



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION NO. 12 OF 2017

AHMED MOHAMED MWINYIHAJI.....PETITIONER/APPLICANT

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

CHINA ROAD & BRIDGE COORPRATION (K).....4TH RESPONDENT

RULING

1. The 2nd Respondent filed a Preliminary Objection dated 19th January 2018 raising the following grounds:

- 1. The Petition herein is devoid of any legal justification and/or merit and offends Section 87 of the Kenya Railways Corporation Act, hence it ought to be dismissed as against the 2nd Respondent with costs.**
- 2. The Petition herein is an affront to Rule 11 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules 2013 for want of attaching the Supporting Affidavit to the Petition and therefore is bad in law.**
- 3. The Petition offends the basic rules of procedure and practice, and by virtue of the same does not lay in law hence it is scandalous, vexatious and an abuse of the process of the Honourable Court and the Petition should be dismissed with costs.**
- 4. Such other, further, alternative, additional and/or incidental grounds as may emerge and/or be canvassed at the hearing of the Petition.**

2. Rule 11 of the Constitution of Kenya (protection of Rights & Freedoms) practice and Procedure Rules 2013 provides thus:

“(1) The petition filed under these Rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no affidavit.”

3. Rule 11 does not thus make it mandatory that the petition must be supported by an affidavit as is being raised in ground 2 of the Preliminary Objection. The 2nd Respondent pleaded further in ground 3 that the petition offends basic rules of procedure and practice with no specific rules offended being cited.

4. In reference to non-compliance with section 87 of the Kenya Railways Corporation Act refers to actions against the Corporation where it is in default of execution of its duties under the said Act. The petition as filed is pursuant to the rights and interests conferred by article 40 of the Constitution and the Land Act. The notice was thus not mandatorily required to be served before the commencement of this suit as the Railways Corporation Act does not deal with issues of compulsory acquisition of land.

5. In light of the clear provisions of the law and the Rules, I find the preliminary objections as filed to be without merit. The written

submissions by the 2nd Respondent is at variance with the grounds contained in their preliminary objection. I will thus not consider issues being introduced through submissions such as the petition not disclosing any cause of action and or a breach of provisions of the cited sections of the Land Act. Consequently I dismiss it in its entirety with costs to the petitioner.

Dated, signed & delivered at Mombasa this 12th October 2018

A. OMOLLO

JUDGE