



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NUMBER 58 OF 2014

IN THE MATTER OF: ARTICLE 22 & 23 OF THE CONSTITUTION OF KENYA, 2010; THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF: CONTRAVENTION OF FUNDMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10, 27, 28, 40, 46, 47 & 53 OF THE CONSTITUTION REGARDING UPHOLDING OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE, RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION, RIGHT TO PROTECTION OF HUMAN DIGNITY, PROTECTION OF RIGHT TO PROPERTY, PROTECTION OF ECONOMIC INTERESTS, RIGHT TO FAIR ADMINSTRATIVE (SIC) AND THE RIGHT TO EDUCATION

IN THE MATTER OF: THE INTENDED EVICTION OF OCCUPANTS FROM A PORTION OF ALL THAT PARCEL OF LAND ORIGINALLY KNOWN AS PLOT NUMBER 143/2 OF SECTION ONE MAINLAND NORTH.

BETWEEN

- 1. NYAMASYO JAMES**
- 2. BONFACE MUTUA**
- 3. DAVID SYANDI KASANGA**
- 4. JAMES MASULU**
- 5. JAMES KARIUKI**
- 6. PAMELLA WANJIKU**
- 7. RONALD MUTULI**
- 8. COSMUS KIMANZI**
- 9. KISOVO MULONZ**
- 10. SAMY KATUNGA**
- 11. MARY NELSON**

12. JONATHAN MAITHYA KATIKU

13. HENRY O. MOMANYI

14. JOHN KITHEKA

15. KARITHI JULIUS..... PETITIONERS

VERSUS

1. MOMBASA COUNTY GOVERNMENT.....1ST RESPONDENT

2. REGISTRAR OF TITLES, MOMBASA.....2ND RESPONDENT

AND

1. AHMED MOHAMED MUSA

2. IRSHAD ISLAMIC INSTITUTE

3. AMINA KUSOMA BUNU

4. ABDU KASSIM AHMED

5. SAID ALI SWAB

6. ATHMAN OMAR ABDALLA.....AFFECTED PARTIES

RULING

1. The application before me is a preliminary objection dated 25th November, 2014 filed by the applicant/1st respondent in response to the petition filed on 24th September, 2014.

2. The Notice of Preliminary objection seeks to have the petition struck out or dismissed on the grounds that:-

(i) The petitioner's (sic) claim if any, is a claim on adverse possession (sic) and the same can only be remedied in a civil suit not through a Constitutional Petition;

(ii) The petitioners have no claim to the suit land and cannot therefore claim to have had their rights violated;

(iii) That the petition herein is speculative and premature;

(iv) That the petition is frivolous, lacks merit and is an obvious attempt to defeat the cause of justice by avoiding the necessity of applying in the normal way, the civil wrong;

(v) That the petitioners have no locus standi to file this petition;

(vi) The entire petition is frivolous, vexations and an abuse of the court process; and

(vii) That it is mete and just that the same be dismissed.

THE 1ST RESPONDENT'S SUBMISSIONS

3. At the hearing of the application Mr. Bwire learned Counsel for the applicant/1st respondent raised two issues for the court's consideration:-

1) If this court has jurisdiction to entertain the petition; and

2) Whether the petition was premature.

He submitted that article 162(2)(b) of the Constitution empowered parliament to enact laws for courts with the jurisdiction to determine issues relating to the environment, use, occupation and title to land. Parliament enacted the Environment and Land Act which gives Courts jurisdiction to deal with the foregoing issues under section 13. He submitted that section 13(b) relates to compulsory acquisition and management of land and disputes, whereas section 13(e) makes provision for any other disputes relating to land.

4. It was submitted for the applicant/1st respondent that paragraph 5 of the Petition states that it relates to ownership and use of land and if the court finds so, then the Petition falls under the purview of the Environment and Land Court (ELC). In so submitting, counsel relied on the case of **Abdullah Mangi Mohammed vs Lazarus Beja and 5 others** [2012] eKLR, where the court held that issues of determination of title to land must be made by the ELC which has jurisdiction.

5. It was argued that in paragraph 7 of the Petition, it is stated that the Petitioners have enjoyed quiet occupation of the land without any interference thus acquiring rights of adverse possession. Further, prayer number 1 of the Petition seeks orders for declaration that the Petitioners are entitled to quiet possession of the land and that they are entitled to land by adverse possession and therefore a determination of title to land has to be made first. It was the argument of the applicant/1st respondent that the Petitioners rights for adverse possession have not crystallized as no finding has been made that they are entitled to adverse possession. It was submitted that this court cannot determine the issues herein under articles 40 and 47 of the Constitution as such actions are brought under the provisions of Order 37, rule 7(1) of the Civil Procedure Rules. The 1st respondent relied on the case of **Anne Wawuda & Another vs Kenya Railways Corporation & Another** [2015] where the court held that courts cannot assume jurisdiction where jurisdiction is conferred to another court. Reference was also made to the case of **Trans Nzoia Grain Farmers Cooperative Society Ltd vs Hon. Attorney General & 4 others** [2013] eKLR, where it was held that one cannot bring a claim for adverse possession in a constitutional petition.

6. Counsel also submitted that the procedure provided in law after issuance of an eviction notice under the provisions of section 119 as read with section 120(6) of the Public Health Act has not been followed as a magistrate had not issued orders for demolition of the structures erected on the land in issue. In support of that submission, Counsel cited the case of **Republic vs Independent Electoral and Boundaries Commission & Another Exparte Robert Nyenge** [2014] eKLR. Mr. Bwire prayed that the preliminary objection be upheld.

7. Mrs Bakari, learned counsel for the 2nd and 6th Affected Parties associated herself with Mr. Bwire's submissions.

PETITIONERS' SUBMISSIONS

8. Mr. Gikandi, learned Counsel for the petitioners opposed the application and submitted that this court has jurisdiction to hear and determine this matter. He urged the court to look at paragraphs 11 and 12 of the petition. He elucidated that the petitioners have laid out a number of issues relating to irregularities committed by the respondents and that these are violations of fundamental rights under articles 40, 47, 10, 28, 53 and 46 of the constitution. He added that adverse possession is incidental to the issues of violation of fundamental rights. It was submitted that it is not now possible for the ELC to deal with the issues of violation of fundamental rights.

9. In urging the court to determine this matter for its juridical effect by looking at substantive issues, counsel drew the court to the provisions of article 159 of the Constitution and rule 23 of the Mutunga rules. In so submitting, Mr. Gikandi cited the case of **Leisure Lodges vs Commissioner of Lands and 767 others** [2016] eKLR where a bench of three (3) High Court Judges held that the ELC and High Court have concurrent and coordinate jurisdiction and that in a matter that has interwoven issues, the court has to look at the most convenient court where a case should be heard. The court has to look at whether it is constitutional matters or the ELC matters that outweigh the others.

Mr. Gikandi prayed for the preliminary objection to be dismissed but if the court feels that the ELC matters outweigh constitutional matters, then the court will decide on the court that is seized of jurisdiction.

THE 1ST RESPONDENT'S REJOINDER

Mr. Bwire in response to the petitioners' submissions on the **Leisure Lodges Case** stated that:- (i) in the year 2010, the ELC had not been established, (ii) the issue of public interest made the court hear the matter as there were 767 respondents, (iii) Leisure Lodge had a title and therefore the High court had jurisdiction to determine contravention of rights, (iv) in the present case, the only directions given were on 5th April, 2016 on the issue of the Preliminary objection, (v) in regard to the alleged infringed rights, they were premised on adverse possession.

ANALYSIS AND DETERMINATION

The main issue for determination is if this court has jurisdiction to hear and determine the petition herein, the other issues are peripheral.

10. In so doing the court is guided by the decision of the Supreme Court in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank and 2 others**, [2012] eKLR, where the court pronounced itself on jurisdiction thus:-

"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 a matter of mere 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"

11. In order for this Court to determine the above issue, reference must be made to the petition filed on 24th September, 2014. Paragraph 5 of the said petition states as follows:-

"The Petition relates to the ownership and use of a portion of all that parcel of land, originally known as plot Number 143/2 of section one Mainland North which was an open space meant for public benefit and communal use"

Paragraph 6 thereof states that:-

"The petitioners state that they have openly used and occupied the periphery of the said communal land. The petitioners began to occupy the said land over (20) years ago. The petitioners being, by

and large landless people, erected thereon various structures for purposes of carrying out their business (sic) to earn a living”

In paragraph 7 of the said petition, the petitioners stated, that:-

“They have always enjoyed quiet and peaceful occupation and possession of the suit property for over twenty (20) years without any interference from any person for which the petitioners state that they have acquired ownership rights under the doctrine of adverse possession and/or the petitioners have acquired prescriptive rights over the suit property on account of the possession without any interference from any person.”

12. The orders sought by the petitioners come into play and this Court must give due regard to the same so as to conclusively determine the petition in issue. The prayers sought in the petition are:-

(i) A Declaration that the petitioners are entitled to a quiet and peaceful occupation of the land known as sub division Nos. 13642, 13643, 13641, 13640, 13638, 13636 (part of the Plot of Land originally known as Plot Number 143/2) of Section One Mainland North, held in the names of Ahmed Mohamed Musa, Irshad Islamic Institute, Amina Kusoma Bunu, Abdu Kassim Ahmed, Said Ali Swabu and Athamn Omar Abdalla; further a declaration to the effect that the respondents and affected parties have no right to evict the petitioners therefrom;

(ii) Conservatory order restraining the respondents and the affected parties from interfering, entering upon, alienating, disposing, dealing in any way whatsoever with the land known as sub division Nos. 13642, 13643, 13641, 13640, 13638, 13636 (part of plot of Land originally known as Plot Number 143/2) of Section one Mainland North Plot of Land whose certificate of titles are held in the names of Ahmed Mohamed Musa, Irshad Islamic Institute, Amina Kusoma Bunu, Abdu Kassim Ahmed, Said Ali Swabu and Athamn Oman Abdalla respectively.”

13. Article 162 (2) of the Constitution provides as follows:-

“Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating

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

Article 162 (3) thereof provides that:-

“Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2).”

13. In furtherance of the provisions of article 162(3) of the Constitution, parliament enacted the Environment and Land Court Act, Cap 12A, which came into force on 30th August, 2011.

Section 13 of the said Act provides that:-

“(1) The Court shall have original and appellate jurisdiction to hear and determine 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.” (emphasis mine).**

Section 13(3) of the said Act provides that:-

“Nothing in this Act shall preclude the Court from hearing and determining 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.”

Section 13(7) of the said Act provides that:-

“In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit including –

- (a) Interim or permanent preservation orders including injunctions;**
- (b) Prerogative orders;**
- (c) Award of damages;**
- (d) Compensation;**
- (e) Specific performance;**
- (f) Restitution;**
- (g) Declaration; or**
- (h) Costs.”**

14. While faced with a situation such as the one raised in the preliminary objection herein, a bench of five (5) High Court Judges in the case of **Patrick Musimba vs National Land Commission and 4 others** [2015] eKLR cited with approval the case of **Daniel N. Mugendi vs Kenyatta University & 3 Others** [2013] eKLR where the Court of Appeal stated as follows:-

“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 and ancillary and incidental to those matters, the same should go for the Environment and Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with two subjects”.

15. In the **Musimba** case (supra) the Court held that the Court of Appeal's decision in **Mugendi** (supra) as read together with section 13 of the ELC Act led to the plausible conclusion that:-

“the ELC has jurisdiction to determine matters of a Constitutional nature as well. We also say so as it would be ridiculous and fundamentally wrong, in our view, for any Court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a Court is properly seized with a matter but a Constitutional issue not within its obvious exclusive, jurisdiction is raised.”

16. The said Court further held as follows:-

“The above analysis leads us to the conclusion that both the ELC and the High Court have a concurrent and or coordinate jurisdiction and can determine Constitutional matters when raised and do touch on environment and land. Neither the Constitution nor the ELC Act limit the High Court’s jurisdiction in this respect while a closer reading of the ELC Act reveals that the ELC Courts jurisdiction was in 2012 limited by parliament in so far as Constitutional issues touching on land and environment are concerned but the Court of Appeal in Mugendi expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches off fundamental rights touching on the subject at hand. We hold that in matters Constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.”

17. In reaching a decision herein, I have considered the pleadings relied on by all the parties, the submissions made by their counsel and the authorities relied upon in advancing their arguments. Although I agree with Mr. Gikandi that this court has a concurrent and coordinate jurisdiction with the ELC, I am duty bound to consider if the cornerstone of this petition lies within the jurisdiction the High court or the ELC. If my finding to the foregoing issue is that jurisdiction lies elsewhere, the court cannot lay any other stone atop a cornerstone that is not well laid out lest the building crumbles. An analysis of paragraphs 5, 6 and 7 of the Petition leaves no doubt in my mind that the substratum of the petition relates to the **ownership, use and occupation** of a portion of the land specified in paragraph 5 of the Petition. The rights of the Petitioners are alleged to have been infringed as a result of the foregoing issues. It is therefore my finding that the ELC has jurisdiction under Article 162(2)(b) of the Constitution, sections 13(2)(e) and 13(7) of the ELC Act to grant orders in Constitutional petitions which allege contravention of fundamental rights and freedoms under the Bill of rights, where the issues of ownership, occupation and use of land are so inextricably intertwined to those of infringement of fundamental rights and freedoms.

18. I find that the preliminary objection raised has merit in so far as the issue of jurisdiction is concerned. I however decline to uphold the objection that the Petition has been brought prematurely. That matter will be best addressed by the ELC which is seized of jurisdiction to address the substantive matters raised in the Petition herein.

19. I therefore make the following orders:-

- (i) That this court has no jurisdiction to hear the Petition dated 24th September, 2014;
- (ii) I hereby transfer the said Petition for hearing and final determination before the Mombasa Environment and Land Court; and
- (iii) costs in the cause.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **MOMBASA** on this 12th day of July, 2016

NJOKI MWANGI

JUDGE

In the presence of:-

.....for the Petitioners

.....for the Respondents

.....for the Affected Parties

.....Court Assistant