



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 494 OF 2013

JOCKEY CLUB OF KENYAPETITIONER

VERSUS

KENYA FOREST SERVICE RESPONDENT

AND

THE NAIROBI BUSINESS PARK LIMITED..1ST INTERESTED PARTY

ACTIS NBPL HOUSING (MAURITIUS) LTD..2ND INTERESTED PARTY

RULING

Introduction

1. In the petition dated 10th October 2013, the petitioner seeks the following orders:

“A declaration that the Grant issued over all that piece of land known as Land Reference No 9937 situate in Nairobi and registered as Grant No L.R 17230 issued under the Registration of titles ordinance was valid to render the petitioner the registered proprietor of the said land containing by measurement four hundred and seven (407) acres with it dimensions, abutments and boundaries delineated in the land survey plan no 70962;

A declaration that the petitioner is the registered proprietor and therefore entitle to quiet possession of all that piece of land known as Land Reference No 9937/11 situate in the City of Nairobi which is subject to Grant No.R 85586/1 and Land reference No 9937/12 issued under the registration of titles Act (Cap 281);

A declaration that the letter dated November 23, 2012 by the respondent is unconstitutional to the extent that it purport to unlawfully and unprocedually extinguish the petitioner’s rights and interests in land Reference No 9937/11 and land Reference No 9937/12;

An order restraining the respondent, whether by itself, its servants, employees, agents or otherwise howsoever from entering upon and/ or in any way seizing control or interfering with the petitioner’s quiet possession of all those parcels of land known as

land Reference No 9937/11 and Land Reference No 9937/12 without regard to the Petitioner's right under Article 40 of the Constitution and the due process of the law;

Such other order(s) and directions as this Honourable Court shall deem just;

Costs of this petition be borne by the respondent."

2. The respondent opposes the petition and by a Notice of Preliminary Objection dated 24th March 2014 seeks the striking out of the petition on the ground that it raises the same or similar issues and involves the same parties as those in **HCC ELC No 61 of 2013 Nairobi Business Park & Another –vs- The Kenya Wildlife Service**. The respondent preliminary objection is couched in the following terms:

1. **"The suit herein is a total abuse of the court process in view of the HCC ELC No. 61/2013 among three of the parties herein raising similar issues. It's an abuse of the court process to file this suit to circumvent what one of the parties has failed to attain in ELC 61 of 2013.**
2. **The plaintiffs are abusing the court process by purporting to litigate in instalments.**
3. **The matter raised can adequately be dealt with under HCC ELC 61 of 2013 since the environmental court is seized with proper jurisdiction constitutionally to determine the matter. The issues for determination relate to ownership and the title to land and not constitutional issues.**
4. **Parties should not be allowed to litigate in two different forums concurrently and the petitioner herein can apply to be enjoined as an interested party in HCC ELC NO.61/2013.**
5. **By virtue of the proceedings in the environmental court ELC NO 61/2013 the petitioner/plaintiffs/interested parties are stopped by record from a probating and reprobating."**

3. In his submissions, Mr Omogeni, Counsel for the respondent, argued that in High Court ELC No. 61 of 2013, the 1st and 2nd Interested Parties in this petition are the plaintiffs while the respondent is the defendant; that it is only the petitioner in this case which is not a party to ELC 61 of 2013; that the plaintiffs in ELC 61 of 2013 seek declaratory orders to the effect that they are the registered owner of L.R No 2486/1/1 emanating from LR 134578; and they also seek damages for trespass and aggravated and exemplary damages against the respondent. The respondent further argues that land the subject of the dispute in ELC 61 of 2013 was purchased in 2000 from the petitioner in this case, the registered owner of **Land Reference No 9937/11**. The respondent's defence in that suit is that the land in dispute is gazetted forest land by Proclamation No 44 of 1932 and Legal Notice No. 174 of 20th May 1964. It is therefore the respondent's contention that the issue of title, ownership, possession and proprietary of title are central issues to be determined in ELC No. 61 of 2013; and that the issues for determination in this petition also relate to issues of title, ownership, and the proprietary rights of the petitioner.

4. The respondent contends that these are issues that can only be determined after evidence is tendered, witnesses cross – examined, and a reasoned judgment rendered, which cannot be done in a constitutional petition. It is its case therefore that the proper forum for the issues raised in this petition is the Land and Environment Court which has jurisdiction under Article 162(2) of the Constitution and the Land Act, Cap 12A, section 13(2)(a) of which gives the Environment and Land Court power to hear disputes relating to title to land, while section 13(7)(h) gives the court power to make declarations.

5. The respondent submitted that it would be an abuse of the court process for parties to litigate the same matters in two concurrent processes as this would offend the sub-judice rule and would be contrary to section 6 of the Civil Procure Code. Counsel for the respondent relied on the case of **Abdullah Mangi Mohamed - vs-lazarus Beja & 5 Others[2012]eKLR** where it was

stated that if there exists a statutory mechanism for the resolution of the dispute, that statutory procedure should be utilised in the determination of the claim to the property rather than clog the Constitutional Court with applications for enforcement of purported rights which require prior determination. He also relied on the case of **Gilbert Kabage Karianjahi & Another -vs- James Mwangi Murangu [2013]eKLR and Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga [2013]eKLR** which defines the sub-judice rule.

6. It was his submission that judicial time can be expended expeditiously if the petitioner applied to be enjoined as an interested party in ELC 61 of 2013, and the petition should be struck off with costs to the respondents.
7. In response, Counsel for the petitioner, Mr. Nyaoga, submitted that the respondent has taken a contradictory position on the matter of jurisdiction. It has, at paragraph 19 of its defence in ELC 61 of 2013, challenged the jurisdiction of the Court, alleging that the claim falls within the jurisdiction of the National Land Commission; and the respondent was thus approbating and reprobating at the same time.
8. It is the petitioner's case that it had not been joined as a party to ELC 61 of 2013 by any of the parties in that suit, nor are its properties the subject of that suit. Rather, the subject of that suit is the attempt by the respondent to exercise its statutory duty to protect the land arising from its classification as forest land. Counsel contended that as the respondent does not challenge the petitioner's title, and therefore the petitioner's title is established, then the petition was properly before the Court. The petitioner relied on the decision in **Mombasa High Court Petition No. 59 of 2011 - Abdulla Mangi Mohamed -vs- Lazarus Beja & Others** for the proposition that the High Court sitting as a constitutional court would only have jurisdiction in cases where the petitioner's title to the land has been established so that the owner of the title is seeking to protect his undisputed title to the land.
9. To the respondent's contention that the present petition offends section 6 of the Civil Procedure Code, the petitioner submitted, on the authority of **JadvaKarsan -v- Harnam Singh Bhogal (1952) EACA 74** that Section 6 refers to the entire matter in controversy, not just some issues in dispute. In the present matter, according to the petitioner, the issue in dispute and the substratum of the suit is Legal Notice No. 174 of 20th May 1964, and whether it limits the petitioner's right to quiet enjoyment of its property. It is the petitioner's contention that this is not the issue in ELC 161 of 2013 as the dispute in that case relates to the legality of the sub-division. It contends that if the present petition is struck out on the basis of the existence of ELC 61 of 2013, the issue of the legality of the notice would remain unresolved, resulting in a violation of Article 48 of the Constitution on the right to access to justice.
10. Mr. Nyaoga submitted further that the issue of the legality of the Legal Notice, even were it to arise in ELC 61/2013, could not be dealt with by the Court seized of that matter. He relied on the decision of the Court in **Cycad Properties Limited & Others -vs- The Attorney General & Others- High Court Petition No. 69 and 70 of 2010** to submit that the Court could not make a finding on the legality of the Legal Notice as there was no privity between the plaintiffs in the ELC case and the respondent.
11. The petitioner contends that while a decision in the present petition, which relates to the original title, can affect the case in ELC No 61 of 2013, a decision in that matter, which is a claim in trespass, could not affect the present petition. The petitioner therefore asked the Court, should it be persuaded by the respondent's objection, not to strike out the petition but to either stay the other suit or consolidate it with the present petition.
12. While agreeing with the petitioner's submissions, Counsel for the Interested Parties, Mr Amoko, submitted that the issue in ELC 61 of 2013 is whether the respondent was entitled to invade the plaintiffs' land; that it is the plaintiffs' case that the land is not covered by the Gazette Notices of 1932 and 1964; that the issue in the present case is the legality of the Gazette Notice and whether the petitioner can be deprived of his land by way of Gazette Notice. According to Mr Amoko,

what the plaintiffs were challenging in the ELC case was the extent of the area covered by the Gazette Notice. The Interested Parties also agreed with the petitioner that the ELC case should be stayed pending the determination of the petition.

13. In reply to the submissions by the petitioner and the Interested Parties, Mr. Omogeni contended that both the ELC case and the present petition were precipitated by the letter from the respondent addressed to the plaintiff in ELC No 61 of 2013, the 2nd Interested Party in this matter; that the petitioner is, in the present petition, purporting to protect the constitutional rights of the Nairobi Business Park Limited, which it cannot do; that the petitioner alleges that the respondent's claim is based on Proclamation No 44 of 1932 and LN No 174/1964, which relate to the extent, dimensions and boundaries of Ngong Forest; that the Court is not well placed to determine such factual disputes and the issues in dispute should therefore be determined in the ELC Division as they relate to boundaries and title.
14. Counsel further urged the Court, in determining the importance of the two cases, to be guided by which party was the aggrieved party in the two cases, and contended that it was the plaintiffs in ELC 61 of 2013 who were aggrieved as they were undertaking developments and alleging trespass against the respondent; and that this petition is purely academic with no demonstration that the petitioner's rights are affected at all.

Determination

15. I have heard the respective submissions of the parties, read their pleadings in this petition and the plaint in ELC No. 61 of 2013. As observed by Mureithi J in **Mombasa High Court Petition No. 59 of 2011- Abdulla Mangi Mohamed –vs- Lazarus Beja & Others**, the starting point in considering whether the issues in dispute fall within the jurisdiction of this Court or of the Land and Environment Court is to consider the issues that the Court is being asked to determine. These emerge clearly from the affidavit of Mr David Davies sworn on 10th October 2013.
16. Mr. Davies gives the history of the Jockey Club and its ownership of the subject property. It appears that the mother parcel from which the subject properties are a subdivision of was granted to the petitioner on 14 April 1960 vide Grant Number L.R 17230 over that parcel of land known as Land Reference No 9937, for a period of 99 years with effect from 1st October 1950, under the Registration of Titles Ordinance. In 2000, the petitioner sought and obtained permission from the then Ministry of Lands and Settlement for a sub-division of the land comprising the original grant. It also obtained a change of user. It was subsequent to this subdivision that it sold the land the subject matter of the suit in ELC No. 61 of 2013 to the 1st Interested Party.
17. The averments by Mr. Davies contained in paragraphs 18-29 of his affidavit are crucial to the determination of the question now before me. He deposes as follows:
18. *On or about November 2, 2012 armed guards from the respondent entered the 1st interested party's parcel of land, being land Reference No 24861/1 and occupied it and prevented any further progress of on-going construction of a business premises. The petitioner was informed by the 1st interested party that the respondent seems to believe that the three parcel of land (Land Reference number 9937/11, land reference no 24861/1 and Land Reference No 24861/2 encroach upon forest land forming part of the Ngong Road Forest Reserve.*
19. *Attempts by the 1st interested party to continue construction have since been prevented by the respondent's armed guards seizing control of the land and threatening violence upon the petitioner's and the interested parties' employees and agents.*
20. *By a letter dated November 23, 2012 the respondent informed the 1st interested party that the land subject of the original grant which had been issued to the petitioner and which begot its title in land reference No 24861/1 was part of Ngong Forest, remained forest land and was not*

available for alienation and issuance of a title.

21. *I am aware that respondent's claim that the petitioner's property is on forest land is based on a Proclamation No 44 of 1932 and subsequent Legal Notice No 174 of May 20, 1964 which declared Ngong Road Forest Reserve to be Forest Land.*
22. *However, as at 1972, when the petitioner was acquiring interests in the land subject of the original grant no forests had been gazetted in Kenya. This position can be confirmed by Gazette Notice No 262 of March 13, 1946 in which it is clear that no area had been demarcated as a forest by that time.*
23. *Further, it is the petitioner's view that Legal Notice No 174 of May 20, 1964 on which the respondent seeks to rely to prove that the suit property is forest land, came after the petitioner had been registered as proprietor of the suit property vide the Original Grant with effect from October 1, 1950.*
24. *The petitioner is the absolute and indefeasible owner of the property subject of the Original Grant. Its property is not and has never been part of the Ngong Road Forest Reserve. However, the petitioner is apprehensive, in light of the activities of the respondent on land Reference No 24861/1 and land Reference No 24861/2 (hereafter 'the neighbouring properties') and in light of the letter dated November 23, 2012, that the respondent shall move by way of armed guards to seize control of its property and destroy the heritage of Horse Racing in Kenya.*

18. In determining the question before me, I bear in mind the provisions of Section 6 of the Civil Procedure Act which provides as follows:

"No Court shall proceed with the trial of any suit or proceedings 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 other Court having jurisdiction in Kenya to grant the relief claimed".

19. I also bear in mind the dicta of the Court in **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A 696,**

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

20. I have already set out the prayers that the petitioner is seeking. From the averments by Mr. Davies, the present petition is precipitated by the actions of the respondent with regard to the land which the petitioner transferred to the Interested Parties. The petitioner states that it was informed by the 1st Interested Party that the respondent *"seems to believe that the three parcels of land (Land Reference number 9937/11, land reference no 24861/1 and Land Reference No 24861/2 encroach upon forest land forming part of the Ngong Road Forest Reserve."*

21. As I understand it, there is no dispute that the petitioner owns land adjoining the Ngong Forest Reserve. What appears to be at issue is the extent of the petitioner's land or, conversely, the extent of the Ngong Forest Reserve. Consequently, both this Court, should it deal with the petition, and the Court dealing with ELC No. 61 of 2013 will be called upon to determine the extent of the boundaries between the petitioner's parcel and the Ngong Forest Reserve.

22. Article 165(5) of the Constitution provides as follows:

(5) The High Court shall not have jurisdiction in respect of

matters—

(a)...

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

23. At Article 162(2), the Constitution provides that **“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

(a) ...

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

24. It appears to me that the respondent is correct when it argues that this Court is not the proper forum for determination of this matter. First, the dispute precipitating the petition is also the subject of ELC No. 61 of 2013. In that case, the plaintiffs allege trespass against the respondent. They seek declarations, among others, that the plaintiffs, the 1st and 2nd Interested Parties in this matter, are the registered owners, are entitled to the possession and have been in possession of L.R. Nos. 24861/1 and 24861/2 respectively.

25. To reach a determination of the matter in order to grant or deny the prayers sought, the Court will have to enquire into the petitioner’s title to the mother title, not with regard to the legality or propriety thereof, which is not in dispute, but with regard to the extent of the land covered in the said titles. And in so doing, it must inquire into the extent or the boundaries of the Ngong Forest, and the gazettelement thereof.

26. In the circumstances, it would be to offend the rule of sub judice for the present petition to subsist alongside the ELC case. The Environment and Land Court has the jurisdiction to hear question relating to the **“use and occupation of, and title to, land.”** It is, in my view, the Court best suited to determine the issues in dispute in both this matter and the ELC case, for a determination of the issues in that case must be preceded by a determination of the extent of the Ngong Forest Reserve.

27. The petitioner has relied on the case of **Cycad Properties & Others –v- Attorney General**(supra)to argue that the plaintiffs in ELC No. 61 of 2013 cannot challenge GazetteNoticeNo. 174 of 1964 because they have no privity with the respondent. In my view, the circumstances of this petition are clearly different and distinguishable from those of Cycad, in which the petitioners were challenging the validity of the compulsory acquisition of property by the state from the original owners some forty years before.

28. In the present case, the Court will be called upon to determine the boundaries and dimensions of the Ngong Forest Reserve vis a vis the petitioner’s property. It appears to me that the petitioner is seeking to have this issue determined in this petition in order to protect the title of the 1st and 2nd Interested Party, the plaintiffs in the ELC case.

29. It is therefore my finding that the present petition and the suit raise the same issues, and that the said issues are best addressed in the ELC case in order not to offend the provisions of Article 162(2)(b) and section 6 of the Civil Procedure Code. For that reason, the preliminary objection succeeds.

30. The question is the best course of action to follow upon such determination. The respondent has prayed that the petition be struck out, while the petitioner asks that the petition be stayed or be transferred to the ELC Court to deal with. In my view, the latter course is what best meets the ends of justice. The Court seized of ELC No. 61 of 2013 has the jurisdiction to hear evidence with regard to the gazettelement of the Ngong Forest Reserve and the exact dimensions thereof vis a vis

the petitioner's property, and thereafter make a determination on whether the property in dispute, namely L.R. Nos. 24861/1 and 24861/2, fall within or outside the forest reserve.

31. In the circumstances, this petition is transferred to the Environment and Land Court to be consolidated with High Court ELC No. 61 of 2013 and for such amendments to be made as that Court may deem appropriate for the better determination of the issues in dispute.

32. With regard to costs, I direct that each party bears its own costs.

Dated Delivered and Signed at Nairobi this 8th day of July 2014

MUMBI NGUGI

JUDGE

Mr. Okong'o Omogeni instructed by the firm of Okongo Omogeni & Co. Advocates for the Respondent

Mr. Mohamed Nyaoga instructed by the firm of Mohammed Muigai & Co. Advocates for the Petitioner

Mr. Amoko instructed by the firm of Oraro & Co. Advocates for the Interested Parties