



REPUBLIC OF KENYA

High Court at Mombasa

Petition 12 of 2012

FATUMA A. CHAMKONO & 40 OTHERSPETITIONERS

VERSUS

DISTRICT COMMISSIONER, MSAMBWENI DISTRICT.....1ST RESPONDENT

DISTRICT OFFICER, DIANI DIVISION.....2ND RESPONDENT

AND

EMFIL LIMITEDINTERESTED PARTY

RULING

1) On 1st November 2012 this Court granted leave to the Interested Party (**EMFIL**) to introduce a cross petition in these proceedings. The Cross-Petition that was subsequently filed has been resisted by the Petitioners and the Respondents who have raised Preliminary Objections to it. This decision is an answer to those objections which were raised in the Notice filed on 6th December 2012. In it, are the following grounds:-

a)The Cross Petition does not raise a Constitutional issue for determination by the Constitutional Court. The Cross Petition is consequently incompetent.

b)There is already a ruling and determination in Judicial Review Application Number 84 of 2011 involving the Interested Party and some of the Respondents named in this Cross Petition in respect of the same and identical issues and complaint raised in this Cross Petition. The Interested Party herein is the Ex-parte Applicant in Mombasa High Court Judicial Review No.84 of 2011. The filing of this Cross Petition herein is accordingly a gross abuse of the process and the Constitutional jurisdiction of this Court.

c)The Interested Party herein cum Petitioner in the Cross Petition herein has instituted an Appeal against the Ruling and Order of the High Court in Judicial Review Case No.84 of 2011 to the Court of Appeal. The Appeal is pending before the Court of Appeal and the Interested Party cum Petitioner cannot in law litigate over the same issues in two Courts at the same time.

2) So as to put this dispute in proper perspective, it would be necessary to understand its controversial background. EMFIL claims to be the registered owner of some 119 parcels of land. That those parcels of land result from the subdivision of what was originally parcel of land known as LR.No.12335/1 which it bought from Associated Sugar Company Ltd. That sometime in 2006, a group of people invaded the land claiming that they had been allocated that land by the Government through

the office of the Director of Land Adjudication and Settlement. That precipitated the filing of Mbsa.Civil Case No.181 of 2007 **EMFIL Ltd – vs - Hamisi Mwalimi Mwarandani and 9 others** (hereinafter **Case No.181 of 2007**). After hearing the matter, the Court found in favour of the EMFIL and in a decision delivered on 29th of October 2010 Serгон J. stated as follows:-

“I have already stated while dealing with the 3rd issue that the Defendants had nothing to pass to the 9th Defendant since the titles they had were fraudulently and or unlawfully obtained while the Plaintiff had an existing valid title deed which is protected under Section 23(1) of the Registration of Titles Act.”

The learned Judge then granted a permanent injunction against the Defendants restraining them from interfering with EMFIL’s land.

3) If EMFIL had thought that it was the end of its woes then it was mistaken. In a Gazette Notice No.6652 dated 14th June 2011 and published on 15th June 2011, the Registrar of Titles Mombasa declared that the Government had revoked the titles to EMFIL’s property. Following that Notice, EMFIL commenced Judicial Review proceedings in **Mombasa J.R. No.84 of 2011 Republic –vs- The Registrar of Titles and Others.** (hereinafter **J.R. No.84 of 2011**). In those proceedings, EMFIL requested, *inter alia*, for an order of Certiorari to quash Gazette Notice No.6652. In a Notice filed on 7th of October 2011, some 303 persons appointed the firm of **Asige Keverenge & Anyanzwa Advocates** to act on their behalf as Interested Parties. A month later, by a Notice dated 8th of November 2011, the 303 Interested parties wholly withdrew from the Judicial Review proceedings.

4) J.R. No.84 of 2011 was heard and in a judgment delivered on the 7th September 2012 the Court made the following orders:-

1) The Applicant’s Notice of Motion dated 9th August 2011 is dismissed.

2) Subject to the vetting of squatters to determine eligibility and to a bar on resale of the parcels of land for a period of not less than 20 years, the Respondents are at liberty to proceed with the allocation of the suit property to genuine squatters or landless persons of the area. The Respondent will file in court for approval the profiles of all squatter allottees to the suit property within 30 days from the date of this ruling.

3) The judicial proceedings herein are deemed to be an application under the Bill of Rights for the enforcement of the Right to property under Article 40 of the Constitution.

4) The Respondents will file affidavits evidence in reply and such other pleadings as they may be advised on the question of the validity of the Applicant’s title to the suit property.

5) The Applicant’s right to compensation for the takeover of the suit property by the Government will be determined upon establishment of the Applicant’s valid title.

6) The pending application for contempt of court against the 1st and 2nd Respondents and two other shall proceed alongside the further hearing of this matter in relation to the Applicant’s title on such dates to be fixed by the court in consultation with the parties.

7) The matter will be mentioned on 8th October 2012 for directions as to further hearing.

8) Costs in the cause.

This Court is made to understand that EMFIL is aggrieved by that decision and has preferred an appeal against it to the Court of Appeal which is pending for hearing and determination.

5) In the meantime, and prior to the determination of J.R 84 of 2011, this petition was filed. It is brought by 41 persons. Some of them, 31 I am told, are amongst the 303 persons who had joined and later withdrawn from J.R. 84 of 2011. The Petitioners claim to be registered proprietors and or allottees of parcels of land said to be situated within Kwale/Ramisi Kinondo/Squatter Settlement Scheme. In this petition, they seek the following orders:-

a) A declaration do issue that Respondent's have no constitutional and or statutory authority or power to evict the Petitioners from their respective parcels of land within the KWALE/RAMISI KINONDO/SQUATTER SETTLEMENT SCHEME Registration Section and or interfere with the Petitioners' occupation, possession and use thereof.

b) An order do issue prohibiting the Respondents, their servants, agents and or subordinates from evicting and/or threatening to evict the Petitioners from their respective parcels of and within the KWALE/RAMISI/KINONDO/SQUATTER SETTLEMENT SCHEME, Registration Section or in any way interfering with the Petitioner's occupation, possession and use of their parcel's of land.

Agreed amongst the parties herein is that the Settlement Scheme was created from EMFIL's land.

6) In the Cross Petition under challenge, EMFIL has taken issue with the manner in which title to its land was revoked by the Registrar of Titles and how the Settlement Scheme was created out of its land. I think it is important that I lay out the entire reliefs sought by EMFIL.

A) A declaration that EMFIL Limited is the registered owner of the suit properties that was subject of the judgement in HCCC No.181 of 2007 Emfil Ltd v Hamisi Mwalimu Mwarandani & 9 others and listed in the Cross- Petition.

B) A declaration be issued declaring that the revocation of titles issued under Gazette Notice Nuo.6652 of 2011 by the Registrar of Titles, the Chief Land Registrar or any other officer authorized by them by way of publication of a Gazette Notice under the provisions of any of the repealed Land Acts or any other law is contrary to Article 40 and 47(1) of the Constitution and is therefore null and void.

C) A declaration be issued declaring that the Cross -Petitioner's rights under Articles 40 and 47 (1) of the Constitution were violated by the publication of Gazette Notice Number 6652 of 2011.

D) A declaration be issued declaring Gazette Notice Number 6652 of 2011 null and void and of no effect.

E) A declaration that the creation of the Kwale/Ramisi Kinondo/Squatter Settlement is illegal, null and void ab initio and contrary to Article 40 of the Constitution as regards Emfil's fundamental right to property.

F) A declaration the Chief Land Registrar and the Director of Land Adjudication and Settlement acted in contempt of court and in breach of Article 40 of the Constitution by creating the Kwale/Ramisi Kinondo/Squatter Settlement from the properties owned by Emfil Limited.

G) The Chief Land Registrar be directed by cancel, delete and or remove all or any entries giving effect to or made pursuant to Gazette Notices and to forthwith restore the Cross-Petitioner's suit properties mentioned in the Gazette.

H) The Chief Land Registrar or any other person authorized by him be ordered within 21 days of the Order of this court to Gazette the revocation and nullification of all titles issued under the Kwale/Ramisi Kinondo/Squatter Settlement and recall all letters of allotment and titles issued under the Scheme.

I) The Chief Land Registrar be directed to publish the Orders in the Kenya Gazette within 21 days from the date of the Order.

J) An Order directing the Public Service Commission to investigate the conduct of the officers set out in paragraph 36 of the Cross-Petition and establish who are responsible for the illegal creation of the Kwale/Ramisi Kindondo/Squatter Settlement and submit its report and recommendations to court within 30 days of the Order of the court.

K) An order do issue directing the Officer Commanding Police Division-Kwale District or any other senior Police Officer in the District or Mombasa County to forthwith remove all trespassers or squatters on the properties of Emfil Limited upon service of this Order.

L) Exemplary damages against the Respondents and costs of the Cross-Petition based on the value of Emfil's land be awarded to the Cross-Petitioner.

7) With this background, I shall now move to determine the preliminary objection. The gist of the objection is that:-

i. There is no provision, whether Constitutional or statutory, that allows for the filing of a Cross-Petition to a Constitutional Petition.

ii. The issues raised in the Cross-Petition are the same and identical to the issues raised in J.R. 84 of 2011 and the Cross-Petition is therefore caught up by collateral estoppel.

8) The Attorney General appearing for the 1st and 2nd Respondent joined the Petitioners in urging the Preliminary Objection. It was submitted that under the current Constitution and The Constitution of Kenya (Supervisory Jurisdiction And Protection of Fundamental Rights and Freedoms of The Individual) High Court practice and procedure Rules, 2006 (popularly known as **the Gicheru rules**) it is not contemplated that a Respondent, let alone an Interested Party, can file a Cross-Petition to a Constitutional Petition. The Petitioners and the Respondents thought EMFIL's Cross-Petition to be an abuse of Court process.

9) It was also argued that EMFIL had in J.R. 84 of 2011 raised the issue of the Constitutionality of the Registrar's action in revoking the titles and the Court had expressed itself in the decision delivered on 7th September 2012. It was further submitted that as there is already a decision on that issue by a Court of concurrent jurisdiction, the Cross-Petition is an invitation to this Court to sit as a court in appeal over the decision in J.R. 84 of 2011. That posed a danger of two Courts of concurrent jurisdiction issuing conflicting decisions in respect to the same dispute.

10) For the EMFIL this Court was beseeched to consider what EMFIL saw as the unique circumstances of this case. The Court was asked to consider that its rights have been trampled upon in total disregard of the decision in Civil case No.181 of 2007 and the stay orders issued by Justice Odera in J.R. 84 of 2011. The Court was asked to note the repeated violations of EMFIL's Constitutional rights and the blatant disregard for Court orders. It was the argument of EMFIL that this court should not be distracted by technical objections but must seek to get to the bottom of the issues raised by the Cross-Petition on their merit.

11) The first issue I must determine is whether EMFIL is within the provisions of the law in filing a Cross-Petition. Article 22(3) requires the Chief Justice to make rules in respect to Court proceedings for the enforcement of the Bill of Rights. Those rules have not been published to date. Under Section 19 of The Transitional and Consequential Provisions of The Constitution, 2010 the application of the Gicheru Rules is saved until the Chief Justice makes the rules contemplated by Article 22. Section 19 provides as follows:-

“Until the Chief Justice makes the rules contemplated by Article 22, the Rules for the enforcement of the fundamental rights and freedoms under section 84 (6) of the former Constitution shall

continue in force with the alterations, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with Article 22.” (my emphasis)

The Gicheru Rules must be applied in a way that it conforms with the aspirations of the Constitution 2010 and in particular Article 22. Article 22 (3) requires that proceedings relating to the enforcement to the Bill of Rights should not be unreasonably restricted by procedural technicalities. It is my view that even in one set of facts, protagonists to a Constitutional Petition can counter-allege violations, breaches or infringements against each other. In which event, it would be good use of Judicial time and effort to consider and determine the rival positions taken by the parties in one proceeding. If as argued by EMFIL, that the same set of circumstances that give rise to the Petitioner’s claim, also give rise to their Constitutional grievance, then it would be sensible to have both the Petitioner’s claim and EMFIL’s grievance heard and determined in one cause. It has not been demonstrated to me that EMFIL’s Cross-Petition prejudices or distracts the just disposal of the main Petition. There is nothing strange about mounting a cross claim in a Constitutional Petition and this court is aware that a provision for Cross Petitions has been proposed in the draft rules (contemplated by Article 22) which are currently under consideration by the Chief Justice.

12) The more substantial question is whether EMFIL’s Cross-Petition should be precluded by collateral Estoppel. Collateral estoppel or Issue Estoppel as it is sometimes known, arises where an issue which has been decided in a particular case and is treated as decided is raised in a subsequent litigation that involves the same issue. The elements of collateral estoppel are:-

a) There has been prior litigation in which issues identical to the subsequent litigation has been brought before the Court.

b)The issue has been actually litigated in the prior proceedings and the party against whom the Estoppel is being asserted has had a full and fair opportunity to litigate the issue in that litigation.

c) The issue must have been decided and rendered as a necessary party of the Court’s final determination.

13) An important distinction between the Doctrines of Res Judicata and that of Issue Estoppel is that persons who were not parties to the prior litigation can assert the doctrine of Issue Estoppel because what is critical in Issue Estoppel is that a particular issue has been decided and expressed by a Court in a final judgment. The decision in **Hunter v Chief Constable of West Midlands and another [1981]3 All ER 727** illustrates this doctrine. In criminal proceedings that preceded the civil action, the criminal Court ruled that a confession made by Hunter had been obtained voluntarily and there was no physical violence or threats inflicted or made by the police on Hunter and his Co-Defendants when they made the confessions. Hunter then brought an action against the Chief Constable in charge of the police officers claiming damages for assault by the police. The civil Court held that the initiation of proceedings for purposes of mounting a collateral attack on a final decision adverse to the intending Plaintiff reached by a Court of competent jurisdiction in previous proceedings in which the Plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of Court. At pg. 733 Lord Diplock stated as follows:-

“The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.”

14) As earlier noted, 31 of the current petitioners were amongst the 303 Interested Parties who joined and then quickly withdrew from J.R. 84 of 2011. Noteworthy is that during their short participation in the proceedings, the 303 Interested Parties did not take part in the hearing. 10 of the current Petitioners did not join those Judicial Review proceedings at all. In a sense then, all the Petitioners herein were strangers to J.R. 84 of 2011. The question to be determined is whether the Petitioners can successfully

set up the defence of collateral Estoppel against the Cross-Petition notwithstanding that they were strangers to the prior litigation. The Petitioners are beneficiaries of the creation of the Settlement Scheme from EMFIL's land. EMFIL alleges that Government officers commenced the survey, demarcation and allocation thereof after the revocation of title to EMFIL's land vide Gazette Notice No.6652 and inspite of stay orders granted on 8th August 2011 in J.R. 84 of 2011. The Gazette Notice was squarely the subject of the Judicial Review proceedings. In the statutory statement filed at the leave stage of those proceedings, EMFIL attacked the decision contained in the Gazette Notice on grounds, inter alia:-

i. That the Applicant was never informed of the said revocation and hence not given an opportunity to be heard at all before the revocation.

ii. That the purported revocation is selective, biased, unconstitutional, unprocedural and was done without any colour of law.

iii. That the constitutional fundamental rights of the Applicant will be greatly prejudiced and highly infringed if the 1st Respondent's said actions which call for the intervention by this honourable court are left unchallenged."

EMFIL was grieving that its right to property (Article 40) and right to fair administrative action (Article 47) had been violated in the manner in which the titles were revoked and by the revocation itself.

15) In the final judgment in J.R. 84 of 2011 the Court considered the question whether the action by the Registrar infringed on EMFIL'S right to property and rendered itself as follows.

"Although the proceedings before the court are for judicial review, the allegations of infringement of the constitutional right to property under Article 40 brought the application into the purview of Article 22 of the Constitution. In accordance with long established practice of deeming an application brought under judicial review to be an application under the Bill of Rights to enable the court a wide latitude of the choice of remedies (see Githunguri v. AG No.21(1986)KLR 1), I will treat this application as an application for enforcement of the Bill of Rights with respect to the right to access to the court in cases of compulsory acquisition or take-over of private land, and direct that the issues of the Applicant's title to the suit property and the payment of compensation under Article 40 of the Constitution be determined hereinafter on the basis of the pleadings filed by the Applicant and affidavit evidence to be filed by the Respondent within the next 14 days from the date of this Ruling."

16) In respect to the right to fair administrative action, the Court found that the Respondent in the Judicial Review proceedings was in breach of EMFIL's right to fair administrative action under Article 47 of the Constitution, but for reasons stated to that decision, did not grant the orders sought. This is what the Court said:-

"In the circumstances, I am not able to grant the judicial review orders of certiorari, mandamus and prohibition even though the Applicant has demonstrated that the Gazette Notice 6652 of 2011 was made without authority and in breach of the right to fair administrative action under Article 47 of the Constitution. It would authorize the Government, in view of the public interest in the settlement of squatters in the area of the suit property, to proceed with the proposed settlement scheme subject to strict enforcement of criteria for determination of squatter status by the adjudicating committee and subject further to a general limitation on resellability of the parcels of land to avoid land speculation. For this purpose, the Respondents will within 30 days lodge with the court for approval profiles of the allottees to demonstrate their squatter status and needs."

17) It is my finding that the questions as to whether the revocation of the titles of EMFIL's land infringed on EMFIL's right to property (Article 40) and its right to fair administrative action (Article 47) were in issue in J.R. 84 of 2011 and a decision was expressed in answer thereto. And although the Court was sympathetic to EMFIL's allegations, it did not for reasons stated in the decision, quash Gazette Notice No.6652. This court is of course aware that EMFIL is dissatisfied with that decision and

has preferred an appeal against it. On looking at the Cross- Petition, the Court cannot help but notice that its central plank is premised on the argument that Gazette Notice No.6652 violates EMFIL's rights to property and to fair administrative action. I must reach the decision that those are issues that were decided and rendered as a speaking part of the Court's determination in JR 84 of 2011. For that reason, it would be against public policy for the Interested Party to relitigate on the same issues. There is a danger that this Court looking at those issues may arrive at a different decision from that in J.R. 84 of 2011. This would be most undesirable as the two Courts are of a concurrent jurisdiction. EMFIL, it seems to me, must pursue its appeal to conclusion.

18) So am I to strike out the entire Cross Petition? I have looked at the Cross Petition keenly and have come to the conclusion that prayers (A), (B) (C) (D) (E) (F) (G) (H) (I) and (K) were either directly decided in JR 84 of 2011 or cannot be granted as a consequence of that decision. Those reliefs are fully reproduced in paragraph 6 of this decision. I venture to demonstrate this.

19) When the Court dismissed the Notice of Motion dated 9th of August 2011 it declined, inter alia, to quash Gazette Notice No.6652 of 2011 and to order reinstatement of EMFIL's titles. That would have dealt with reliefs (A) (D) (G) (H) and (I).

20) When the Court ruled that the Respondents therein were at liberty to proceed with the allocation of EMFIL's property to genuine squatters or landless persons of the area, it would have decided prayer (K) and any question that the allottees are not genuine squatters or landless persons would have to be taken up in JR 84 of 2011.

21)The Court reached a decision that the Gazette Notice was an affront to EMFIL's right under Article 47 (1) of the Constitution. In respect to Article 40, the Judge made the following orders which bears repetition:

“(3) The Judicial proceedings herein are deemed to be an application under the Bill of Rights for the enforcement of the Right to property under Article 40 of the Constitution.

(4)The Respondents will file affidavits evidence in reply and such other pleadings as they may be advised on the question of the validity of the Applicant's title to the suit property.

(5)The Applicant's right to compensation for the takeover of the suit property by the Government will be determined upon establishment of the Applicant's valid title.”

And so the issues raised by reliefs (B) (C) and (E) were decided therein. And so was relief (F), in part.

22) The Court ordered that the Application for contempt filed in those proceedings would be heard at a later date. That Application is pending and this is expressly admitted in paragraphs 26 and 27 of the Cross Petition. It would be idle to ask this Court to declare that the Chief Land Registrar and the Director of Land Adjudication and Settlement acted in contempt of Court when the same question must be determined in the pending Application. The rest of relief (F) cannot therefore be granted.

23)What about reliefs (J) and (L)? Perhaps I should reproduce them again;

“J. An Order directing the Public Service Commission to investigate the conduct of the officers set out in paragraph 36 of the Cross-Petition and establish who are responsible for the illegal creation of the Kwale/Ramisi Kinondo/Squatter Settlement and submit its report and recommendations to court within 30 days of the Order of the court.

L. Exemplary damages against the Respondents and costs of the Cross-Petition based on the value of Emfil's land be awarded to the Cross-Petitioner.

My understanding is that the issue in respect to EMFIL's right to property, under Article 40 of the Constitution, is still a matter to be determined in JR. 84 of 2011 which was deemed by the Judge there to

be an Application brought under the Bill of Rights. This court is unable to proceed in respect to reliefs (J) and (L) while the question of Article 40 is still pending in the other proceedings.

23) These are now my orders:

a) I hereby strike out the Cross Petition in respect to reliefs (A) (B) (C)(D) (E)(F) (G) (H) (I) and (K) but with no order as to costs.

b)The hearing of the Cross Petition in respect to reliefs (J) and (L) will pend the outcome of the appeal emanating from JR 84 of 2011.

c) Notwithstanding my orders above, EMFIL will continue to participate in these proceedings in their role as Interested Parties.

Dated and delivered this 11th day of April, 2013.

F. TUIYOTT

J U D G E

.....FOR PETITIONERS

.....1ST RESPONDENT

.....2ND RESPONDENT

.....INTERESTED PARTY

J U D G E