner before but the 1st respondent became harsh, adamant, rude and vowed to place a permanent caution on the said parcels of land....”

[7] Based on the averments in the Petition, the Petitioner principally seeks a declaration of wrongful caution and consequently the removal of cautions on his properties as follows:

“1. An order be issued directing 1st, 2nd respondent to lift the cautions to the petitioner parcels of lands known as LEMBUS/TORONGO/721, 790, 791 AND 792.

2. A declaration that the 1st respondent abused his power by arbitrarily placing caution NOW AND THEN without proper reasons to justify the cautioning the petitioners lands using public office to frustrate the petitioner access to any financial lending institutions for development on land parcel number LEMBUS/TORONGO/721, 790, 791 and 792 taking the same as his normal duty to committing the actions of impunity with full swing to attack the petitioners properties.

3. A declaration orders be issued that the 2nd and 3rd respondent willfully neglected their duty in failing to act as per the grievances of the petitioner.

4. Damages against the 1st and 2nd respondent for abuse of office and irregularly cautioning by targeting the petitioner’s land/properties.

5. Costs of this suit be awarded to the petitioner.

6. That I pray that as a matter of interest of justice orders sought be allowed.”

[8] Article 165 (5) (b) of the Constitution ousts the jurisdiction of the High Court in matters “(b) falling within the jurisdiction of Courts contemplated in Article 162 (2) of the Constitution.”

[9] Article 162(2) of the Constitution provides that Parliament shall establish Courts to hear and determine disputes relating to – **“(b) the environment and the use and occupation of, and title to, land”.**

[10] Section 13 of the Environment and Land Court Act, in giving effect to Article 162 (2) (b) of the Constitution, provides for the jurisdiction of that Court to deal with matters, among others, relating to title to land.

[11] The placement of a caveat or caution, and its removal, as an encumbrance on the title to land is clearly a matter within the exclusive jurisdiction of the Environment and Land Court being a matter affecting title to land. The effect of a caution on the title to land in prohibiting any dealing with the land is provided for under section 72 of the Land Registration Act, 2012 as follows:

“Notice and effect of caution.

72. (1) *The Registrar shall give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution.*

(2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the Court.”

[12] *Consequently, in terms of Article 165 (5) (b) of the Constitution, the High Court lacks jurisdiction of the matter of challenge of caution placed against a title to land being a matter “falling within the jurisdiction of the Court (Environment and Land Court) contemplated under Article 162(2) of the Constitution.*

Matters of fact

[13] The point of objection relating to the existence of a previously instituted suit requires evidence to demonstrate the facts and they are therefore, not suitable subject of Preliminary Objection within the character of a demurrer as held in ***Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd*** (1969) EA 696 per Sir Charles Newbold, P., at 701 as follows:

*“A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact had to be ascertained** or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop.”*

[14] There was no evidence, apart from the averments in the Preliminary Objection that there is a previously instituted suit between the parties in the Environment and Land Court at Eldoret - *“Eldoret Environment and Land Court Case No. 346 of 2013 seeking similar orders”* - as would invoke the *sub judice* rule under section 6 of the Civil Procedure Act, if correct, the prior suit would take precedence and the later suit would be stayed accordingly to the provisions of section 6 of the Civil Procedure Act which provides as follows:

“6. Stay of suit

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign Court shall not preclude a Court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign Court.

[Act No. 10 of 1969, Sch.]”

[15] However, in view of the Court’s finding on jurisdiction nothing will turn on the fact of pendency of an earlier suit. The Court does not also have to determine the other points of objection nos. 3, 4, 5 and 6 of the Notice of Preliminary Objection relating to the form and content of the proceedings before the Court, which the Court does not now entertain in view of the finding on jurisdiction.

Conclusion

[16] For the reason that the matter of the challenge and petition for removal of cautions on title to land is the province of the Environment and Land Court established under Article 162 (2) (b) of the Constitution, the High Court has under Article 165(5) of the Constitution no jurisdiction on the matter. *Were it to proceed with this matter, this Court would be engaging in an invalid exercise of judicial authority which would be a nullity, void and of no effect. The Court must down its tools, and refer the petitioner to appropriate forum.*

Orders

[17] Accordingly, for the reasons set out above, the Court makes the following orders:

1. The Preliminary Objection dated 18th March 2019 is upheld.
2. The Petition is struck out.
3. There shall be no as to costs in this matter which has been determined at the Preliminary Objection stage against a self-representing litigant not too well versed in matters of jurisdiction of the Courts and procedures of law.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Petitioner in person.

Hon. Attorney General for the Respondent.