



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CONSTITUTIONAL PETITION NO 1 OF 2016
(FORMERLY CONSTITUTIONAL PETITION NO 26 OF 2016
IN THE HIGH COURT OF KENYA AT NAIROBI)

BENSON LUSWETY WANYONYI.....1ST PETITIONER
SIMO MULAKI SINA.....2ND PETITIONER
ELIZABETH KITUKU...../.....3RD PETITIONER

VERSUS

COUNTY GOVERNMENT OF TAITA TAVETA.....1ST RESPONDENT
CHIEF LAND REGISTRAR.....2ND RESPONDENT
DIRECTOR OF LAND ADJUDICATION.....3RD RESPONDENT
CABINET SECRETARY LANDS.....4TH RESPONDENT
NATIONAL LANDS COMMISSION.....5TH RESPONDENT
HON. ATTORNEY GENERAL.....6TH RESPONDENT
GICHEHA FARM.....1ST INTERESTED PARTY
BASIL CRITICOS.....2ND INTERESTED PARTY

RULING

INTRODUCTION

1. The Petitioners' *Ex parte* Notice of Motion application dated 26th January 2016 brought under a Certificate of Urgency was initially filed at the High Court of Kenya at Nairobi on 27th January 2016, the same date the file was transferred to this court on the ground that the suit premises in question fell under the jurisdiction of this court.

2. The said application was brought pursuant to the provisions of Rule 20 and 21 of the Constitution of

Kenya (High Court Practise Rules of 2006).The said application had sought the following orders:-

- (a) THAT this application be certified as urgent and be heard ex parte in the first instance.**
- (b) THAT the Respondents themselves or their servants be restrained from carrying on the process of surveying and planting beacons, issuing title deeds or interfering with the existing boundaries on Sir Ramson Farm LR No, 6730/1 and Major Max Farm LR. No 6730/2 situate at Taita Taveta pending the hearing and determination of this application inter partes.**
- (c) THAT the Respondents themselves or their servants be restrained from carrying on the process of surveying and planting beacons, issuing title deeds or interfering with the existing boundaries on Sir Ramson Farm LR No, 6730/1 and Major Max Farm LR. No 6730/2 situate at Taita Taveta pending the hearing and determination of the Petition.**
- (d) THAT costs do abide the application.**

3. When the matter came up in this court on 2nd March 2016, counsel for the Petitioners applied to withdraw the aforesaid application. The same was withdrawn with no order as to costs. They were also granted leave to file a fresh Notice of Motion application.

4. The subsequent Notice of Motion application dated 14th March 2016 was filed by the firm of M/S Tengo Madara & Co Advocates, which firm also filed a Notice of Change of Advocates. The said application sought the following orders:-

- (1) This application be certified as urgent and service thereof be dispensed with in the first instance.**
- (2) Pending the hearing and determination of this Application a CONSERVATORY ORDER by way of a stay and/or injunction do issue restraining all government functionaries, public servants inclusive of the local police, Registrar of Titles, Director of Land Adjudication and Settlement or any other government officials and all other security organs from interfering with, surveying, demarcating, invading, trespassing on or ingress (sic) on to LR. NO. 6730/1 SIR.RAMSON FARM and LR. NO 6730/2 MAJOR MAX FARM (the suit premises) situated at Taita Taveta County arising from the occupation by the Applicants of the above two parcels pending the final determination/conclusion of this Application.**
- (3) Pending the hearing and determination of this Application a CONSERVATORY ORDER by way of a stay and/or injunction do issue restraining all government functionaries, public servants inclusive of the local police, Registrar of Titles, Director of Land Adjudication and Settlement or any other government officials and all other security organs from interfering with, surveying, demarcating, invading, trespassing on or ingress (sic) on to LR. NO. 6730/1 SIR.RAMSON FARM and LR. NO. 6730/2 MAJOR MAX FARM (the suit premises) situated at Taita Taveta County arising from the occupation by the Applicants of the above two parcels pending the final determination/conclusion of this Petition.**
- (4) Pending the hearing and determination of this application an order of PROHIBITION directed at the Chief/Principal Magistrates Court at Taveta restraining them/ him/her or any other judicial officer in Taveta from hearing or in any other way handling any matter Civil/Criminal arising from a dispute of ownership of land relating to LR. NO. 6730/1 SIR.RAMSON FARM and LR. NO. 6730/2 MAJOR MAX FARM (the suit premises) until the final determination of this application.**
- (5) Pending the hearing and determination of this application a DECLARATION that the purported Order made by the President in respect of the settlement of squatters in the Kenyatta Farm is unconstitutional, null and void and incapable of bestowing legal title IN SO FAR AS IT AFFECTS THE APPLICANTS who are the Bona-fide squatters in the suit**

premises having remained in possession for over 45 years and having no input from the National Land Commission pursuant to its constitutional mandate.

5. Before the court could give directions on the hearing of the said Notice of Motion application dated 14th March 2016, on 4th May 2016, the Attorney General representing the 2nd, 3rd, 4th and 6th Respondents counsel filed a Notice of Preliminary Objection dated 28th April 2016.

6. The grounds of the said Notice of Preliminary Objection were that:-

(1) THAT this Honourable Court lacked jurisdiction to hear and determine this matter by virtue of Section 13(1) and (2)(a) of the Environment and Land Court Act, 2011,

(2) THAT the 1stPetitioner/Applicant was a vexatious litigant having filed this Petition and Petition.... (sic)of 2016 both pending at Voi Law Courts.

(3) It was apparent from the petition that the suit parcel was private land.

7. The said 2nd, 3rd, 4th and 6th Respondents' filed their Written Submissions dated 9th May 2016 on 11th May 2016. The 1st Respondent filed its Written Submissions dated 31st May 2016 on even date while the 1st Interested Party's filed its Written Submissions dated 24th May 2016 on 31st May 2016.

8. On their part, the Petitioners filed their Written Submissions dated 6th June 2016 on 22nd June 2016. They also filed Grounds of Opposition to the 2nd, 3rd, 4th and 6th Respondents Preliminary Objection. The grounds were as follows:-

(1) The Petition was not incompetent by virtue of having been filed in the High Court at Voi.

(2) The Petitioner (sic)had a veritable cause of action.

(3) The High Court of Kenya was seized of jurisdiction under Article 23(3) of the Constitution to grant orders for:-

(a) A Declaration of Rights

(b) A Conservatory Order

(c) A Declaration of invalidity of any Law (sic) that denied, violated, infringed or threatened a right or a fundamental freedom in the Bill of Rights and was not forged under Article 24.

(4) The Petition was founded on a violation of Fundamental Rights Articles 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29(sic).

(5) Jurisdiction could not be determined without interrogation of the contents of the Petition, Hence (sic) the Preliminary Objection was misconceived.

(6) ELC act. (sic)No 19 of 2011 did not have provision for the grant of conservatory Orders(sic).

(7) The Act did not provide for prescriptive relief.

(8) ELC did not deal with fundamental rights provided under the Bill of Rights and was limited to violation of Articles 42, 69, 70 (sic) in respect of degradation of land.

(9) Prescriptive rights as found in the Limitation of Actions Act CAP 22 of the Laws of Kenya

related to the High Court as envisaged in Sections 13 and 37 of the Revised edition (2012).

9. The parties were in agreement that this court could hear and determine the said Preliminary Objection application in the absence of the 2nd Interested Party who had not been served as he would not suffer any prejudice if this court proceeded to make a determination of the said Preliminary Objection. Notably, the 5th Respondent was served but did not file any responses herein.

10. The Ruling herein is therefore based on the said parties' Written Submissions which were not highlighted as they relied on the same in their entirety.

LEGAL ANALYSIS

11. The court set out the prayers that had been sought in the Petitioners' application and Petition in detail with a view to establishing whether it had jurisdiction to handle the issues that had been raised therein or if the issues could only be dealt with by the Environment and Land Court.

12. Indeed, the Petitioners had rightly pointed out in their Grounds of Opposition to the Preliminary Notice, which this court found to have been superfluous and did not accord with the proper procedure as their Written Submissions would have sufficed, that jurisdiction could not be determined without interrogation of the contents of the said Application and Petition herein.

13. Notably, the Petitioner's application which precipitated the 2nd, 3rd, 4th and 6th Respondents' Preliminary Objection, was brought pursuant to the provisions of Articles 2(1), (4)(sic), 10, 19, 20(1)(2) & (4) a & b(sic), 21(1) (sic) 22 (1) & (3), 24(1)e(sic), 28, 29(a), 50, 61, 63(1), 66, 67, 159(1) (2) (e), 165(3)b, d, (sic)(ii) (6) & (7), 258 & 259 of the Constitution of Kenya 2010, the sixth schedule of the Constitution, Rules 20 and 21 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual), sections (sic) 3, 5 and 6 of the National Land Commission Act no. (sic) 5 of 2012 and the inherent jurisdiction of the Court and all enabling provisions of laws as set out in the various statutes cited in support of the petition.

14. A careful perusal of the Articles relied upon by the Petitioners in support of their said application revealed that the same related to the general provisions relating to the Bill of Rights, the provisions defining what community land is, how it is to be vested and held by communities identified on the basis of ethnicity, culture or similar community of interest, how such community land is to be disposed of, how and by whom unregistered community land is to be held, the requirement of Parliament to enact a law to give effect to Article 63 of the Constitution of Kenya, provisions relating to the National Land Commission, the purpose and principles of this Constitution which must be protected and promoted, an outline of the nature of jurisdiction conferred on the High Court, the general provisions of enforcement of this constitution and how the Constitution of Kenya is to be construed.

15. Evidently, most of the Articles under which the said Petitioner's application were premised, did not relate to the rights and fundamental freedoms enshrined in the Constitution of Kenya, 2010. In other words, they did not fall under any of the provisions of Chapter 4 Part 2 wherein Articles 26 to 57 of the Constitution of Kenya state in very clear terms what is to be regarded as rights and fundamental freedoms.

16. In fact, from the way the said Articles the Petitioners relied were set out, this court formed the impression that the same were really a treatise or a submission of what the Constitution of Kenya sets out and/or stipulates but not that there was any contravention or infringement of the said Articles. However, only Articles 28, 29 and 50 of the Constitution of Kenya had relevance herein as they fell under rights and fundamental freedoms set out in Chapter 4 Part 2 of the Constitution of Kenya.

17. Article 28 of the Constitution of Kenya provides that every person has inherent dignity and the right to have that dignity respected and protected while Article 29 of the Constitution of Kenya states as follows:-

Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources;

(d) subjected to torture in any manner, whether physical or psychological;

(e) subjected to corporal punishment; or

(f) treated or punished in a cruel, inhuman or degrading manner.

18. Article 50 of the Constitution of Kenya provides that:-

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

19. At the outset, this court wishes to state that after carefully combing through the Petitioners’ pleadings, it did not find an iota of evidence showing that the said Petitioners’ right to fair trial as prescribed under Article 50 of the Constitution of Kenya had been infringed in any way. Indeed, until it was demonstrated how this right to fair trial enshrined in the supreme law had been infringed or contravened, reliance on the said provision remained a mere unsubstantiated statement.

20. Similarly, there did not also appear to have been any evidence demonstrating that the Petitioners’ rights under Articles 28 and 29 of the Constitution of Kenya had been violated, infringed and/or contravened. Indeed, there was no proof that their inherent dignity had been violated or that they had been treated or punished in a cruel, inhuman or degrading or that they had been treated in any way prohibited by Article 29 of the Constitution of Kenya, as this is what this court formed the impression that the other sub-articles in Article 29 were not relevant in the circumstances of this case.

21. What was, however, discernible from the Petitioners’ pleadings was that their complaint related to the process of survey of land. In his Supporting Affidavit, the 1st Petitioner, who was representing one hundred and seventy (172) others, contended that they had been squatters in the said suit premises which they averred was public and/or community land. He said that they had lived in the said suit premises for over forty five (45) years.

22. In their Petition, the Petitioners stated that His Excellency the President of the Republic of Kenya, Uhuru Kenyatta, declared in a public rally that he would resettle squatters in the County Government of Taita Taveta, and in particular in the 2nd Interested Party. Land surveyors thereafter started surveying the land.

23. It was the 1st Petitioner’s averment, which was also set out in the Petition, that the List of Squatters had not been disclosed and that the Surveyors were drawing new maps irrespective of existing boundaries and structures on the ground. They complained that there had been no consistency and transparency in the way the numbers had been being given out.

24. They also complained that they had not consulted and that the whole process had taken a political dimension which action could scuttle their right to own property as was enshrined in the Constitution of Kenya. It was their argument that the National Land Commission was the only institution that was mandated under the Constitution of Kenya to deal with land but that that was not the case herein. These

arguments were ably captured by the 1st Interested Party in its Written Submissions.

25. A closer look at the Petition herein showed that the Petitioners had contended as follows:-

“5A. The Petitioners aver that the above parcels adjoin and neighbour LR NO 7287 otherwise known as GICHEHA FARM.

5B . The Petitioners aver that they settled in the above parcels in the 1950s when the same was remote uninhabited with dense bushes and full of wild animals.

7A. The Petitioners aver that any settlement of settlers ought to take into account their presence which is over 45 years and its (sic) subject to the doctrine of adverse possession.

7B. The Petitioners aver that the said announcement did not constitute a formal/executive directive as the Constitution was and is clear on the powers of the Presidency in so far as alienation, transfer, adjudication and consolidation is concerned. The Petitioners aver that if indeed the announcement related to private land as evident in the constitution then it was limited to land owned by the first interested party and not the parcels in issue.

7C. The Petitioners aver that they hold a legitimate expectation that any dealings in or within the suit premises ought to be in their favor or take them into consideration.”

26. They had sought the following reliefs in their Petition:-

(i) A Declaration that the process of surveying and erecting beacons on Sir Ramson Farm LR. No. 6730/1 and Major Max Farm LR. No. 6730/2 be and is hereby declared null and void and the Petitioners be recognised as lawful settlers in the suit premises.

(ii) A Conservatory Order do issue restraining the Respondents, their officers and agents from surveying, demarcating, adjudicating or in any other manner dealing with the suit premises issuing any title relating to suit premises.

(iii) An Order that the Respondents to do (sic) undertake a clear and an open, transparent and involved process in relation to any action (s) contemplated in on (sic) Sir Ramson Farm LR. No. 6730/1 and Major Max Farm LR. No. 6730/2.

(iv) Costs in the Petition.

27. The Petitioners' position was that the action of demarcation, which had the effect of establishing a Settlement Scheme, was in contravention of the Constitution of Kenya, 2010. However, as can be seen from hereinabove, this is not the correct position of the law as such an action did not fall within the meaning of a fundamental right or freedom as envisaged in Chapter 4 Part 2 of the Constitution of Kenya. Rather, it was a question of law to determine whether or not a Settlement Scheme was in fact being established in the Petitioners' place of residence as they had contended and if so, what the ramifications of such an action were.

28. As the 1st, 2nd, 3rd, 4th and 6th Respondents and the 1st Interested Party correctly pointed out, the jurisdiction of the High Court in hearing matters relating to land has been ousted by the provisions of Article 165(5) of the Constitution that stipulate as follows:-

The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

29. Article 162(2) of the Constitution of Kenya further provides as follows:-

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

30. The Environment and Land Court Act Cap 12 (Laws of Kenya) was thus enacted to give effect to the Environment and Land Court Act. Section 13(1) and (2) of the said Environment and Land Court Act states as follows:-

(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.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

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

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

31. This court thus found itself in agreement with the submissions by the 1st, 2nd, 3rd, 4th and 6th Respondents and the 1st Interested Party that the question the Petitioners had brought before it related to surveying, demarcating and adjudicating of the suit premises. In other words, the issues related to questions of title, boundaries, use of and occupation of land which squarely fell under the jurisdiction of the Environment and Land Court.

32. The fact that the Environment and Land Court has no jurisdiction to hear any question regarding the interpretation of this Constitution as provided under Article 165(3)(d) of the Constitution of Kenya except applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution as provided in Section 13(3) of the Environment and Land Act did not in any way bring the Petitioners' cause of action within the jurisdiction of the high court merely because they were seeking a conservatory order. This is because what was really the crux of their matter was a dispute relating to land.

34. For the Petitioners to have successfully petitioned this court with a view to benefitting from the conservatory orders that could be granted under Article 23 (3) (c) of the Constitution of Kenya, they ought to have demonstrated that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or was threatened as contemplated by Article 22(1) of the Constitution of Kenya.

35. Indeed, if a party wishes to benefit from the orders under Article 23(3) of the Constitution of Kenya, he is required to set out its case in a clear manner citing the relevant provision of the Constitution of Kenya that has been infringed upon. It is not for the court to guess what such a party's case is. In this particular case, the Petitioners failed to set out their case in a clear manner to the satisfaction of this court.

It was thus not persuaded that they were entitled a Conservatory Order or a declaration under the said Article 23(2) of the Constitution of Kenya.

36. In any event, a conservatory order is not an end in itself. It is a means to an end. It is to be granted only where the status of a matter ought to be maintained, what in normal practise, is referred to as “maintaining the status quo.” It is an interlocutory order that is granted pending the determination of the substantive issue therein.

37. Assuming this court had been persuaded to grant the said Conservatory Order, it would have been obligated to interrogate the facts of the case before it can grant the declaratory orders that the Petitioners had sought, which we have seen hereinabove, it would have no jurisdiction to do. The further step of interrogation or enquiry would have definitely have meant that this court would have encroached on the jurisdiction of the Environment and Land Court.

38. The 1st Interested Party referred this court to the case of **Patrick Musimba vs The National Land Commission and 4 Others [2015] eKLR** which addressed the question of concurrent and co-ordinate jurisdiction of courts. While sitting as a Commercial & Admiralty court, this very court dealt with the issue of cross-cutting issues between two (2) courts of competent jurisdiction in the case of **Sehit Investments Limited vs Josephine Akoth Onyango & 3 Others [2015] eKLR**.

39. In that case, the court assumed jurisdiction as it had found that the issues that had been raised therein were more of a commercial nature as opposed to being land related. It rendered itself as follows:-

“...As could be seen from the reliefs sought by the Plaintiff, the issues before the court were intertwined and could not be said to lie within the sole jurisdiction of either the High Court or the Environment and Land Court...The court was thus in agreement with the 1st and 2nd Defendants’ submissions that the use of the word “or” in Article 262 of the Constitution of Kenya gives a court wide and unfettered discretion to determine when a matter can be transferred to the Environment and Land Court and this is clearly not one of those straight forward matters that can be solely heard by the Environment and Land Court.”

40. Although the Petitioners may have felt that their dispute against the Respondents and the Interested Parties may case had constitutional issues cutting through the land issues in question, a possibility that was recognised in the case of **Del Monte Kenya Limited vs The County Government of Muranga & 2 Others [2016] eKLR** that was relied upon by the 1st Interested Party, the substratum of their case was really a question relating to land only.

41. It had nothing to do with infringement or contravention of their fundamental rights and freedoms which this court could have aptly taken up for determination. In this regard, this court therefore found itself in agreement with the holding in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others [2012] eKLR** that was relied upon by the 2nd, 3rd, 4th and 6th Respondents to the effect that a court can only exercise jurisdiction conferred upon it by the Constitution, Statute or both.

42. From the reliefs that had been sought both in the application and the Petition herein, there was no confusion in the mind of this court as to which court had the jurisdiction to hear and determine same. It had carefully perused the pleadings and finding the case to be straightforward, ascertained that it did not have jurisdiction to hear and determine the issues herein as they were land related and not constitutional issues.

43. For that reason, this court therefore restrained itself from delving into the question as to whether or not the Petitioners had a veritable cause of action or if the Environment and Land Court did not provide for prescriptive relief. It was clear to it that only a court of competent jurisdiction could listen to the merits or otherwise of the Petitioners’ case with a view to deciding whether or not they were entitled to a declaration that they be recognised as lawful settlers in the suit premises.

44. As pointed hereinabove, any attempt at answering any question relating to the occupation and title of the suit premises in question would not be possible without encroaching on the jurisdiction of the Environment and Land Court, an action that is prohibited by the Supreme law of Kenya.

45. If the Petitioners had wanted preservatory orders, be it in the form of a status quo, injunctive or other prohibitory order pending the determination of their dispute with the Respondents and Interested parties, nothing would have been easier than for them to have sought the said orders from an Environment and Land Court as it has jurisdiction to grant the same. The power to grant orders that prohibit any action while a dispute is being determined is not the preserve of the High Court only.

46. Accordingly, having carefully considered the pleadings herein, the Written Submissions by all the parties and the case law that was relied upon by the 1st, 2nd, 3rd, 4th and 6th Respondents and the 1st Interested Party, this court thus came to the firm conclusion that it did not have any jurisdiction to hear and determine the issues that had been raised in the Petitioners' Petition as it came out clearly that there were no cross-cutting issues between this court and the Environment and Land Court that would have persuaded it to hear and determine the matter.

47. Having said so, this court found that the Application and Petition herein cannot be transferred to any court of competent jurisdiction for determination as it had been framed as constitutional reference. Indeed, no purpose would be served in leaving the Application and Petition hanging without a definite determination.

48. As the dispute between the parties herein cannot be determined in any way other than by an Environment and Land Court, this court was persuaded by the submissions of the 1st, 2nd, 3rd, 4th and 6th Respondents and the 1st Interested Party that the Petitioners' Petition ought to be struck out.

49. However, the court was slow to make a determination that the Petition an abuse of the court process as had been submitted by the 1st Respondent for fear of pronouncing itself on the merits or otherwise of the said Petition.

50. Finally, this court would have made certain observations regarding the form and substance of the Petitioners' pleadings but because it found that it had no jurisdiction to deal with the matter, it had no option but to down its tools. Appreciably, jurisdiction is everything. Without it, a court can do nothing, a position that was ably held in the case of M/S Lilian S [1989] KLR 1 that was relied upon by the 1st Interested Party.

DISPOSITION

51. In the premises foregoing, the upshot of this court's Ruling was that the 2nd, 3rd, 4th and 6th Respondents' Notice of Preliminary Objection dated 28th April 2016 and filed on 4th May 2016 was merited and the same is hereby upheld.

52. Consequently, the Petitioners' Notice of Motion application dated 14th March 2016 and their Petition amended on even date are hereby struck out with costs to the 1st, 2nd, 3rd, 4th and 6th Respondents and the 1st Interested Party herein.

53. It is so ordered.

DATED and DELIVERED at VOI this 18th day of July 2016

J. KAMAU

JUDGE