



REPUBLIC OF KENYA

High Court at Malindi

Petition 11 of 2012

**IN THE MATTER OF CHAPTER FOUR ON THE BILL OF RIGHTS, OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS OF THE
INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006**

AND

**IN THE MATTER OF ARTICLES 1,2,3,10,12(1)
(A),19,20,21,22,23,27(4),35(2),40,47,50,64,73(1), AND 129 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF THE CONSTITUTIONALITY OR OTHERWISE OF
THE REPORT OF THE SPECIAL TASK FORCE ON KILIFI JIMBA AND CHEMBE
KIBABAMSHE SCHEMES IN**

MALINDI DISTRICT DATED JUNE, 2010

BETWEEN

- 1. DENMAN PROPERTIES LIMITED**
- 2. BOND STREET PROPERTIES LIMITED**
- 3. GREEN LILY LIMITED**
- 4. HOLBORN PROPERTIES
LIMITED.....PETITIONERS**

VERSUS

1. THE HON.ATTORNEY GENERAL

2. THE COMMISSIONER OF LANDS

3. THE CHIEF LAND REGISTRAR

4. THE DISTRICT LAND REGISTRAR, KILIFI

**5. THE TOWN CLERK, MUNICIPAL COUNCIL
OF MALINDI**

6.THE MINISTERIAL TASK FORCE ON LAND

ISSUES IN COAST PROVINCE.

**7.THE HON.GIDEON M.
MUNGA'RO.....RESPONDENTS**

AND

CHARO MASHAKA

KAZOMBA &

30

OTHERS.....INTERESTED PARTIES

RULING

1. The 1st to the 4th Petitioners moved this court by way of a Petition dated 1st September 2012 and filed on 3rd September 2012.

2. In the said Petitions, the Petitioners are seeking for declaratory orders, the main ones being a declaration that the Petitioners are the legal proprietors of several parcels of land situate in Kilifi/Jimba and in Chembe/Kibabamshe within Kilifi county; and a declaration that the issuance of certificates of leases based on the Report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June, 2010 and the letter by the Hon. Gideon M Mung'aro dated August, 2010 is illegal and contrary to Articles 3, 10, 27, 40, 47 and 50 of the Constitution and is therefore *null* and *void ab initio*.

3. The 5th Petitioner was joined in the Petition by consent of the parties on 14th December 2012.

4. The Petitioners, through their advocate have sued five Respondents and thirty one (31) Interested Parties.

5. The Application before me is dated 18th October 2012 by the 7th, 8th, 13th, 14th, 15th, 16th and 17th Interested Parties. The said Interested Parties are seeking for the following reliefs:

(a) That this Honourable Court be pleased to strike out the Petitioners Petition dated 1st September, 2012 and the Petitioners' Chamber Summons Application dated 1st September, 2012 with costs to the 7th, 8th, 13th, 14th, 15th, 16th and 17th Interested Partys/Applicants.

b) That costs of the Application be provided.

6. The Application is premised on the grounds that, **firstly**, the Petitioner's Petition and the Chamber Summons do not disclose any reasonable cause of action against the Interested Parties, **Secondly**, that as per the pleadings and the annexures appended to the relevant pleadings and in particular annexure RQ 5(a) attached on Renzo Quaciari's Affidavit, the mentioned Plots therein do not form part of the subject matters of the Petition

7. The Petitioners filed their Grounds of Opposition dated 9th November 2012 in which they stated that the Interested Parties' Application is frivolous, vexatious, bad in law, incompetent, misconceived and an abuse of the court process.

8. Mr. Kenga, counsel for the 7th, 8th, 13th, 14th, 15th, 16th and 17th Interested Parties (Interested Parties) submitted that the entire parcels of land which are alleged to be owned by the Interested Parties/Applicants do not form part of the subject matter of the suit.

9. According to Mr. Kenga, the letter dated 20th August 2010 by the 7th Respondent calling for the cancellation of the title deeds for various plots within Kilifi/Jimba and Chembe Kibabamshe schemes seems to be the one which caused the filing of the present Petition. The said letter is annexed on the 1st Petitioner's affidavit as annexure RQ 5a.

10. The Applicants' counsel submitted that the plots mentioned in the letter dated 20th August 2010 do not belong to the Petitioners; that the Petitioners plots are distinct from his client's plots and consequently his clients should not be allowed to participate in these proceedings.

11. Mr. Binyenya, counsel for the 1st to 4th Petitioners submitted that the 1st Petitioner is the owner of the Plots shown in paragraphs 24- 42 of the Petition. According to counsel, the 1st Petitioner is the registered proprietor of 18 plots.

12. The Petitioner's counsel further submitted that the 2nd Petitioner is the registered owner of six plots as shown in paragraphs 45-51 of the Petition; that the 3rd Petitioner is the owner of one plot as outlined in paragraphs 54-55 of the Petition while the 4th Petitioner is the owner of the 9 plots as shown in paragraphs 57- 66 of the Petition.

13. According to counsel, the basis of the Petitioner's Petition is not just the letter dated 20th August 2010 by Hon. Munga'ro, but also the entire "**Special Task Report**" on which the letter of 7th August 2010 was based.

14. The Petitioner's advocate further submitted that the Petition was filed pursuant to the provisions of Article 21(1) of the Constitution which mandates the Petitioners to move the court to safeguard their rights to own property pursuant to Article 40 of the Constitution.

15. According to counsel, the Civil Procedure Rules are not applicable in a Constitutional Petition; that it is only the Gicheru Rules that are applicable as read together with Section 19 of the sixth schedule of the constitution. Consequently, the Applicant's Application should fail for having been filed pursuant to the provisions of the Civil Procedure Rules.

16. The Petitioner's counsel further submitted that the Petition touches on so many people whose rights are likely to be affected. For that reason, counsel urged, Justice Meoli granted to the Petitioners leave to advertise in the daily newspaper the filing of the Petition so as to allow other people to participate in the proceedings.

17. The Petitioner's counsel finally submitted that due process was not followed in the workings of the Ministerial Task Force, that it would be unfortunate if the Petition is struck out just because the Interested Parties do not wish to be enjoined in the Petition and that the Application is unmeritorious.

18. Mr. Ogeto, counsel for the 5th Petitioner associated himself with Mr. Binyenya's submissions.

19. I have read the Application and the pleadings on record. I have also considered the rival submissions and the only two issues that arise are these:

(a) Are the parcels of land indicated in the letter dated 20th August 2010 and which are to be allocated to the Applicants related to the Petitioners' Parcels of land?

(b) Will the allocation of the parcels of land indicated in the letter of 20th August 2010 to the Applicants, if at all, infringe on the rights of the Petitioners?

20. According to Paragraphs 24- 44 of the Petition, the 1st Petitioner

purchased from **Vista Properties Limited, Ali Mohamed Ali and Glitter Venture Company Limited 18 parcels of land all in Kilifi Jimba** for an accumulative amount of Kshs. **100,215,000/-** being parcels number Kilifi/Jimba **342, 335, 340, 341, 427, 338, 353, 333, 334, 311, 331, 337, 317, 336, 345, 328, 343 and 344.**

21. The 2nd Petitioner has averred in the Petition at paragraphs 45- 53 that it purchased 6 plots from **Kenga Mure, Ali Mohamed Ali, Glitter Venture Company Limited, Mohamed Ahmed Badawy and Paul Kiiru Mwangi** for a total of Kshs. **18,200,000.** The said plots are **Kilifi/Jimba 315, 319, 316, 314, 346 and 312.**

22. The 3rd Petitioner purchased one plot being **Kilifi/Jimba 323** from **Ali Mohammed** for Kshs. **3,000,000/=.** The 4th Petitioner has averred that it purchased 9 plots from Ali Mohamed Ali, La Marina Limited, Gold finger Investment Limited and Kenland Enterprises Limited for Kshs. **196,725,000.** The plots are **Chembe Kibabamshe 396, 637, 638, 401, 423, 425, 428, 394, and 379.**

23. By way of a letter dated 20th August 2010, Hon. Gideon M. Mung'aro, the Member of Parliament for Malindi Constituency and the 7th Respondent herein, wrote to the Commissioner of Lands attaching a letter of the local committee, which according to the letter, ***"has been investigating the remaining parcels which were left behind to establish genuine owners"***.

24. The said letter listed 28 persons as the ***"genuine"*** owners of the parcels of land in Chembe and Jimba. The Plot numbers were indicated against the 28 names. The seven Applicants are amongst the 28 people who are listed in the letter and they were to be allocated the following parcels of land all in **Chembe Kibabamshe: 409, 416, 399, 417, 398, 361 and 407.**

25. The genesis of the current Petition, as correctly argued by the Petitioner's counsel, is the ***"Report of the Special Task Force on Kilifi Jimba and Chembe Kibabamshe"*** which, according to the copy that is in the Petitioner's list of documents, is dated June, 2010. The said copy is not signed.

26. The introductory part of the Report states as follows:-

"The Ministerial Task Force on land issues in Coast Province identified Kilifi/Jimba, Chembe Kibabamshe and Madeteni Schemes as some of the areas with chronic land problems that require special attention. It therefore recommended the function of a special task-force to look into all the issues related to the schemes and come up with viable solution."

27. The terms of reference of the appointed task force, which was composed of officials of the Ministry of Lands and the local land committees was to isolate plots without dispute; isolate plots occupied by people who are not the registered owners; identify plots with titles issued without following appropriate procedures; isolate plots with multiple titles; isolate plots transferred and or charged to third parties; isolate plots allocated to non-occupants and lastly isolate plots with court cases.

28. The Task-Force Members, according to the Report, did a comprehensive ground inspection exercise between 13th July 2009 and 16th October 2009 and came up with several findings. The said findings were summarised in tables which were annexed on the Report as annexures “A” to “L”. Those findings are the crux of the Petitioners Petitioner.

29. The Petitioner has averred at Paragraph 12 of the Petition that the 1st to the 27th Interested Parties are persons to whom Certificates of Leases regarding plot numbers Chembe **Kibabamshe 362, 359, 355, 301, 294, 295, 409, 416, 301, 431, 432, 435, 399, 417, 398, 361 and 407** and **Kilifi/Jimba 322, 311, 348, 308, 278, 326, 317, 309, 244 and 394** were issued on the strength of the letter by the 7th Respondent dated August 20, 2010. That may be so.

30. But the question that arises is this, how does the allocation of Plots numbers **Chembe/Kibabamshe 409, 416, 399, 417, 398, 361 and 407** which are purportedly supposed to be allocated to the Applicants affect the rights of the Petitioners to own land?

31. It is trite law that claims arising from legal rights are affirmative; they are affirmative as against some specified persons. A legal right is best understood by answering two fundamental questions:

a) Who is a “right holder?”

b) Who is under an obligation to observe or honour that right?

32. Legal systems should, in appropriate circumstances provide clear answers to these questions and to that extent, the system will provide an effective regime of rights for social inter-relations.

33. The Constitution at Article 22, has identified “**a right holder**” as every person. Consequently, and in accordance with the said Article, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened

34. The utility of any right will be severely diminished if the person under an obligation to honour that right is not identified, and that is why Article 21 of the Constitution provides that it is a fundamental duty of the state and every state organ to observe, respect, protect and fulfill the rights and fundamental freedoms in the Bill of Rights. It is for this reason that more often than not, it is the state or state organs that are ordinarily sued for breach of rights and fundamental freedoms.

35. It is clear to this court that possession, disposition and control of property are concepts of rights within the realm of the Constitution and can if violated be redressed.

36. I have looked at the Petitioner's pleadings and I have not found how the Applicants herein have denied, violated, infringed or threatened the Petitioner's rights to own the parcels of land enumerated in the Petition. The Parcels of land in which the 7th Respondent *vide* his letter dated 20th August, 2010 recommended to be allocated to the Applicants have nothing to do with the Petitioner's parcels of land.

37. The Applicants were not members of the Task Force neither did they participate in authoring the letter dated 20th August, 2010.

38. Though the Petitioners have sued the Applicant's as 7th, 8th, 13th, 14th, 15th, 16th and the 17th Interested Parties, I find and hold that the said Applicants are not necessary parties or Respondents in these proceedings. There is no justiciable issue between the Petitioners and the Applicants for the court to determine.

39. It would have been different if the Applicants had moved the court seeking to be enjoined in the Petition alleging that their rights are likely to be infringed or violated by the filing of the Petition or by the findings of the Task Force. They have not stated so and they are right to protest at their inclusion in the Petition by the Petitioners.

40. This court has the inherent power to dismiss or strike out a suit where there is no cause of action as against a party. In **Mukisa Biscuit Co. Vs. West End Distributors Limited (1969) EA 696**, the East Africa Court of Appeal held as follows:

“The court had inherent power to dismiss the suit notwithstanding that the case did not fall within any of the specific provisions of the Civil Procedure Rules, which do not purport to be exclusive”

41. I therefore do not agree with the Petitioners’ advocates’ submissions that the present Application should be disallowed because it has been brought pursuant to the provisions of the Civil Procedure Rules and not the High Court Practice and Procedure Rules, 2010 (Gicheru Rules) which are supposed to govern all Petitions.

42. In view of my findings that there is no *nexus* between the parcels of land which had been proposed to be allocated to the Applicants and the 1st to the 4th Petitioner's parcels of land, I dismiss with costs the Petition as against the Applicant's herein.

43. The Petition shall proceed for hearing as against the Respondents and the remaining Interested Parties.

Dated and Delivered at Malindi this 9th day of May, 2013.

O. A. Angote
JUDGE