



REPUBLIC OF KENYA

High Court at Mombasa

Petition 22 of 2012

OMAR TAHIR SAID.....PETITIONER

VERSUS

REGISTRAR OF TITLES.....1ST RESPONDENTS

COMMISSIONER OF LANDS.....2ND RESPONDENTS

RULING

- 1) This petition arises out of the revocation of the petitioners title to land described as LR.No.MN/1/2411 by way of administrative fiat. In the main, the petitioner seeks a Judicial declaration that the revocation carried out by the 1st Respondent is unconstitutional, null and void abinitio.
- 2) Two interested parties joined the petition, they are Kenya Civil Aviation Authority (KCAA) and The Ethics and Anti-corruption Commission (EACC). In responding to the petition, and at the hearing, KCAA raised some Preliminary Objection vide a Notice dated 22nd November 2012. One of the objections challenges the jurisdiction of this court to grant a majority of the prayers sought. The objection reads:-

THAT the jurisdiction of this Court has not been properly invoked in respect to prayers (b), (d), (e) and (f) of the Petition herein the same being issues which fall squarely within the exclusive jurisdiction of the Environment and Land by dint of Section 13 of the Environment and Land Act, Act No.19 of 2012 as read together with Article 162(2)(b) of the Constitution of Kenya hence to that extent this Court lacks the jurisdiction to in anyway deal with the aforesaid prayers or at all.
- 3) Once a question of jurisdiction is raised then I am obliged to decide the issue right away. As stated in the often quoted decision of **The owners of Motor vessel “Lilian S” –vs- Caltex Oil (Kenya) Limited [1989] 1 KLR 1. “Jurisdiction is everything. Without it a Court has no power to make one more step.”**
- 4) To begin with it is necessary to understand the nature of the petition and the prayers it seeks. There exists a civil case in the High Court, being MBSA.HCCC No.2009 **Kenya Anti-Corruption Commission – vs- Zakayo Kipkemoi Cheruiyot & 2 others** (hereinafter **the civil suit**). There the petitioner herein is the 2nd Defendant. In that suit the predecessor to the EACC sought a declaration that the initial allocation of the suitland and its subsequent transfer to the petitioner is a nullity and prays for the cancellation of the entries made in the land register in favour of the 1st Defendant and the Petitioner. That is amongst other prayers. That suit is still pending for determination.
- 5) In spite of the civil suit the 1st Respondent purported to revoke the Petitioners title to the land

described as LR MN/1/2411 through Gazette Notice No.15570 published on 26th November 2010. It is the view of the Petitioner that the action of the 1st Respondent is an affront to at least three of his fundamental rights enshrined in the Bill of Rights in the Constitution 2010;

- i. Article 40 – The right to property.
- ii. Article 47 – The right to fair administrative action.
- iii. Article 50 – The right to fair hearing.

6) This Petition seeks to enforce those rights and prays for the following:

- a) A declaration that the Respondent's revocation of the Petitioner's title to all that parcel of land comprised in title LR MN/1/2411 is unconstitutional, null and void ab initio.
- b) A declaration that the Grant of Title to the Petitioner in respect to the suit property is conclusive evidence of ownership and that the Petitioner is the absolute and indefeasible owner of the suit property unless the same is revoked by the court.
- c) An Order of certiorari to do issue to bring into this Honourable Court for the purposes of being quashed, the 1st Respondent's Gazette Notice Number 15570 dated 26th November, 2010 purporting to revoke the Petitioner's title to all that parcel of land comprised in Title Number **L.R. MN/1/2411-Mombasa**.
- d) An Order of prohibition do issue to prohibit the Respondent's by themselves, or servants agents or whomsoever from alienating the Petitioner's parcel of land comprised in Title Number **L.R. MN/1/2411-Mombasa** or in any manner interfering with the Petitioner's possession of the said premises.
- e) An order of prohibition do issue to prohibit the Respondent's by themselves, servants, agents or whomsoever from in any manner whatsoever from issuing any title and/or license in respect to the Petitioner's land comprised in Title Number **L.R MN/1/2411-Mombasa** or registering any encumbrances thereon.
- f) An order of Mandamus do issue to compel the Respondent's by themselves, servants or agents or whomsoever to delete any entry on the Petitioner's Title made as a consequence to or in furtherance of all that parcel of land comprised in **L.R. MN/1/2411-Mombasa**.

7) The view taken by the Petitioner is that this Court, The High Court, has jurisdiction given to it by Article 23(1) to hear and determine, all petitions for the enforcement of The Bill of Rights. Article 23(1) reads:-

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

8) The objection taken up by KACC is an invitation to discuss the authority and scope of The Environment and Land Court (hereinafter **the E and L Court**) in respect to the Enforcement of the Bill of Rights. That discussion ought to start by examining the provisions of the law that establishes the E and L Court.

9) Article 162 (2) and (3) of The Constitution provides as follows:-

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

(a)and

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

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

The Court contemplated under Subclause (b) to Article 162 (2) was established vide Section 4 of The Environment and Land Court Act. (hereinafter **the E and L Court Act**) The provision reads:-

“4(1) there is established the Environment and Land Court

(2) The Court shall be a Superior Court of Record with the status of the High Court.”

(3) The Court shall have and exercise jurisdiction throughout Kenya.”

10) Section 13 of The E and L Court Act is on jurisdiction of the E and L Court. The provisions of that Section need to be reproduced in their entirety:-

“13. (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 environment 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 and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.

3) 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.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) 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 and just, 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.”

11) A cursory reading of Section 13(3) of the Act could suggest that the Courts jurisdiction as an enforcer of the Bill of Rights is limited to those relating a clean and healthy environment Under Articles 42, 69 and 70 of the Constitution. But this may not be so. From the preamble of the E and L Court Act, it is clear that the object of the Act is to give effect to Article 162 (2)(b) of The Constitution. In understanding the scope of the jurisdiction of the E and L Court it must be remembered that the Constitution contemplated that it would be a Court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. In petition No.170 of 2012 – **United States International University - vs – The Attorney General**, Majanja J had to determine whether the High Court should continue to determine labour and employment matters in the light of the establishment of the Industrial Court. This is what he the Judge said of the term “status” used in respect to the Courts established under Article 162 (2) of the Constitution.

“The Constitution does not define what “status” means but in my view it implies that the Court must have the same juridical incidents as to the High Courts.

The E and L Court has juridical likeness or similarity with the High Court. In this juridical likeness, the E and L Court would have authority to entertain applications for the redress of a denial, or violation, or threat to a right or fundamental freedom in the Bill of Rights in matters falling under its jurisdiction. It is in acknowledgement of this, I suggest, that the Legislature, by Section 13(3) of the E and L Court Act, expressly recognized the authority of the Court to enforce the fundamentals rights under Articles 42, 69 and 70 of the Constitution.

12) Yet to limit the Courts authority to the fundamental rights specified in Section 13(3) would be to unduly constrict the Constitutional intent of establishing a Court Under Section 162(2) (b) that would determine disputes relating to the Environment and the use and occupation of, and title to, land. In exercising its power under Article 162 (3) of determining the jurisdiction and functions of the special Courts contemplated under Article 162 (2), Parliament cannot shrink from the scope of the objective for establishing the Courts expressly stated in Article 162(2). Legislation made under Article 162(3) is to give effect to the provisions of Article 162(2). That legislation was intended, *inter alia*, to flesh out the jurisdiction of the Courts, to clarify their original and appellate roles and to outline the reliefs it could grant. The disputes to be heard and determined by E and L Court include those relating to a clean and healthy environment but much more. That is why Section 13(2)(e) of The E and L Court Act gives the Court wide powers to hear and determine **“any other dispute relating to Environment and Land.”** I take the view that the E and L Court has jurisdiction to enforce the Bill of Rights in disputes that touch on or are incidental to all matters specified in Article 162 (2) (b) of the Constitution and Section 13(2) of the E and L Act, it is not limited to only those expressly mentioned in Section 13(3).

13) The next issue I must determine is whether this jurisdiction (in so far as it relates to breaches of rights and freedom in matters arising from disputes falling within the disputes described in Article 162 (2) (b) and Section 13 of E and L Act) is shared with the High Court. This issue arises because of the provisions of Article 165 (3)(b) which gives the High Court **“jurisdiction to determine the question whether a right or fundament freedom in the Bill of Rights has been denied, violated, infringed or threatened.”** In resolving this issue, I again find assistance in the decision of **United States International University (supra)** where a similar issue arose in regard to the Industrial Court. The learned Judge stated:-

“The answer to this question is found at Article 165 (5) (b) which categorically states that this court, the High Court is not to exercise jurisdiction of the Courts established in Article 162 (2)

.....This would only leave the Industrial Court as the only other forum for the Exercise of the jurisdiction over cases dealing with matters described in Section 12 of the Industrial Court Act, 2011.”

Majanja J. then went on:

“To exclude the jurisdiction of the Industrial Court from dealing with the other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and The Industrial Court. This would give rise to forum shopping thereby undermining the stable and consistent applications of employment and labour laws. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court.”

This can, no doubt, be said about the jurisdiction of the E and L Court.

14) Article 165 (5) (b) is to the effect that:-

“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).”

It follows that the High Courts enforcement jurisdiction does not extend to matters relating to disputes falling Under Section 13(2) of the E and L Court Act. That is the preserve of the E and L Court. There is need for this clarity so that litigants know which Court has jurisdiction in respect to which dispute. Perceptions and suspicions of forum shopping would be minimized or eliminated.

15) Back to the matter at hand. At the heart of the petition is the question whether the revocation of the Petitioners title to land described as LR No.MN/2/2411 breached the Petitioners rights Under Articles 40,47 and 50(1) of the Constitution. It cannot be contested, the controversy relates to title to land and therefore the proper Court to determine these Constitutional question is the E and L Court.

16) Prior to the establishment of the E and L Court, the High Court held fort and heard and determined disputes relating to title to land. But the Judges to the E and L Court were appointed with effect from 1st October 2012. Following the establishment of that Court, The Chief Justice vide Gazette Notice No.16268 published on 9th November 2012, issued practice directions on proceedings relating to Environment and Land matters. Practice directions 3 and 4 are relevant.

“3. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.

4. All cases relating to the environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto has yet to commence shall be transferred to the Environment and Land Court as directed by the Chief Registrar.”

As at the date of the gazettelement of these practice directions (9th November 2012) the hearing of this petition had not commenced. This is one of those cases that should have been transferred to the E and L Court. It is for this reason that I cannot continue to entertain it and I must now, as I hereby do, direct that it be transferred to the E and L Court Mombasa.

17) There shall be no order on costs.

F. TUIYOTT

J U D G E

Dated and Delivered in open court this 11th day of April, 2013 in the presence of:

.....FOR PETITIONER

.....FOR 1ST RESPONDENT

.....FOR 2ND RESPONDENT

.....FOR 1ST INTERESTED PARTY

.....FOR 2ND INTERESTED PARTY

COURT.....

.....

J U D G E