



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 10 OF 2015

IN THE MATTER OF ARTICLES 3,10, 19,20,21,22,23,27,43 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE RIGHT TO OCCUPY AND LIVE IN RESIDENTIAL HOUSES OWNED BY THE COUNTY GOVERNMENT OF EMBU

BETWEEN

FREDRICK KIVUTI & 22 OTHERS.....PETITIONERS

VERSUS

THE SECRETARY

COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER

FOR INFRASTRUCTURE, ENERGY, TRANSPORT & HOUSING

IN THE COUNTY GOVERNMENT OF EMBU.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF EMBU.....3RD RESPONDENT

RULING

A. Introduction

1. This is a for ruling is Respondents/Applicant Notice of Motion application dated 5th June 2018 seeking the following orders;

- a) *That this honourable court do dismiss the suit herein for want of prosecution alternatively*
- b) *The orders issued herein on 12th October 2016 be vacated and/or set aside forthwith*
- c) *The costs of the application be provided for.*

B. Respondents/Applicants Case

2. In their affidavit in support of the Notice of Motion aforementioned, the Respondent/Applicant deponed that it had been 3 years since the suit was instituted and the Petitioners had not undertaken any step in furtherance of their case since getting orders on the 12th October 2016.

3. It is further deponed that the orders aforementioned were of the nature of an interlocutory injunction which under the Civil Procedure Rules lapse after 12 months if the matter is not determined.

4. Further, they deponed that litigation must come to an end and that it was only fair that the current petition is dismissed.

5. In their further affidavit dated 16th July 2018, the Respondent/Applicant submitted the Petitioner had not attached authority from the other 21 petitioners authorizing him too swear the replying affidavit to the application for dismissal on their behalf.

6. It is further deponed that the Petitioners had filed the matter as a constitutional matter and can then turn back to claim it is a land matter. They further deponed that the nature of orders granted to the petitioners was irrelevant as it was causing undue hardship to the Respondent/Applicant.

7. They also deponed that the right of housing in Kenya had not been realized and there was need for the Respondent/Applicant to get their houses as they needed them.

C. Petitioner's Case

8. In his replying affidavit dated 28th June 2018, the 1st Petitioner swearing on behalf of the other petitioners deponed that the petition was based on the infringement of their rights to fundamental housing as enshrined in the constitution.

9. He further deponed that the petition ought to be heard in the Environmental and Land Court as that was the court with jurisdiction.

10. He further deponed that the Environmental and Land Court in Embu had given directions that it was only entertaining cases of 10 years and above which the current case was not and that if dates were available he would proceed with his case and consequently the current application for dismissal was premature.

11. He further deponed the orders issued by this court were conservatory in nature and thus not subject to the civil procedure rules as stated by the Respondent/Applicant.

D. Respondent/Applicant's Submissions

12. The respondent/applicant submitted that the court has jurisdiction to entertain their application for dismissal.

13. It was his submission that the delay by the Petitioner in prosecuting his case was an inordinate delay and further that the Petitioner had taken no single action in moving his case which was a departure from the overriding objectives of the civil procedure act. He relied on the cases of; **Mwangi S Kimenyi v Attorney General & Another (2014) eKLR.**

14. He further submitted that assertions by the Petitioner that this suit fell under the jurisdiction of the Environmental and Land Court and that no dates had been given was aimed at misleading the court and was in bad faith and were an abuse of the court process aimed with the intention to continue enjoying court orders. He relied on the case of **Gideon Sitelu Konchella v Daima Bank Limited (2013) eKLR** and urged the court to dismiss the petition.

E. Petitioner's Case

15. It was submitted by the Petitioners' that this court lacked jurisdiction to entertain the matter as the same ought to be heard by the Environment and Land Court as the matter involved land use and occupation, He relied on the case of **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others (2017) eKLR.**

16. He relied on the case of **Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 Others Petition No. 2 of 2014** as quoted in **Petition No. 4 of 2014 Casade Co. Ltd v Kenya Association of Music Production & 3 Others** in which conservatory orders were distinguished from injunctions.

17. It was further submitted that the delay in prosecuting the petition was caused by factors beyond their control, this being the lack of dates in the Environmental and Land Court. The court was urged to dismiss the present application with costs and transfer the same to the Environment and Land Court.

F. The Determination

18. The Petitioners have raised the issue of jurisdiction. It is my opinion that addressing this first is paramount. **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers including the power to *'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'* and the jurisdiction *'to hear any question respecting the interpretation of the Constitution.'* **Article 23** which also touches on jurisdiction of the High court provides that; *"23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."*

19. **Article 23(2)** nevertheless mandates Parliament to enact legislation giving original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation of a fundamental right or freedom in the Bill of Rights. From the foregoing, it becomes clear that 'constitutional court' is not part of the hierarchical structure in our Kenyan judicial system.

20. In fact, nowhere in the Constitution of Kenya 2010 is there a mention of the term 'constitutional court'! It would also follow that every High Court judge in Kenya has jurisdiction to discharge functions falling under **Article 165** of the Constitution because the Constitution only makes blanket reference to 'the High court.' It is thus not difficult to fathom why for instance a land matter disputing ownership in the Environment and Land Division (ELC) and over which a constitutional petition is subsequently framed invoking the breach of the right to property under **Article 40** of the Constitution is unlikely to be enthusiastically entertained in the Constitutional and Human Rights Division in the first instance.

21. Courts have also on numerous occasions emphatically ruled that where there is a specific mechanism given for resolution of disputes, then that must be followed and that the Constitution is not meant to replace the existent statutory regime. See the case of **Dickson Mukweluine v Attorney General & 4 others, Petition No. 390 of 2012**, and **Thande v Montgomery and Others [1970] EA 341**. That is why for instance a constitutional petition solely claiming maintenance and custody of children and which invokes say, **Article 53** of the Constitution on equal parental responsibility is likely to be rerouted back to the Children's court for hearing and determination. See the case of **Violet Kedogo Kiharangwa v Preston Ngira Obadiah, Petition No. 339 of 2011** as per Lenaola J.

22. Briefly, in their petition, the petitioners claimed that the respondents were in violation of their right to occupy and live in residential houses owned by the 3rd Respondent. It is alleged that the petitioners have not violated the terms of their tenancies with the 3rd respondent who wants to evict them from the said houses.

23. It is averred that the acts complained of are unconstitutional and a violation Articles 3, 10,19,20,21,22,23,27 &43 of the constitution. Similarly, the reliefs sought in the petition can safely be grouped into two, namely, "reliefs seeking to declare the unconstitutionality or otherwise of the actions complained of and reliefs touching on the legality or otherwise of the alleged eviction" Evidently, the petition raises issues touching on constitutionality or otherwise of the actions complained of and alleged violation on property rights.

24. The *locus classicus* on jurisdiction is the celebrated case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd {1989} KLR 1** where **Justice Nyarangi** held as follows: -

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

25. In **Judicial Service Commission vs Gladys Boss Shollei & another [2014] eKLR**, even though the decision related to an objection on the jurisdiction of the Industrial and Labour Relations Court to handle issues pertaining to violation of constitutional rights, the court of Appeal held that the Industrial and Labour Relations Court had jurisdiction to handle complaints relating to violation of constitutional rights arising out of a labour dispute.

"[45] In this case, the respondent filed her petition in the Constitutional and Human Rights Division of the High Court and the same was properly transferred to the Industrial Court by the High Court as the violations alleged arose from the employment relationship. Accordingly, I would thus reject the contention that the Industrial Court had no jurisdiction to entertain the respondent's claim."

26. A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court **In the matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported)** at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner;

"Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent."

27. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. See the case of **Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011** . At this point, I wish to clearly state that 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. In this regard, my view is that the intention in the Constitution is that if an issue arises touching on land in respect of its use, possession and control, then this High Court will have no jurisdiction. If the dispute touching on land is for anything else other than which I have stated, my view is that, that dispute will be outside the jurisdiction of the Land Court. The same was upheld by Mabeya, J in **Capital Fish Kenya Limited vs. Monnatz Limited & 2 others (2014) eKLR**

28. The other closely related issue is of the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters which fall within the ambit of the Environment and Land Court.

29. A similar issue arose in the case of **United States International University (USIU) vs. Attorney General** where Majanja, J dealt with it at a very great length. Although the said case related to labour issues one of the issues in contention was whether or not the Employment and Labour Relations Court as created under Article 162(2) of the Constitution has the jurisdiction to interpret the Constitution and to grant the remedies provided under Article 23 of the Constitution which remedies are clearly stated to be a sole preserve of the High Court. The Learned Judge expressed himself on the said issues as follows: -

"45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial

Court Act, 2011.” (emphasis added).

30. It is instructive to note that the Court of Appeal has also had an occasion to address itself on the very issue in the earlier cited case of ***Daniel N. Mugendi vs. Kenyatta University & 3 others*** where the in allowing an appeal and setting aside an order dismissing a suit on the finding that the Industrial Court was not possessed of jurisdiction to interpret the Constitution and to grant the remedies provided under Article 23 of the Constitution settled the issue in *toto* in respect to such matters within the jurisdiction of both the Employment and Labour Relations Court as well as those before the Environment and Land Court. I stand guided by the said decision. The Court of Appeal expressed itself in the following words: -

"In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects." (emphasis added).

31. In the final analyses, I find that this matter relates to question of unlawful eviction from land on which the petitioner's houses sit. The constitutionality or otherwise of the petitioner's complaints falls within the jurisdiction of the Environment and Land Court which in my view has jurisdiction to determine the issues raised as clearly stipulated in the provisions of the law cited above.

32. I have noted with concern that the petitioners/respondents were granted conservatory orders on 12/10/2016 but never moved the court to have their suit heard. They are litigants who seem to have lost interest in their petition just because they are enjoying the conservatory orders. This act of indolence should not be condoned and ought to be punished in ways of costs.

33. Consequently, having established that this court lacks authority to entertain the current application it is my opinion in the interests of justice that this file be mentioned before the Environment and Land Court for directions before the Honourable judge.

34. The respondents to meet the costs of this application

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr Muriithi for Okwaro for the petitioner.