



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. JUDICIAL REVIEW APPLICATION NO. 37 OF 2018

REPUBLIC.....APPLICANT

VERSUS

CO-OPERATIVE DEVELOPMENT

KATELEMBO TASK FORCE.....1ST RESPONDENT

COUNTY CO-OPERATIVE

COMMISSIONER MACHAKOS.....2ND RESPONDENT

AND

JOSEPH MUTISYA.....1ST INTERESTED PARTY

CHARLES MUTISYA.....2ND INTERESTED PARTY

JOSEPHAT MULWA MAINGI.....3RD INTERESTED PARTY

KATELEMBO ATHIANI MUPUTI

RANCHING AND FARMING CO-OPERATIVE

SOCIETY LTD.....4TH INTERESTED PARTY

AND

RAPHAEL PAUL KATUMO NINDI.....EX-PARTE APPLICANT

JUDGMENT

1. In the Notice of Motion dated 6th September, 2018, the Ex-parte Applicant has prayed for the following reliefs:

a) That an order of certiorari do issue to remove into this Honourable Court and quash the decision dated 16th August, 2018 by the Katelembo, Athiani Muputi FCS Ltd – Task Force the 1st Respondent herein.

b) Costs of this application be provided for.

2. The Motion is premised on the Ex-parte Applicant’s Statutory Statement in which he averred that the proceedings and decision of the 1st Respondent delivered on 16th August, 2018 taking away the Ex-parte Applicant’s land rights in plot numbers 3437X was ultra vires the Co-operative Societies Act.

3. According to the Ex-parte Applicant, there are no powers conferred upon the 1st and 2nd Respondents under the Co-operative Societies Act to inquire into and make a decision as they did against a non-member of Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited.

4. The Ex-parte Applicant averred that the 1st Respondent acted without jurisdiction; that the 1st Respondent made a jurisdictional error by purporting to interpret the Co-operative Societies Act and that the 1st Respondent failed to accord the Ex-parte Applicant a right to be heard.

5. The Ex-parte applicant finally averred that the 1st Respondent's decision and actions in entertaining and determining the purported dispute between the 1st and 2nd Interested Parties and himself was unreasonable because they did not consider material facts and that they acted in bad faith and in breach of the principles of proportionality.

6. In his Replying Affidavit, the 3rd Interested Party deponed that he is a member of Katelembo Athiani Farming and Co-operative Society Limited; that he was allocated plot number 3436X by the said society and that he has enjoyed open and quiet possession of the said plot number 3436 for over three decades until the Ex-parte Applicant illegally encroached on the land.

7. According to the 3rd Interested Party, the 1st Respondent exercised its mandate judiciously as provided for under the Constitution and the Co-operative Societies Act; that the 1st Respondent was constituted by the 2nd Respondent with a view of verifying and auditing all land transactions relating to Katelembo Athiani Farming and Ranching Co-operative Society Limited (*the 4th Interested Party – the Society*) and that the functions of the Co-operative Societies have been devolved under the 4th schedule of the Constitution.

8. According to the 3rd Interested Party, the functions of the Co-operative Societies were transferred from the National Government to the Machakos County Co-operative Commissioner vide Legal Notice No. 168; that the 1st Respondent exercised its discretion in conducting investigations as to the ownership of Plot No. 3436X; that the 1st Respondent's decision was fair and just and that the Application should be dismissed.

9. The 2nd Respondent deponed that the 1st Respondent in hearing and determining the matter subject of Plot 3437X within the Society acted within the powers granted to it through the relevant legislation and delegated vide Gazette Notice No. 1949 dated 3rd March, 2017 and gazette Notice No. 6958 dated 21st July, 2017.

10. According to the 2nd Respondent, all the principles of natural justice as well as fundamental rights were accorded to all the parties who appeared before the 1st Respondent particularly the Ex-parte Applicant; that the Application before the court is premature and that the court is devoid of jurisdiction.

11. The Ex-parte Applicant swore a Further Affidavit in which he deponed that the terms of reference of the 1st Respondent did not give the 1st Respondent the power to hear and determine land disputes concerning non-members of the Society; that it is the Environment and Land Court that has exclusive jurisdiction to deal with disputes relating to land, land use, title to land and that the decision of the 1st Respondent was *ultra vires*, in error of law and without jurisdiction.

Submissions

12. In his submissions, the Ex-parte Applicant's advocate submitted that this court is of equal status as the High Court and has the power to grant Judicial Review reliefs; that this court's jurisdiction has been granted by both the Constitution and the Environment and Land Court Act and that the decision under challenge is from a Tribunal which is subordinate to this court, namely, Katelembo, Athiani Maputi FCS Limited – Task Force which is a public body exercising public function.

13. Counsel submitted that the decision under challenge was made by the 1st Respondent; that the subject matter of the decision is a land dispute and that there are no dispute mechanisms that exist in the Co-operative Societies Act.

14. It was submitted that the provisions of Section 76 of the Co-operative Societies Act cannot come into play because the Ex-parte Applicant is neither a member nor a past member of the 4th interested party, or a party claiming through a member, a past member or a deceased member. Consequently, it was submitted, the parties before this court would not have been proper parties to appear before the Co-operative Tribunal.

15. The Ex-parte Advocate submitted that the Task Force acted without jurisdiction by taking away the Ex-parte Applicant's rights; that the terms of reference Gazetted as per the Gazette Notice are *ultra vires* the provisions of the Co-operative Societies Act and that in any event, the said terms of reference did not give the 1st Respondent the mandate to hear and determine a Land Dispute.

16. The Ex-parte Applicant's counsel submitted that the Applicant was not given sufficient notice to prepare for the dispute; that he was not given a notice of the intended inquiry, the opportunity to tender evidence and call witnesses and that no evidence was produced to controvert the Applicant's averments.

17. Counsel submitted that the 1st Respondent acted in breach of the principles of proportionality and that its actions failed to strike a fair balance between the adverse effects of its decision and the action of hearing. The Applicant's counsel relied on numerous authorities which I have considered.

18. The 1st Respondent's advocate submitted that gazette notice number 27 dated 30th March, 2017 conferred on the 1st Respondent the power and authority to ascertain which land was due to which member; that the fact that the Applicant had allegedly purchased land from a member of the 4th Interested Party gave the Respondent the *locus standi* to determine the dispute and that one of the mandates of the 1st Respondent was "*to pin point the persons culpable and propose appropriate action to be taken*".

19. Counsel submitted that each party was accorded an opportunity to state its case and present evidence; that according to the Minutes of 31st May, 2008, the Ex-parte Applicant stated how he bought plot number 3437x from the Society and that the onus to demonstrate that the decision of the 1st Respondent is absurd was on the Applicant. Counsel relied on several authorities which I have considered.

20. The 1st and 2nd Interested Parties' advocate submitted that the suit lands are plot numbers 3437 and 3436, Katelembo Athiani Muputi Ranching and Farming Co-operative Society Limited.

21. Counsel submitted that the 1st Respondent had jurisdiction and acted judiciously having been appointed by the 2nd Respondent and that the Ex-parte Applicant having purchased the suit property from Katelembo Society placed himself within the jurisdiction of the Respondents.

22. The 1st and 2nd Interested Parties submitted that all the parties were afforded an opportunity to tender their oral and documentary evidence and that the 1st Respondent acted legally, fairly and rationally.

23. The 3rd Interested Party's advocate submitted that Legal Notice No. 168 dated 9th August, 2013 transferred Co-operative Societies functions from the National Government to the County Government of Machakos; that Gazette Notice No.1949 mandated the County Government of Machakos to constitute the 1st Respondent and that the 1st Respondent had the requisite jurisdiction.

24. Counsel submitted that the Ex-parte Applicant and the 1st and 2nd Interested Parties received summons to appear before the 1st Respondent for purposes of determining ownership of a parcel of land; that the parties appeared before the 1st Respondent and ventilated their respective cases and that the Ex-parte Applicant was afforded an opportunity to prepare for the hearing in advance and tender evidence.

Analysis and Findings

25. The Ex-parte Applicant (*the Applicant*) is seeking for a Judicial Review order of Certiorari to quash the decision of the 1st Respondent dated 16th August, 2018. The Application is based on the ground that the 1st Respondent acted *ultra vires* and without jurisdiction; that the 1st Respondent did not afford the Ex-parte Applicant the opportunity to be heard and that the decision of the 1st Respondent was tainted with unreasonableness, bad faith and was not proportional.

26. The broad issues for determination in this matter are; -

a. Whether the 1st Respondent had jurisdiction to make the determination of 16th August, 2018.

b. Whether the Ex-parte Applicant was given an opportunity to be heard.

c. Whether the decision of the 1st Respondent was tainted with unreasonableness, bad faith and unproportionality.

27. According to the Verifying Affidavit of the Ex-parte Applicant, he is the owner of land known as Plot number 3437x measuring approximately 2.04 acres which he bought from the 4th Respondent in the year 2009. The Applicant deponed that after purchasing the said land from the Society, he took possession of the same by fencing the land.

28. The Ex-parte Applicant deponed that he was shocked when he was summoned on a short notice to appear before the 1st Respondent and that although he attended as summoned, he was neither informed of any complaint nor given a chance to respond to the complaint.

29. The Ex-parte Applicant deponed that he was later notified of the decision of the 1st Respondent dated 16th August, 2016 to the effect that he should vacate the suit land and that the 1st Respondent did not have the requisite jurisdiction to hear the dispute.

30. The Ex-parte Applicant annexed on his Affidavit the letter by the 4th Respondent dated 28th January, 2014 which confirmed that he owned plot number 3437X measuring 2.04 acres. The Ex-parte Applicant also annexed the transfer form dated 7th August, 2009 showing that the 4th Interested Party transferred plot number 3437X to him.

31. The impugned Report of the 1st Respondent is dated 16th August, 2018. The Report is titled as follows:

“THE TASK FORCE IN THE MATTER OF LAND DISPUTE BETWEEN WILSON MUTISYA NGULI REPRESENTED BY: JOSEPH MUTISYA (SON) AND CHARLES MUTISYA (SON) JOSEPHAT MULWA MAINGI (CLAIMANTS) VS RAPHAEL PAUL KATUMO NINDI (RESPONDENT).”

32. The Report shows that the “Task Force” – the 1st Respondent - sat at Machakos Co-operative Board Room on 31st May, 2018 to deliberate over the Land Dispute. After hearing the claimants and the Ex-parte Applicant on the said date, the 1st Respondent made the following “Taskforce Decision:”

“1. The Taskforce ruled that Mr. Raphael Paul Ketumo Nindi should therefore vacate the suit land and the complainants take possession of the same as per the boundaries that were demarcated by the Surveyor from the task force between plot numbers 3436 and 3437.”

33. The 2nd Respondent deponed that the jurisdiction of the 1st Respondent emanates from gazette notice number 27 and 99 dated 3rd March, 2017 and 21st July, 2017 respectively.

34. The purview of a Judicial Review Application was considered by Yano J., while granting an order of certiorari in **Republic vs. National Land Commission Ex-parte Kinnock Limited [2019] eKLR** where he rendered himself as follows:

“11. The purview of judicial review was clearly set by Lord Diplock in the case of Council for Civil Services Union-vs-Minister for Civil Service [1985]AC 374 at 401D when he stated that;

“Judicial review I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegality, the second irrationality, and the third “procedural impropriety...” “By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it... By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...I have described the third head on ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision”

35. Odunga J., while referring a matter to be heard and determined by the Environment and Land Court, made a finding that the Environment and Land Court is a court of equal status as the High Court and has powers to grant Judicial Review reliefs like the ones prayed for in the instant matter.

36. In **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or 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 the 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 of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, 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”.

37. 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, 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.”

38. From the above decisions, it is trite that the jurisdiction of a Court, Tribunal or anybody exercising quasi-judicial or public functions flows from the Constitution or legislation or both.

39. The Kenya Gazette Notice No. 1949, pursuant to which The Task force was appointed, was pursuant to Section 27(3) (c), 93 and 93 (A) of the Co-operative Societies Act. The gazette notice reads in part as follows:

“...the management requested the Government of Machakos County Under section 27(3) (c) of the Co-operative Societies Act (Cap 490 Laws of Kenya) to act and resolve various outstanding issues.

Now therefore, in exercise of my powers under Section 93 and 93(A) of the Co-operative Societies Act (Cap 490) Laws of Kenya I hereby appoint for a period of three (3) years from the 1st October, 2016 the following multi-disciplinary team...”

40. Section 93 and 93(A) of the Co-operative Societies Act provides as follows;

“93. Power of the Minister

The minister may at any time and on any matter direct the Commissioner as to the exercise of his powers and duties under this Act.

93 A. Other powers of the Commissioner.

Without prejudice to any other powers under this Act the Commissioner may-

a) Call for elections in any Co-operative Society.

b) Attend meeting of Co-operative Society and require every society to send to him at a proper time, notice and agenda of every meeting and all minutes and communications in respect thereof.

c) Require that societies update their by-laws; and

d) Exercise such other powers consistent with this Act as may be prescribed.”

41. Accordingly, whereas the Minister for Machakos County Government can exercise the powers under Section 93 of the Act under devolution, the reference to Section 93 (A) is with respect to the Commissioner, who again under the devolution provisions, is the Machakos County Commissioner.

42. Contrary to the above provisions of the Co-operative Societies Act, the decision under challenge was not made by the County Co-operative Commissioner, but by a multi-disciplinary team of several officers, inclusive of the County Co-operative Commissioner. To that extent, the decision by the Task force, the 1st Respondent herein, cannot be anchored on the provisions of Sections 93 as read with 93(A) of the Co-operative Societies Act.

43. Furthermore, the provisions of Section 27(3) (c) of the Act deal with consideration and approval of estimates of income and expenditure for the ensuing financial year or part thereof. Section 27 (3) (c) of the Co-operative Societies Act does not give the Minister or the Commissioner the powers to resolve land disputes within a Co-operative Society.

44. The Terms of Reference set out in the Gazette Notice appointing the 1st Respondent have nothing to do with the consideration and approval of estimates of income and expenditure for the ensuing financial year, which is what Section 27(3) (c) of the Act requires.

45. It is not in dispute that the proceedings before the task force were over a Land Dispute. This can be discerned from the proceedings as follows:

“IN THE MATTER OF A LAND DISPUTE BEFORE TASK FORCE SITTING AT MACHAKOS CO-OPERATIVE BOARD ROOM 31ST DAY OF MAY, 2018.”

46. The decision by the task force is as follows:

Task Force Decision

i. The taskforce ruled that Mr. Raphael Paul Katumo Nindi should therefore vacate the suit land and the complainants take possession of the same as per the boundaries that were demarcated by the surveyor from the taskforce between plot numbers 3436 and 3437.

ii. Raphael Paul Katumo Nindi should pursue compensation from the society since the disputed piece of land belongs to Wilson Mutisya Nguli and Josphat Mulwa Maingi.

47. Indeed, the nature of the proceedings before the 1st Respondent can be described as having been a hearing and determination on the occupation, title and use of land since the Task force resolved to evict the Ex-parte Applicant from a piece of land he has had exclusive possession for many years.

48. Within the Terms of Reference Gazetted, which in themselves are *ultra vires*, the provisions of Section 27 (3) (c) of the Co-operative Act, did not give the task force the power to hear and determine Land Disputes. The decision by the Task force was therefore *ultra vires* the terms of reference, which in any event are *ultra vires* the Co-operative Societies Act.

49. In administrative law, unless Parliament expresses or implies a dispensation, legislative power must be exercised by those to whom it is given, and not by further delegates. The only organ authorized by the Constitution and statute to hear disputes concerning the use and occupation of, and title to land, is the Environment and Land Court and the Magistrate’s Court, and not a Task Force appointed by the County Executive Member of the County Government of Machakos.

50. The statutory mandate of this court and the Magistrate’s Court is provided for by the Environment and Land Court Act. Section 13(1) of the Environment and Land Court Act provides as follows:

“Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.”

51. Section 9 (a) of the Magistrates Act provides as follows:

“9. A magistrate's court shall-

(a) In the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act and subject to the pecuniary limits Cap. I2A under section 7(1), hear and determine claims relating to —

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, chores in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.”

52. To the extent that the County Government of Machakos does not have any mandate under the Co-operative Societies Act to establish a Task force to resolve land disputes involving the 4th Interested Party and the people who purportedly bought land from them, and in view of the constitutional and statutory provisions giving such jurisdiction to only the Environment and Land Court and the Magistrate’s Court, I find that the decision of the 1st Respondent dated 16th May, 2018 was *ultra vires*, null and void.

53. Having found that the 1st Respondent did not have jurisdiction to arrive at the findings of 16th August, 2018, and having declared the said decision null and void for want of jurisdiction, I will not delve into the other issues raised by the Ex-parte Applicant.

54. For those reasons, I allow the Ex-parte Applicants’ Application dated 6th September, 2018 as follows; -

a) An order of Certiorari do and is hereby issued removing into this court and quashing the decision dated 16th August, 2018 by the Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited – Task Force, the 1st Respondent herein.

b) Each party to bear his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE