REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 33 OF 2018

REPUBLIC.....APPLICANT

VERSUS

KATELEMBO ATHIANI MUPUTI FCS LIMITED.....1ST RESPONDENT

KATELEMBO ATHIANI MUPUTI

FCS LIMITED – TASK FORCE.....2ND RESPONDENT

AND

MESHACK MUTUA.....1ST INTERESTED PARTY

ROSE KATILE MUTUA.....2ND INTERESTED PARTY

AND

JOHNSON MUSAU MUINDI.....EX-PARTE APPLICANT

JUDGMENT

Introduction:

1. In the Notice of Motion dated 26th September, 2018, the Ex-parte Applicant *(the Applicant)* has prayed for the following orders:

> ***a) That Certiorari do issue to remove to this Honourable Court for the purpose of being quashed and to quash the decision of Katelembo Athiani Muputi FCS Task Force dated 12th July, 2018.***
>
> ***b) That Prohibition do issue prohibiting the Respondents, the Land Registrar Machakos or any other institution from in any manner altering and or interfering with the status of registration of title number Athiani River/Athiani River Block 1/460.***
>
> ***c) That Mandamus do issue to compel the 2nd Respondent to return to the Applicant the title deed for title number Athiani River/Athiani River Block 1/460 which the 2nd Respondent wrongfully detains.***

2. The Notice of Motion is supported by the Statutory Statement of the Applicant who has deponed that he is a holder of a Power of Attorney in respect of a parcel of land known as Athi River/Athi River Block 1/460 (*the suit land);* that the said suit land is registered in the name of Claudia Alexius Muindi and that on 30th August, 2006, the Interested Parties filed a suit against the Applicant in Machakos CMCC No. 698 of 2006.

3. The Applicant averred that the said civil case is partly heard; that while the said case was pending before the Chief Magistrate, the Interested Parties lodged a claim before the 2nd Respondent and that after hearing the parties, the 2nd Respondent ordered for the cancellation of the title in respect to the suit property.

4. The Applicant finally averred that the decision of the 2nd Respondent is *sub judice* Machakos CMCC No. 608 of 2006; that the decision of the 2nd Respondent is unjustified and oppressive and that the 2nd Respondent's decision offends both the Constitution and the Land Registration Act.

5. In her Replying Affidavit, the 1st Interested Party deponed that the Application is incompetent by virtue of Section 76 of the Co-operative Societies Act; that on 24th January, 2004, they entered into a written Sale Agreement with one Mathew Mukewa, who was the wife of the registered proprietor of the suit property, for the sale of the suit property; that they executed the transfer form and that the 1st Respondent authored a letter to the Land Registrar informing him that the suit property now belonged to them.

6. According to the 1st Interested Party, it transpired later that the current registered owner of the suit property, Claudia Alexius Muindi, had proceeded to have the suit property registered in her name on 7th September, 2005 and that the 2nd Respondent heard the dispute and found that the suit property belongs to the Interested Parties.

7. It was the deposition of the 1st Interested Party that he did instruct his advocates to institute Machakos CMCC No. 698 of 2006 seeking for declaratory orders that the Title Deed issued to the Applicant is null and void and for a declaration that the suit property belongs to them.

8. The 1st Interested Party finally deponed that on 21st May, 2019, the court delivered Judgment in their favour by holding that the suit property belongs to them; that the Applicant has not preferred an appeal against the said Judgment and that upon the delivery of the Judgment by the lower court, the current Application has been overtaken by events. The 2nd Interested Party filed an Affidavit in which she adopted the depositions of the 1st Interested Party.

Submissions:

9. In his submissions, the Applicant's advocate submitted that the 2nd Respondent did not have jurisdiction to hear the dispute between the Applicant and the Interested Parties in respect to the suit property and that pursuant to Article 162 of the Constitution and Section 13 of the Environment and Land Court Act, it is only this court that can hear a dispute relating to title and ownership of land.

10. Counsel submitted that Judicial Review is not concerned with private rights of parties; that Judicial Review is concerned with the decision making process and that the merits of the dispute will be determined in ELC Appeal Number 23 of 2019 which arose from the decision of the lower court in Machakos CMCC No. 698 of 2006.

11. According to counsel, the Applicant has demonstrated that the 2nd Respondent acted without jurisdiction and that the actions of the 2nd Respondent were *sub judice* ELC No. 3 of 2018 *(formerly CMCC No. 698 of 2006).*

12. On his part, the Interested Parties' advocate submitted that the 2nd Respondent was constituted to hear and make recommendations on the proprietorship of plot number 1403, being title number Athi River/Athi River Block 1/460 *(the suit property);* that in its Ruling, the Task Force took note of the ongoing case in court and that the Task Force made a recommendation that the Title Deed should be withheld from the parties to await the determination of the matter that was pending in court.

13. Counsel submitted that the 2nd Respondent did not issue any binding decision; that the matter in the lower court has since been finalized in favour of the Interested Parties and that the 2nd Respondent's recommendation was given based on the law and evidence that was presented to it.

14. The Interested Parties' advocate finally submitted that the court is not clothed with the jurisdiction to determine this matter by dint of the provisions of Section 76 (1) of the Cooperative Societies Act; that this court should down its tools and that the Notice of Motion should be dismissed with costs.

Analysis and findings:

15. The Ex-parte Applicant *(the Applicant)* is seeking to quash the decision of the 2nd Respondent dated 12th July, 2018, and for an order prohibiting the Land Registrar from effecting the decision of the 2nd Respondent. The Applicant has annexed the decision of the 2nd Respondent which is titled as follows:

> "THE TASK FORCE
>
> IN THE MATTER OF LAND DISPUTE BETWEEN MESHACK MUTUA
>
> ROSE MUTUA
>
> (CLAIMANT)
>
> VS
>
> JOHNSONMUSAU MUINDI
>
> (RESPONDENT)"

16. The report of the 2nd Respondent shows that the 2nd Respondent's members heard the dispute between the Ex-parte Applicant and the Interested Parties in respect of the suit property on 22nd May, 2018. On 12th July, 2018, the 2nd Respondent made the following

'Recommendations/Ruling:

> ***i. Plot No. 1403 being Title No. Athi River/Athi River Block 1/460 issued to Claudia Alexia Muindi be cancelled and issued to the current buyer Meshack Mutua Musau and Rose Katile Mutua.***
>
> ***ii. Title Deed Athi River/Athi River Block 1/460 held by the task force to remain in the custody of the taskforce pending the determination of the case in court Machakos no. CMCC 698 of 2006.***

17. The present Application is premised on the grounds that the 2nd Respondent did not have jurisdiction to determine the dispute relating to the suit property and that the hearing of the dispute by the 2nd Respondent was *sub judice* Machakos CMCC No.698 of 2006.

18. The purview of a Judicial Review Application was considered by Lord Diplock in the case of ***Council for Civil Services Union vs. Minister for Civil Service [1985] AC 374 at 401D*** in which he stated as follows:

> ***"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"***

19. 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. Indeed, that is the implication of Article 162 (2) (b) of the Constitution which states that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

20. 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. 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".***

21. Similarly, the Supreme Court in ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR*** stated 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."***

22. The nature of the proceedings before the 2nd Respondent can be described as having been a hearing and determination on the occupation, title and use of land. Indeed, the Task force recommended that the Title Deed for the suit land should be cancelled and a fresh Title Deed to be issued to the Interested Parties.

23. The only organ authorized by the Constitution and statutes 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 or the National Government.

24. 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."***

25. 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."***

26. To the extent that the County Government of Machakos or the National Government does not have any mandate under the Co-operative Societies Act to establish a Task force to resolve land disputes involving the 1st Respondent, the Ex parte Applicant and the Interested Parties, 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 2nd Respondent dated 12th July, 2018 was *ultra vires*, null and void.

27. Furthermore, the 2nd Respondent purported to resolve the dispute in respect to the suit land while aware that the same dispute was before the Magistrate's court. The *sub judice* rule is captured in Section 6 of the Civil Procedure Act, which provides as follows:

> ***"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

28. The *sub judice* rule is founded on the principle that a multiplicity of suits between the same parties and over the same subject matter should be avoided in the interest of the parties and the system of administration of justice. Having been informed of the pending suit in court, the 2nd Respondent should have either downed its tools, or joined the proceedings in the lower court. The hearing of the dispute by the 2nd Respondent while the same dispute was still pending in the lower court was therefore illegal, null and void.

29. The issue of whether it is the Cooperative Tribunal or this court that has the jurisdiction to hear the dispute between the Ex-parte Applicant and the Interested Parties should have been raised in the lower court, and not in response to the current Application. In any event, it is the Interested Parties who filed the suit in the lower court. Are they now saying that it is the Tribunal that should have heard the matter and not the court? And if that is so, why did they file the matter in the lower court and not before the Co-operative Tribunal? These are the questions that this court will determine while dealing with the Appeal arising from the decision of the lower court and not in these proceedings.

30. Having found that the 2nd Respondent did not have jurisdiction to entertain the dispute between the Ex-parte Applicant and the Interested Parties, and the decision of the 2nd Respondent having been *sub judice* Machakos CMCC No. 698 of 2006, I allow the Application dated 26th September, 2018 as follows:

> ***a) An order of Certiorari is hereby issued to remove to this Court for the purpose of being quashed and to quash the decision of Katelembo Athiani Muputi FCS Task Force dated 12th July, 2018.***
>
> ***b) An order of Prohibition is hereby issued prohibiting the Respondents, the Land Registrar, Machakos or any other institution from in any manner altering and or interfering with the status of registration of title number Athiani River/Athiani River Block 1/460 pursuant to the decision of the 2nd Respondent dated 12th July, 2018.***
>
> ***c) Each party to bear his/its own costs***

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE