



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 419 OF 2016

KURIA NJOROGE1ST PETITIONER

JOYCE NJERI KIMANI.....2ND PETITIONER

RUTH NJERI KURIA.....3RD PETITIONER

PERMINUS MWANGI GITHINJI.....4TH PETITIONER

JAMES NDUNG'U WAMBU.....5TH PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

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

RULING

1. The petitioners herein seek the following prayers in their amended petition dated 24th February 2017:

a) A declaration that the 1st respondent's intended hearing and review and nullifications of the petitioners' grants to KAJIADO/MOSIRO/35, 86, 911, 34, 165, 379, 572, 48, 934, 369, 293, 433, 385, 333, 612, 50, 936, 859 and 212 respectively and disposition of land from the former Adjudication Section of Mosiro Sub-Location within Keekonyokie Section in Kajiado District previously duly adjudicated and adjudication register prepared, registered, demarcated and titles issued, and settled pursuant to a Court of Appeal No. 85 of 1992 Nairobi, and the 2nd respondent's refusal to manage the land register by providing relevant documents and material, are in excess of their respective mandate and violates or threatens to violate the petitioners' rights to freely own and use their respective property in Kenya.

b) An order of prohibition to restrain the 1st respondent from holding any meeting reviewing any grant or disposition, establishing their propriety of legality respecting or relating to the former Adjudication Section of Mosiro Sub-Location within Keekonyokie Section in Kajiado District previously duly adjudicated and adjudicating register prepared, registered, demarcated and titles issued, and settled pursuant to a Court of Appeal judgment dated 9th June 1995 in Civil Appeal No. 85 of 1992 Nairobi, and specifically respecting the petitioners' respective properties, and further from making any recommendations from such action.

c) An order of certiorari to bring into this court for purposes of quashing and to quash the decision of the 1st respondent to review, cancel and nullify the petitioners' grants to KAJIADO/MOSIRO/35, 86, 911, 34, 165, 379, 572, 48, 934, 369, 293, 433, 385, 333, 612, 50, 936, 859 and 212 respectively and further directing the re-adjudication of the entire area formerly adjudication Section of Mosiro Sub-Location within Keekonyokie Section in Kajiado District previously duly adjudicated and adjudication register prepared, registered, demarcated and titles issued, and settled pursuant to a Court of Appeal judgment dated 9th June 1995 in Civil Appeal No. 85 of 1992 Nairobi.

d) Compensation, damages and any other relief this Honourable Court may deem fit and just.

e) Cost and interest.

2. In the 2nd and 3rd respondents' grounds of objection, to the amended petition, filed on 11th May 2017, the respondents listed several grounds of objection but the ground that is most relevant to this ruling is the one that challenges the jurisdiction of this court to entertain the petition and grant the orders sought. The case against the 2nd and 3rd respondents was however withdrawn on 13th December 2017 after which the court directed the parties to file written submissions to the petition.

3. On 7th March 2018, the case came up for mention before Mativo J. for further directions when Mr. Wahome, learned counsel for the respondent sought the transfer of the case to the Environment and Land Court (ELC) on the basis that it falls within the jurisdiction of Environment and Land Court. The court thereafter directed the parties to address it on the question of jurisdiction.

4. On 19th June 2018 parties made their respective submissions on the question of the jurisdiction of this court to hear and determine the petition.

5. Mr. Wahome, learned counsel for the respondent submitted that the issues raised in the petition relate to title, occupation and use of land which, under the provisions of Article 165(5) (b) of the Constitution, are matters reserved for the specialized courts established under Article 162(2) of the Constitution.

6. Counsel further made reference to Section 13 (1) of the Environment and Land Court Act which vests the Environment and Land Court with power to issue reliefs, declarations and prerogative orders that could then enforce the constitutional rights that the petitioners seek to assert through the instant petition. It was the respondent's case that the appropriate forum where the petitioners ought to have filed their petition was before the Environment and Land Court.

7. Mr. Ombwayo, learned counsel for the petitioners submitted that the objection to jurisdiction was an afterthought since the respondent had conceded this court's jurisdiction in the grounds of opposition filed in response to the petition. Counsel submitted that this court, being a constitutional court had jurisdiction under Article 165 (2) (b) to determine whether fundamental rights and freedoms had been denied, infringed, or threatened.

8. The petitioners' counsel further argued that the petition sought to challenge the respondents' exercise of powers of review under Section 14 of the National Land Commission Act (2012) in instances where land adjudication had been concluded and titles issued to the petitioners who then acquired absolute ownership to the land in question. The petitioner's case was that the respondent acted in violation of Article 40 of the Constitution and that the issue before the court was therefore a constitutional issue and not a challenge on the validity of the titles. Counsel added that it would be just and expedient to hear and determine the matter before this court as opposed to the Environment and Land Court that has hearing dates in 2019.

9. In a rejoinder, counsel for the 1st respondent submitted that the jurisdiction is a legal issue that can be raised at any point during the proceedings and that a party's convenience is not one of the considerations in determining whether a court has jurisdiction to hear and determine a case.

DETERMINATION

10. I have considered the rival submissions of counsel for both parties on the question of jurisdiction. I am aware of the well hackneyed legal principle that jurisdiction, for a court of law, is everything and without it a court of law will as a matter of course down its tools. (See Owners Of Motor Vessel 'Lillian "S" Vs. Caltex Oil Kenya Ltd 1989 K.L.R 1).

Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 thus defines "jurisdiction" as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

John Beecroft Saunders in his treatise **Words and Phrases Legally Defined Vol. 3, at page 113** reiterates the latter definition of the term 'jurisdiction' as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

11. From these definitions, it is clear that the term "jurisdiction", as further defined by **The Black's Law Dictionary, 9th Edition**, is the Court's power to entertain, hear and determine a dispute before it.

In the case of **Sir Ali Bin Salim vs. Shariff Mohammed Shatry, Civil Appeal No. 29 of 1940** the East African Court of Appeal stated:

"(i) If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any

waiver on their part cannot make up for the lack or defect of jurisdiction”.

Similarly the Supreme Court in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR expressed itself as follows:

“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 one of mere procedural 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.”

12. From the above text and cited authorities, it is clear that even where the issue of jurisdiction is not raised, that omission does not necessarily confer jurisdiction on the Court if it has none. The fact that jurisdiction flows from the Constitution or legislation or both means that jurisdiction cannot be conferred on a court by any other means including the consent of the parties. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises.

13. In our context, the Constitution of Kenya, 2010 has pronounced itself clearly on the jurisdictional competencies of various Courts of law in Kenya. The drafters of the Constitution, it appears, had the intention of clearly demarcating the jurisdictions of the said Courts so as to prevent *lacunae* and conflicts. Besides the Constitution, there are several statutes which demarcate the jurisdictions of various Courts and tribunals. In the instant case, the respondent’s argument was that under Articles 162 (2) and 165(2) (b) of the Constitution, the jurisdiction of the High Court and courts of equal status has been clearly spelt out.

The Constitution elaborately sets out the jurisdiction of the High Court and states in **Article 165(3)** 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) *Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*
- d) *Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*
- e) *He question whether any law is inconsistent with or in contravention of this Constitution;*
- f) *The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
- g) *Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
- h) *A question relating to conflict of laws under Article 191; and*
- i) *Any other jurisdiction, original or appellate, conferred on it by legislation.*

(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.”

Article 162(2) on the other hand empowers Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to

- a) *Employment and labour relations; and*
- b) *The environment and the use and occupation of, and title to, land.*

Clause (3) thereof authorizes Parliament to “determine the jurisdiction and functions of the Courts contemplated in clause (2).”

14. Pursuant to **Article 162(3)** of the Constitution, Parliament enacted the Environment and Land Court Act (hereinafter “**the Act**”) which at

Section 4 establishes the Environment and Land Court. Under Article 162(1), the Environment and Land Court is a superior court of record, with the status of the High Court. The general jurisdiction of the Environment and Land Court is set out at section 13(1) of the Environment and Land Court Act as follows:

“(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court [the ELC] 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.”

15. As I have already indicated at the beginning of this ruling, the orders sought by the petitioners are orders of declaration of violation of rights, prohibition, certiorari, compensation for damages and costs. Section 13(2) of the Environment and Land Court Act clarifies the general jurisdiction in section 13(1) so as to avoid ambiguity as to what a matter touching on land and environment is. Section 13(3) is clear that nothing is to preclude the jurisdiction of the Environment and Land Court to hear a denial, violation, or infringement of or threat to, rights and fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

16. In ***Eldoret, EL&C Petition No. 2 of 2013, (Mohammed Said vs. County Council of Nandi [2013] eKLR***, Munyao Sila J. considered, in great detail, the issue of whether the jurisdiction of the Environment and Land Court is only limited to breaches of Articles 42, 69 and 70 of the constitution and held **inter alia**:

“Section 13 (3) emphatically states that nothing is to preclude the jurisdiction of the Environment & Land Court to hear 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. A plain reading of Section 13 (3) will demonstrate that the jurisdiction of the court is not limited only to hearing matters touching on violations of Articles 42, 69, and 70 of the Constitution. That section does not state that the E&LC is only to hear the matters set out in Articles 42, 69 and 70 of the Constitution. The section for whatever reason, emphasizes the jurisdiction of the court to hear petitions touching on the environment. There is no preclusion to hear any other petition, grounded on any other Article of the Constitution, so long as it falls within the purview of land and environment.

Indeed, the High Court has no jurisdiction in respect of matters that fall within the jurisdiction of the Environment and Land Court or that fall within the jurisdiction and the Industrial Court.”

17. In the said case of ***Mohammed Said (supra)***, various other decisions were considered, including the case of ***Omar Tahir Said vs Registrar of Titles & Another, Mombasa High Court Petition No. 22 of 2012, (2013) eKLR***, and ***United States International University (USIU) vs Attorney General, Nairobi High Court Petition No.170 of 2012 (2012) eKLR***. The common thread that runs through all the above cases is the decision that it is the Environment and Land Court that has jurisdiction to hear matters touching on environment and land. The courts went further to state that the manner in which such suits are commenced is immaterial whether instituted by plaint, originating summons, judicial review or as a constitutional petition, matters of land and environment fall within the domain of the Environment and Land Court. The courts further observed that the argument that the Environment and Land Court can only hear petitions touching on violations of Articles 42, 69, and 70 is misguided as the Environment and Land Court can hear any petition so long as the petition touches on the environment, and the use and occupation of, and title to land.

18. It is not in dispute that the instant petition relates to land and that the petitioners challenge the nullification of grants and disposition of land from former adjudication Section of Mosiro Sub-Location within Keekonyokie Section in Kajiado District. A perusal of the orders sought in the petition leaves no doubt in my mind that the dispute herein revolves over land and I therefore find that the Environment and Land Court is right the court vested with the jurisdiction to hear and determine it. The petitioners’ main contention in the petition is that their land ownership rights are violated or threatened with violation by the 1st respondent. Guided by the dictum in the above cited cases, I similarly find that **the Environment and Land Court is not precluded from hearing a petition grounded on any other article of the Constitution as long as it falls within the purview of land and environment.**

19. Consequently, I find that the objection to jurisdiction is merited, I therefore allow it and direct that this matter be referred to the Environment and Land Court Division of (Nairobi High Court) for hearing and determination.

Dated, delivered and signed in open court at Nairobi this 11th day of July 2018.

W. A. OKWANY

JUDGE

In the presence of

Mr Ombwayo for the petitioners

Miss Mwasau holding brief for Mr Wahome for the respondents

Court Assistant - Kombo