



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 3 OF 2019

IN THE MATTER OF: ARTICLES 1(1) (2) (3) (A) (B), 2(4), 10, 19, 20, 21, 22, 23, 40, 47,

48, 165 (3) (D) (II) (III), 238, 244, 258(1), 259(1) (3), OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AS ENshrined UNDER ARTICLES 10, 40, 47, 48 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF: LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: NATIONAL POLICE SERVICE ACT, NO. 11A OF 2011

AND

IN THE MATTER OF: ILLEGAL, FRAUDULENT AND UNJUSTIFIABLE DEALING

IN PROPERTY LR. NO. 79568/III, LMU/1633/1/3/98 MTANGAWANDA

AND

IN THE MATTER OF: CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURES RULES, 2013

BETWEEN

ABUDULRAHMAN SALIM BAABAD.....PETITIONER

VERSUS

COUNTY COMMISSIONER OF LAMU.....1ST RESPONDENT

ADMINISTRATION POLICE SERVICE, LAMU.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

AND

CANISTEL LIMITED.....INTERESTED PARTY

RULING

1. By this Petition dated and filed herein on 4th March 2019, Abdulrahman Salim Baabad (the Petitioner) accuses the Respondents of breaching his Constitutional and fundamental rights and prays for:-

1. A declaration that the Petitioner is the rightful and legal owner of Parcel of land being Plot 'A', Plot 'B' and Plot 'C' of LR No. 79568/III, LMU/1633/1/3/98 Mtangawanda;

2. A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Article 40, 47, 48 and 60 of the Constitution of Kenya 2010, have been contravened and infringed upon by the Respondents herein;

3. A declaration that the 2nd Respondent's occupation of the Petitioners Parcel of Land Plot 'A' Plot 'B' and Plot 'C' LR No. 79568/III, LMU/1633/1/3/98 Mtangawanda is illegal, unlawful, wrongful and an infringement and violation of the Petitioner's Constitutional rights to property;

4. A conservatory order restraining, prohibiting and stopping the Respondents jointly and severally, their agents, officers and any person acting under them from entering upon or trespassing, encroaching, constructing any structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise interfering with the Petitioners proprietary rights including the right to quiet possession and enjoyment over the suit premises;

5. An order (directing) the 2nd Respondent to immediately vacate and render vacant possession of the suit Parcel to the Petitioner and to remove and demolish the structures erected therein;

6. An order of mandamus directed to the 4th Respondent to register and issue the title to the said property in favour of the Petitioner;

7. An order directing the 2nd Respondent to compensate the Petitioner for infringement of his Constitutional rights and freedoms, illegal occupation and construction thereon;

8. An order directing the Interested Party to pay the Petitioner the licence fees for the use and occupation of the Petitioners parcel of land from November 2017 to-date and to continue paying the same to the Petitioner so long as they occupy and use the Petitioner's parcel of land;

9. That this Court do grant any other appropriate relief and make such further directions for purposes of enforcing the provisions of Articles 1 (1) (2) (3) (a), (b), 4(b) 2(4), 6(1) (2), 10, 165(3) (4) (ii) (iii), 238, 244, 258(1) and 259 (1) and (3) of the Constitution in relation to the Petitioner; and

10. Costs of this Petition.

2. Upon being served with the Petition, Messrs Canistel Limited (the Interested Party) filed a Notice of Preliminary Objection dated 16th May 2019 objecting to its joinder as the Interested Party and the competence of the suit as against itself on the grounds that:-

i) There is no provision under the law entitling a Petitioner to bring a suit claiming relief against an "Interested Party."

ii) The Petitioner has brought this suit against the named Interested Party without leave of the Court.

iii) Clause 12 of the Licence Agreement dated 5th February 2018 between the Petitioner and the named Interested Party subjects any dispute arising out of or in connection with the said Agreement to arbitration.

iv) Consequently, subject to the provisions of Section 2 as read with Sections 6(1), 10 and 35 of the Arbitration Act, Cap 49 as well as Clause 9 of the said Agreement, this Honourable Court lacks the jurisdiction to entertain the Petition as against the named Interested Party so far as it concerns it.

3. Pursuant to the directions given by this Court to the effect that the Preliminary Objection be disposed of first, the Parties filed detailed written submissions and authorities in regard thereto. I have looked at the submissions and authorities as filed by the Learned Advocates for the parties.

4. As can be seen from Prayer No. 8 of the Petitioners Prayers, he urges this Court to direct the Interested Party to pay him the licence fee for the use and occupation of the suit property. Those prayers apparently arise from the Petitioners contentions at Paragraph 23 of the Petition whereat he avers that:-

“23. On or about sometime (sic) in February 2018, the Petitioner entered into a Licence agreement with (the) Interested Party for a period of 36 months. The lessees have not been paying the agreed rentals to the Petitioner but have instead reneged the agreement and (are) wrongfully channeling the said funds to the 1st and 2nd Respondent(s) but have continued to use the Petitioner's land for their activities.”

5. The Interested Party however disputes inclusion in the Petition stating that the Petitioner cannot seek relief against it as an Interested Party. As it were the Interested Party has not filed any other response to the Petition other than the Notice of Preliminary Objection. Accordingly, as at this Stage, there is no denial on its part on the allegations made by the Petitioner against itself.

6. Given the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules which empower the Court to enjoin any party whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in a suit, it is my considered view that the objection on the ground that the Petitioner cannot seek any relief against it and/or that leave was required is premature and incapable of resolving the issues in dispute herein.

7. On the other hand, the Interested Party asserts that this Court lacks jurisdiction to determine the Petition as the agreement between the Petitioner and the Interested Party subjects any dispute arising out of or in connection with the said agreement to arbitration.

8. Section 6 of the Arbitration Act cited in the objection provides as follows:-

(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when a party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:-

a) That the arbitration agreement is null and void, inoperative or incapable of being performed;

b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the Court shall not be continued after an application under sub-Section (1) has been made and the matters remain undetermined.

(3)”

9. In the matter before me, I have not seen any formal application made by the Interested Party for the dispute to be referred to arbitration nor an acknowledgment on its part of the Petitioner's Claim. The Preliminary Objection by the Interested Party is thus totally misconceived in this respect.

10. As Law J stated in the oft-cited case of ***Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors Ltd (1969) EA 696:-***

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Point may dispose of the suit.”

11. In the premises herein, I am not satisfied that the issues raised by the Interested Party herein are capable in the least in disposing of this suit. The Preliminary Objection is thus without merit. It is dismissed with costs to the Petitioner.

Dated, signed and delivered at Malindi this 13th day of May, 2020.

J.O. OLOLA

JUDGE