



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. 29 OF 2018

PEPE LIMITED.....PETITIONER

VERSUS

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

KENYA PORTS AUTHORITY.....3RD RESPONDENT

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT.....4TH RESPONDENT

AND

KENYA REVENUE PROTECTION SERVICES.....1ST INTERESTED PARTY

COMMISSIONER INTELLIGENCE &

STRATEGIC OPERATIONS, KRA.....2ND INTERESTED PARTY

RULING

1. This Ruling is in respect to the Notice of Preliminary Objection dated 6th March, 2018 filed by the 2nd Respondent. In the said Notice of Preliminary Objection, the 2nd Respondent averred that the Petition should be struck out on the ground that it offends the provisions of Sections 13(1) and 13(2) of the Environment and Land Court (ELC) Act and Section 12 of the East African Community Customs Management Act.

2. The Notice of Preliminary Objection was supported by the 1st and 3rd Respondents and proceeded by way of written submissions. The 1st Respondent's advocate submitted that the dispute presented in the Petition is a civil commercial claim; that the prayers in the Petition are meant to protect and preserve the Petitioner's commercial business which happens to be located on its land and that the cause of action does not concern the use of the Petitioner's land and that this court does not have jurisdiction to deal with the dispute.

3. The 2nd Respondent's advocate submitted that the dispute before the court stems from the license which had previously been issued to the Petitioner to operate a Custom Transit Shed on L.R. No. 337/196; that the 2nd Respondent appoints and licenses custom areas, Transit Sheds and Inland Container Depots on the request of the 3rd Respondent as an extension of the port and that such appointments and licensing does not have any relation to the user of the land.

4. Counsel submitted that the customs license is issued to operate the Transit Shed on land; that the land describes the limits of the Transit Shed and that any dispute that emanates from customs license is a commercial dispute. The 2nd Respondent's counsel submitted that the issues raised in the Petition are not on the land, but on the rights to enjoy the benefits that arise from the customs license to operate the Transit Shed on the said land.

5. The 2nd Respondent's counsel submitted that the jurisdiction of this court is limited to land and land matters as defined and described in

Article 162(2) (b) of the Constitution and Sections 13(1) and (2) of the Environment and Land Court Act and that the court lacks jurisdiction to deal with the dispute herein. Counsel relied on numerous authorities which I have considered.

6. The 3rd Respondent's counsel submitted that there is no dispute on the use and occupation of L.R. No. 337/196; that the Environment and Land Court Act denies the Environment and Land Court jurisdiction to hear any constitutional issues other than the right to a healthy and clean environment and that to the extent that the Petitioner's complaint is pegged on an illegality, to wit unlawful gazettement, this court does not have the requisite jurisdiction.

7. The 3rd Respondent's counsel submitted that the 3rd Respondent is the only body mandated by law to receive and consign cargo at the port of Mombasa and all ports in Kenya; that it is the 3rd Respondent who licenses all the CFSs and ICDs and that its relationship with the Petitioner is contractual in nature.

8. The 3rd Respondent's counsel submitted that the 2nd Respondent, due to space and efficiency, designates an area as a customs area; that the decisions by the 2nd and 3rd Respondents have no bearing on the Petitioner's right to use and occupy the suit property and that the signing of an Agreement between the Respondents and the Petitioner on the use of the suit land does not amount to land use.

9. The 3rd Respondent's advocate finally submitted that there are three existing Judgments in rem which have fully and finally determined the issues raised in the Petition; that the Petitioner's appointment as a Transit Shed predated the Petitioner's acquisition of the suit land and that the suit should be struck out.

10. On behalf of the 4th Respondent, the Attorney General submitted that by virtue of the Petitioner's land having been gazetted as an inland container depot, it became a controlled land use falling within the jurisdiction of the Environment and Land Court; that the issues raised in the Petition are within the jurisdiction of the Environment and Land Court and that the land having been gazetted as an inland container depot, the Petitioner had surrendered rights attached to its use. Counsel relied on several authorities which I have considered.

11. The Petitioner's advocate submitted that the reliefs sought in the Petition fall within the orders and reliefs that this court has jurisdiction to give; that the cause of action is founded on the Petitioner's right concerning the use and occupation of L.R. No. 337/196 and that the unlawful and unreasonable acts of the Respondents interferes with the Petitioner's right to use and occupy the suit property.

12. Counsel submitted that the occupation and use of the suit land as a customs area and inland port is binding on the land and that the Petitioner cannot change the use of the land at will. According to the Petitioner's counsel, the industrial use of the suit land as stipulated in the special conditions of the title includes warehousing and storage and that the use of the suit land is not for commercial purposes.

13. The Petitioner's counsel submitted that the authority and gazettement of the use and occupation of L.R. No. 337/196 was not limited to any timeframe; that the said gazettement gave the Petitioner a legitimate expectation that its accrued rights would not be arbitrarily violated and that interest in the use of land is one of the interests protected under Article 40 of the Constitution.

14. It is not in dispute that the Petitioner is the registered proprietor of Land Reference Number 337/196 situated in Athi River, whose current designated use and occupation is that of an inland port where goods whose duty has not been paid are entered for home use or transshipment in accordance with the Customs Laws and Regulations.

15. Although the conditions in the title shows that the suit property is to be used for light industrial purposes, the land was designated as a place of loading and unloading; customs area for imports and exports goods in transit and transshipment; place of examination of goods including baggage; and entrance and exit to and from customs area vide Gazette Notice Number 6972 of 13th December, 1996 and Gazette Notice No. 171 of 23rd January, 1998. The said designation was done by the then Commissioner of Customs and Excise.

16. The Petitioner's case is that on the basis of the appointment of the use and occupation of the suit land by the Commissioner of Customs as an inland port, a customs area and a Transit Shed, it has over the years committed large funds and investments running into billions of shillings in improving and developing the suit land with the express knowledge and approval of the Respondents.

17. The Petitioner has further claimed that it is on the basis of the designation of the suit property as an inland port, a customs area and a Transit Shed that the 1st Respondent connected the suit property to the colonial meter gauge railway by way of a railway siding.

18. The Petitioner's complaint is that being aware of the use of the suit land, the Respondents have conspired to prejudice the Petitioner's property and accrued rights over L.R. No. 337/196 and to adversely, unlawfully, arbitrarily and unconstitutionally interfere with the use and occupation of L.R. No. 337/196 (*the suit land*); that the 1st Respondent has deliberately refused to provide L.R. No. 337/196 with a railway siding to the SGR and that being a stakeholder, the Petitioner should have been consulted in the construction of the SGR.

19. The Petitioner's further complaint is that the 2nd Respondent has been subjecting those using the suit property to arbitrary tax uplifts with a view of discouraging them from using the suit land to enter their uncustomed goods for home use; that the 2nd Respondent has routinely sent officers of the Interested Parties to interfere with the operations and use of the suit land and that the Respondents have openly given undue preference to other ICD's by connecting their properties to the SGR and directing all uncustomed goods to those ICD's.

20. The Petitioner is seeking for several declaratory orders including a declaration that the use and occupation of L.R. No. 337/196 is as defined under Gazette Notices and that to that end, the land must be connected by both rail and road; a declaration that the Respondents having caused the Petitioner to acquire the suit land and improve it for use as an inland container depot has acquired rights in the use of the land, which rights are protected by the Constitution and a declaration that prior to the construction of the SGR, the 1st and 4th Respondents were under mandatory duty to undertake public participation involving the stakeholders who would be effected by the said construction.

21. The other declaratory orders that the Petitioner is seeking are that: the acts of the 2nd and 3rd Respondents in failing to nominate cargo to the Petitioner's L.R. No. 337/196 is unconstitutional; that the refusal to connect the SGR to the suit land is unlawful; that the acts of the 2nd Respondent of subjecting the Petitioner to a new application for designation of the suit land is malicious and contrary to fair administrative action and for the 2nd Respondent to be ordered to ensure that the use and occupation of the suit land is without interference.

22. The ultimate prayer of the Petition is worded as follows:

“An order be and is hereby issued permanently prohibiting the Respondents, their employees, staff, agents, servants and persons/agencies acting through them individually and severally or whomsoever from in any way stopping, interfering with, thwarting, impeding, or fettering the manifesting, transport by rail or road or processing of uncustomed goods to or at the Petitioner's L.R. No. 337/196 with Grant No. I.R. 26166 or the use of the land as gazetted in Gazette Notice 6972 of 13th December, 1996 as enhanced by Gazette Notice No.171 of 23rd January, 1998.”

23. In its response to the Petition, the 1st Respondent's Managing Director deponed that indeed, under Section 2 of the East African Community Management Act, a customs area is any place appointed by the Commissioner for carrying out customs operations; that under Section 12 and 14 of the same Act, the Commissioner may by notice in the Gazette appoint customs areas and Internal Container Depots and that the Petitioner's licence to operate as a ICD and customs area has not been revoked by the Commissioner of Customs.

24. The Respondents in this matter have argued that the Gazette Notices appointing L.R. No. 337/96 as an ICD does not have any relation to the user of the suit land, and that the dispute herein is purely of a commercial nature. Consequently, it has been argued that this court does not have the requisite jurisdiction to deal with the dispute.

25. This court derives its jurisdiction from the provisions of Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act (ELC Act). Article 162(2) (b) of the Constitution provides as follows:

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

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

26. Pursuant to the above constitutional provision, Parliament enacted the Environment and Land Court Act which enumerates the jurisdiction of this court in detail. The relevant provision to the current Preliminary Objection is Section 13(2) of the Environment and Land Court Act which provides as follows:

“(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;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.”

27. The jurisdiction of this court also extends to the hearing of claims of violation of constitutional rights and fundamental freedoms relating to the environment and land.

28. The Petitioner's cause of action is founded on the Petitioner's right to protect its interests in and rights concerning the use of L.R. No. 337/196 from the alleged unconstitutional, unfair and arbitrary deprivation and interference of the said use. From the averment of the Petitioner, it has alleged that after its land was gazetted as a Transit Shed by the 2nd Respondent, with the approval of the 3rd Respondent, the said Respondents have been interfering and threatening the Petitioner with the use of L.R. No. 337/196.

29. According to the title, the use and occupation of the suit land is for light industrial purposes. The suit land was later on gazetted by the 2nd Respondent as an inland port and customs area for entering uncustomed goods for home use. It is the Petitioner's case that it has invested heavily in the suit land for this use, and that the said use is binding on the land. Whether this averment by the Petitioner is true or not can only be determined at trial. However, what is true is that since 1996, to date, the suit land is used only as a customs area and an inland port area duly gazetted by the 2nd Respondent, with the concurrence of the 3rd Respondent.

30. As clearly stated in Article 162(2) (b) of the Constitution, it is the mandate of this court, and not the High Court, to hear disputes relating to the use and occupation of, and title to, land. The terms “use” and “occupation” of land are defined in the Black's Law Dictionary, 8th Edition as follows:

a. “Use...1. The application or employment of something especially long-continued possession and employment of a thing for the purpose for which it is adopted as distinguished from a possession and employment that is merely temporary or occasional.

b. “Occupation” is defined as the possession, control or use of real property.”

31. The 2nd and 3rd Respondents had the suit land gazetted as an inland port and customs area in 1996, and the suit land has been used for

this purpose only since then until now. How can it be said that the said gazettelement cannot be categorized as the “use” and “occupation” of land if that has been the only use of the suit land for the past twenty (20) years?

32. I have gone through the Petition and I have not come across a claim by the Petitioner of a commercial nature. Indeed, the Physical Planning Act categorizes what “commercial use” and “industrial use” in respect to land entails. According to Sections 30(6) (a) and (b) of the Act, Industrial use of land includes “warehousing and storage” which is what the suit land was designated for by the 2nd and 3rd Respondents.

33. The term “use of land” was defined by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others (2017) eKLR* as follows:

“for land use to occur, the land must be utilized for the purpose of which the surface of the land, air above it or ground below it is adopted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which the land is adopted.”

34. The court went further to hold as follows:

“Land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounting to use of the land, is a kin to saying that writing a Will bequeathing land or the act of signing a tenancy agreement constitute land use.”

35. The above decision of the Court of Appeal defined the term land use in the context of a charge as a disposition. However, where the creation of an interest is in respect to the use of the land as a commodity, then such an interest is what is contemplated by Section 13(1) of the Environment and Land Court Act as “other instruments granting any enforceable interests in land.”

36. Indeed, the dominant use of the suit property is of a public nature and not private or commercial use. Even if the said use is commercial in nature, this court will still have the jurisdiction to deal with the dispute if the dispute is restricted to an “interest in the use of land” or “instruments granting any enforceable interests in land” as stipulated under Article 13(2) (d) of the Environment and Land Court Act.

37. The term “interest in the use and enjoyment of land” has been defined in the Black’s Law Dictionary, 8th Edition as follows:

“the pleasure, comfort, and advantage that a person may derive from the occupancy of land. The term includes not only the interests that a person may have for residential, agricultural, commercial, industrial, and other purposes, but also interests in having the present-use value of land unimpaired by changes in its physical conditions.”

38. Indeed, from the above definition of an “interest in the use and enjoyment of land,” and from the provisions of Section 13(2) of the Environment and Land Court Act, this court can still deal with claims relating to the use of land which are purely commercial in nature-including Leases and Tenancy Agreements - as long as the substratum of the claim is the “use” and “occupation” of the land. That is what the Petition that is before me is all about.

39. To the extent that the Petition raises issues of denial, violation, infringement and threat of the Petitioner’s constitutional rights and freedoms in relation to the occupation and use of L.R. No. 337/196, it is this court, and not the High Court, that has the requisite jurisdiction to deal with those issues.

40. The 3rd Respondent’s advocate submitted that in any event, this suit is *res judicata*; that the court dealt with the issue of whether there was public participation in the construction of the SGR in the cases of *Patrick Musimba vs. National Land Commission & 4 others (2016) eKLR* and *Okiya Omtata Okoiti & 2 others (2014) eKLR vs. Attorney General & 3 others (2014) eKLR* and that on the issue of the 3rd Respondent’s right to decide where to consign containers, the same was dealt with in the case of *Republic vs. Kenya Ports Authority & Another Ex-parte Messina (K) Limited (2011) eKLR*.

41. The principles governing the doctrine of *res judicata* are well captured in Section 7 of the Civil Procedure Act which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

42. There is no evidence before me to show that the Petitioner in this matter was a party in the suits that I have been referred to by the 3rd Respondent; or that the Petitioner is litigating under the same title. Consequently, the issues of this suit being *res judicata* does not arise.

43. The Judgments that the 3rd Respondent has referred the court to were made by the High Court, which has the same status as this court. The said Judgments, other than being persuasive, are not binding on this court. It does not therefore matter that the said Judgments are “Judgments in rem.”

44. It is for the reasons I have given above that I find that this court has the pre-requisite jurisdiction to deal with this Petition. The court also finds that this matter is not *res judicata* as claimed by the 3rd Respondent.

45. This court therefore finds that the Preliminary Objections raised by the 1st, 2nd and 3rd Respondents are unmeritorious. The said Preliminary Objections are dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE