



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 56 OF 2017

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT CP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

BETWEEN

KENYA WOOL INVESTMENTS LIMITED.....APPLICANT

AND

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE CABINET SECRETARY TREASURY3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

DOPP INVESTMENTS LTD.....5TH RESPONDENT

RULING

Introduction

1. The Applicant instituted this suit by way of ex parte Chamber Summons dated 25th September, 2017, brought pursuant to the Provisions of Order 53 Rule 1 (1), (2) and (4) of the Civil Procedure Rules & Sections 8 and 9 of the Law Reform Act. The Ex-parte Applicant through that application sought the leave of court to commence Judicial Review proceedings. The leave was granted pursuant to which the ex-parte applicant filed the substantive motion on 3rd October, 2012 praying for the following orders :-

a) An order of Mandamus do issue to direct the 1st Respondent to revoke all title documents held by the Interested Party in respect of the parcel of land L.R NO. 1040/2 MAZERAS as directed by the 2nd Respondent in the Kenya Gazette No. 6862 dated 17th July, 2017.

b) An order of Prohibition to prohibit the 1st, 2nd, and 3rd Respondents by themselves, agents, or otherwise howsoever from paying out in compensation the amount of Kenya Shillings Six Hundred and Sixty Seven Million, Nine Hundred and Thirty Thousand, Eight Hundred and Eighty Seven (Kshs. 667,930,887.00) to any other person/entity other than the ex-parte Applicant.

c) An order of Mandamus compelling the 2nd and 3rd Respondents to make the payment of Kenya Shillings Six Hundred and Sixty Seven Million, Nine Hundred and Thirty Thousand, Eight Hundred and Eighty Seven (Kshs. 667,930,887.00) being the compensation award due to the ex-parte Applicant Kenya Wool Investments consequent to the acquisition of the portion of 13.8

hectares of its parcel of land L.R NO. 1040/2 MAZERAS by the 2nd Respondent on behalf of Kenya Railways Corporation.

d) An order of Prohibition to prohibit the 1st and 2nd Respondents by themselves, agents or otherwise whomsoever from inviting to, advertising for, putting up public notices, investigating, convening, holding any meeting and or otherwise dealing with property known as Land Reference Number 1040/2 MAZERAS.

e) An order of Prohibition to prohibit the 1st Respondent from any way whatsoever contravening the laid down statutory procedure for the hearing and review of the disposition of the Land referred to as L.R NO. 1040/2 MAZERAS as it purported to do by inviting further hearings through its letter dated 28th August, 2017.

f) An order of Prohibition to prohibit the 2nd Respondent's Review Committee from altering and/or making amendments to its determination which resulted in the revocation of the title documents held by the Interested Party DOPP INVESTMENTS LIMITED by Gazette Notice dated 17th July, 2017.

2. Before the Notice of Motion could be heard the Applicant on 23rd November, 2017 filed a Notice of Motion dated 22nd November, 2017 seeking to commit to civil Jail identified officials of the 2nd Respondent.

3. Before the Notice of Motion above dated 22nd November, 2017 could be heard the 2nd Respondent on 7th December, 2017 filed a Notice of preliminary Objection against the entire suit on the following grounds:-

a) That the Court lacks jurisdiction to proceed with the trial of the instant application as the issues raised are directly and substantially before the Environment and Land Court as between the same parties being:

i. Mombasa ELC No. 258 of 2016 between Martin Muthama and others –vs- Kenya Wool Investment Company, DOPP Investment, National Land Commission and Attorney General.

ii. Kiambu CMCC No. 424 of 2017 between Kenya Wool Investment Copmany Limited –vs- Dr. Swazuri A. Mohammed, National Land Commission

iii. Mombasa ELC Petition No. 18 of 2016 between Hamisi Tsuma Mwero –vs- Natinal Land Commission, Kenya Railways Corporation, Chief Land Registrar, Attorney General and DOPP Investment.

b) Further the 2nd Respondent contends that this court lacks jurisdiction to proceed with the application as issues raised are res judicata having been directly and substantially before court as between the same parties herein and Rulings delivered in the above mentioned previously instituted matters.

c) Lastly the 2nd Respondent contended that by dint of Article 162, Article 165 (5)(b) of the Constitution, Section 13 of the Environment and Land Court Act, Sections 112,113, 114, 115, 127 and 128 of the Land Act, this Court lacks jurisdiction since the application filed herein raises issues of ownership , title to land and compulsory acquisition which jurisdiction lies in the Environment and Land Court and further sought that the application be dismissed with costs.

4. The 2nd Respondent again on 19th December, 2017 filed another Notice of Preliminary Objection against the Ex-parte Applicants application for Contempt on the grounds that the Ex-parte Applicant had not complied with Section 30 (1) and (2) of the Contempt of court Act. The Act has since been declared unconstitutional and this court will disregard the said Preliminary Objection.

5. The Ex-parte Applicant further filed Grounds of Opposition dated 16th March, 2018 opposing the 2nd Respondents Notice of Preliminary Objection dated 14TH December, 2017.

6. In the cause of time the Interested Party filed a Preliminary Notice of Objection dated 16th July, 2018 objecting against the Ex-parte's Applicant Application dated on 3rd October, 2018.

7. Accordingly therefore before court are two Preliminary Objections as follows:-

i. The 2nd Respondent's Notice of Preliminary Objection dated 5th December, 2017 seeking the dismissal of the entire suit and;

ii. The Interested Party's Notice of Preliminary Objection dated 16th July, 2018

Submissions

Ex-parte Applicant's Submissions

8. The Ex-parte Applicants filed their submissions on the Notice Of Preliminary Objection dated 5th December, 2017 submitting that the cause of action in these proceedings are not substantially the same cause of action as in the other two suits filed in the Environment and Lands Court.

9. The Ex-parte Applicant submitted that since the parties in the two suits are not the same as parties herein and the suits have not been heard and/or finally determined, it was thus improper for the 2nd Respondent to raise a Preliminary Objection on grounds of res judicata.

10. On the principle of sub judice, the ex-parte applicant submitted that the issues raised in the three suits referred to in the Notice of Preliminary Issue are not directly or substantially in issue in this suit because in the Environment and Land Court, the Plaintiff's lay claim to ownership of L.R No. 1040/2 MAZERAS while the Applicant herein seeks enforcement of the decision by the 2nd Respondent published vide Gazette No. 6862 Vol. CXIX-No CXIX

11. The Applicant submits that the Preliminary Objection by the 2nd Respondent is embarrassing and prejudicial to the ex-parte Applicant and should be dismissed.

The Interested Party's Submissions

12. The Interested Party submitted that the documentary evidence adduced in court and before the National Land Commission in this suit as well as the previous ones in the ELC clearly shows that it is the bona fide owner and valid holder of the proprietary rights to the suit property having paid for and successfully transferred the same. The Interested Party asked the court to dismiss the suit herein.

The 1st, 3rd and 4th Respondent's Submissions

13. Mr. Wachira, Counsel for the parties submitted that the substantive notice of motion seeking Judicial Review Orders should proceed to full trial. Counsel submitted that the Preliminary Objection raises a factual dispute which is contested and not purely on points of law. Mr. Wachira submitted that it has not been shown that parties in the Judicial Review are parties to the ELC suits.

The 2nd Respondents Submissions

14. Mr. Mbuthia, Counsel for the 2nd Respondent submitted that the substantive motion was filed in court without Jurisdiction and the only measure that court can take is to dismiss it and transfer the same to the Environment and Lands Court on grounds that the motion before court is sub judice.

15. Counsel, further submitted that the applicant failed to disclose the existence of the ELC suits before leave and stay was granted in this suit and that the same consists of material non-disclosure.

The Determination

16. I have considered the two Preliminary Objections, responses thereto as well as submissions by Counsel. The issue that the court is called upon to decide is whether it has the jurisdiction to handle the Application before court.

17. In the case of *OWNERS OF THE MOTOR VESSEL LILLIAN "S" V CALTEX OIL (KENYA) LTD 1989 KLR 1 at page 14*, the court of Appeal stated thus:

"Without jurisdiction a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings, pending other evidence. A court of law downs its tools in respect of the matter before it the moment, it holds the opinion that it is without jurisdiction."

18. Also in *Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others*, Application No. 2 of 2011 [2012] eKLR, the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:

"(68) 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." (Emphasis provided).

19. I have considered the fact that there are pending cases before the Mombasa Environment and Land Court being *Mombasa ELC No. 258 of 2016 between Martin Muthama and others –vs- Kenya Wool Investment Company, DOPP Investment, National Land Commission and Attorney General* and *Mombasa ELC Petition No. 18 of 2016 between Hamisi Tsuma Mwero –vs- Natinal Land Commission, Kenya Railways Corporation, Chief Land Registrar, Attorney General and DOPP Investment*. I do note that the same matters are pending before courts which I consider to be of competent jurisdiction. I agree with the 2nd Respondent to the extent that issues of compensation as well as ownership need to be determined in their context and not in isolation.

20. It is my opinion that the orders sought in the current application would have been raised and addressed in the courts that the cases are

pending before. In *Peter Oduour Ngoge v Hon. Francis Ole Kaparo, SC Petition 2 of 2012*, [para. 29-30] the Court stated as follows:

“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted. In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.” (Emphasis provided).

21. For the above reasons it is the finding of this court that the issues raised in this application are already the subject of existing Litigation in the ELC. It is also the finding of this court that because the issue of compensation for Land is raised in the said ELC suits, the ELC is better suited to proceed and determine those issues. For those reasons the Application dated 3rd October, 2017 is dismissed for want of Jurisdiction.

22. Parties shall bear own costs of the Application.

23. Orders Accordingly.

Dated, Signed and Delivered in Mombasa this 10th day of December 2018.

E. OGOLA

JUDGE

In the presence of:

Wachira Nguyo for 3rd and 4th Respondents

Mr. Omolo for Interested Party

N/A for Ex-parte Applicant

N/A for 2nd Respondent

Mr. Kaunda Court Assistant