



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC JR 4 OF 2018

IN THE MATTER OF ARTICLES 10, 22, 23, 40, 47 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CHAPTER 284 LAWS OF KENYA (REPEALED), THE LAND ACT, 2012, THE LAND REGISTRATION ACT, 2012, THE ENVIRONMENT AND LAND COURT ACT, 2011 AND THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF TITLE NUMBER MBOONI/MUTITU/4083, MUTITU ADJUDICATION SECTION

AND

IN THE MATTER OF AN APPLICATION FOR FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

JOHNSTONE MUTISYA KIAMBA.....APPLICANT/PETITIONER

VERSUS

THE CABINET SECRETARY MINISTER OF LANDS

AND HOUSING.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERA.....2ND RESPONDENT

BARTHLOMEW NGUTHI MAKAU.....INTERESTED PARTY

RULING

1. What is before this Court for ruling are the two notices of preliminary objection one of which is filed by the first and the second Respondents while the second one is filed by the Interested Party.
2. The Respondents' notice of preliminary objection is dated 04th June, 2018 and was filed in court on 12th June, 2018 while the one by the Interested Party is dated 15th May, 2018 and was filed in court on the 17th May, 2018.
3. The Respondents' preliminary objection is premised on the following grounds:-
 - (1) **THAT the entire suit offends Order 53 Rules (1), (2) and (3) of the Civil Procedure Rules, 2010.**
 - (2) **THAT the entire suit is frivolous, vexatious and a waste of the Court's Judicious time.**
 - (3) **THAT the entire suit is an abuse of Court process.**
4. The Interested Party's preliminary objection is premised on the grounds that:-

(1) THAT the Applicant/Petitioner lacks the locus standi to institute the present petition as he lacks the requisite legal authority in contravention with the mandatory provisions of Section 54 of the Law of Succession Act, Cap 160.

(2) THAT the Honourable court does not have the requisite jurisdiction to entertain the matter as it offends the provisions of Articles 23 and 165(1) of the Constitution of Kenya, 2010.

(3) THAT the Petition is fatally defective as it offends the provisions of Article 23 of the Constitution of Kenya, 2010 as read together with Section 9(3) of the Law Reform Act Cap 26 of the Laws of Kenya.

(4) THAT the Petition is incompetent, a non-starter, scandalous, vexatious and otherwise an abuse of the court process as it offends the provisions of Order 53 Rules 1, 2 & 3 of the Civil Procedure Rules.

5. The court directed that the two notices of preliminary objection be disposed off by way of written submissions.

6. The Respondents and the Applicant filed their submissions on 02nd July, 2018 the same being dated 28th and 29th June, 2018 respectively. On the other hand, the Interested Party filed his submissions on the 17th May, 2018 the same being dated 15th May, 2018.

7. On whether the entire suit offends the provision of **Order 53 rules 1, 2 and 3 of the Civil Procedure Rules, 2010** the Respondents' Counsel cited Rule 1 which provides as follows;

1.(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

The Counsel was of the view that this being a judicial review application, the Petitioner/Applicant ought to have sought leave of the court to file a substantive application seeking orders for certiorari and prohibition and in failing to do so, the entire suit offends Order 53 Rule 1 and should therefore be struck out with costs to the Respondents.

8. The Respondents' Counsel further cited Order 53 Rule 2 which provides as follows:-

(2) Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

The Counsel was of the view that the Petitioner/Applicant ought to have sought leave within six months after the decision was made by the Deputy County Commissioner Mbooni West District.

9. In addition, the Respondents' Counsel submitted that the entire suit fails to follow the procedure laid out in Order 53 Rule 3 of the Civil Procedure Rules and should therefore be struck out.

10. Order 53 Rule 3 provides as follows:-

3. (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

(4) If on the hearing of the motion the High court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rules the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

11. The Respondents rely on the cases of **Rasaline Tubel & 8 others V Patrick K. Cheruiyot & 3 others (2014) eKLR, Republic V. Attorney General (on behalf of Land Disputes Tribunal – Uasin Gishu) & 2 others (2011) eKLR and Gilbert Hezekiah Muiya V Advocates Disciplinary Committee (2015) eKLR.**

12. On the issue of whether the application is frivolous, vexatious, misconceived and an abuse of the court process, the Respondents' Counsel referred the court to **Section 7(2) of the Fair Administrative Action Act, 2015** which provides that:-

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if:-

a) The person who made the decision;

(i) Was not authorized to do so by the empowering provision;

(ii) Acted in excess of jurisdiction or power conferred under any written law;

(iii) Acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) Was biased or may reasonably be suspected of bias; or

(v) Denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

b) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

c) The action or decision was procedurally unfair;

d) The action or decision was materially influenced by an error of law;

e) The administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant;

f) The administrator failed to take into account relevant considerations;

g) The administrator acted on the direction of a person or body not authorized or empowered by any written law to give such directions;

h) The administrative action or decision was made in bad faith;

i) The administrative action or decision is not rationally connected

(i) The purpose for which it was taken;

(ii) The purpose of the empowering provision;

(iii) The information before the administrator; or

(iv) The reasons given for it by the administrator;

j) There was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

k) The administrative action or decision is unreasonable;

l) The administrative action or decision is not proportionate to the interests or rights affected;

m) The administrative action or decision violates the legitimate expectations of the person to whom it relates;

n) The administrative action or decision is unfair; or

o) The administrative action or decision is taken or made in abuse of power.

In light of the above, the Respondents' Counsel further referred the court to annexure "JMK-6" where the Deputy County Commissioner has indicated in his ruling that the Respondent has a habit of not appearing in the appeal proceedings. The Counsel added that the Deputy County Commissioner followed rules and procedures provided for by the law in hearing and determining the appeal case number 2 of 2001 since the aggrieved parties were given a fair hearing. The Counsel submitted that the appeal proceedings only proceeded ex-parte after the respondent in the appeal (deceased) failed to appear despite several summons being issued to him and that there is no evidence provided by the Applicant to show that the Respondent in the appeal (deceased) had notified the Deputy County Commissioner of his ill health or reasons for his absence during the proceedings.

13. The Counsel for the Respondents further submitted that the Deputy County Commissioner in hearing the appeal complied with the Provisions of Section 7(2) of the Fair Administrative Action Act, 2015 and Article 50 of the Constitution in that fair hearing was provided to the aggrieved parties to the Land Adjudication dispute in Land, parcel number Mbooni/Mutilu/4083, Mutitu Adjudication Section.

14. Article 50(1) of the Constitution provides that:- *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

15. The Respondents' Counsel further cited Section 29 of the Land Adjudication Act which provides as follows:-

(1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall –

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

(4) Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap.2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

In light of the above, the Counsel submitted that the actions of Deputy County Commissioner meet the threshold of the provisions of the law, thus making the entire suit frivolous, vexatious, misconceived and a waste of courts judicial time.

16. The Counsel further submitted that this being a judicial review application, the Petitioner should have filed chamber summons application seeking leave to file a substantive application for judicial review orders of certiorari and prohibition. The Respondents have termed the Constitution petition that the Petitioner/Applicant filed in a judicial review application as one which offends the rules of Civil Procedure Rules, 2010. Their Counsel submitted that no leave was sought as provided for under Order 53 of the Civil Procedure Rules, 2010 to file the substantive application and that the Petitioner/Applicant has filed two substantive applications seeking similar orders. The Counsel cited the case of **Graham Rioba Sagwe & 2 others v Fina Bank Ltd & 5 others (2017) eKLR** where Mativo, J defined the concept of abuse of court process as follows:-

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. [7] The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and Respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action. [8]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent. [9].

In light of the above, the Respondents' Counsel submitted that there is no provision in law that allows the Petitioner/Applicant to file a Constitutional petition in a judicial review application, or allow the Petitioner/Applicant to file two substantive applications in seeking judicial review orders. The Counsel was of the view that the Petitioner/Applicant has not properly commenced his proceedings before this court thus making the entire suit an abuse of court process.

17. The Counsel for the Interested Party chose to address the first three points of his notice of preliminary objection. On whether the Applicant/Petitioner has the locus standi to institute the present petition in line with the provision of Section 54 of the Law of Succession Act, Cap 160, the Counsel submitted that the limited grant of letters of administration ad litem issued in Makueni High Court P & A No.11 of 2018 indicates that its purpose was "..... Limited only to filing suit of damages in respect of death of deceased, Harrison Kiamba Mwanja."

18. The Counsel pointed out that it is not in dispute that the present matter relates to land and not damages in respect of the late Harrison Kiamba Mwanja. The Counsel added that a limited grant is always limited to a specific purpose in relation to the estate of a deceased person and as such a person appointed under such grant would be lacking the necessary locus standi where he purports to do that which he has not been authorized to do. The Counsel referred the court to Section 54 of the Law of Succession Act, chapter 160 of the Laws of Kenya which provides as follows:-

"A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the fifth schedule to this Act."

19. The Counsel cited the case of **Julian Adoyo Ogunga & Another v Francis Kiberenge Bondeva (suing as the administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR**.

20. On whether the petition as filed complies with the relevant legal provision, the Counsel for the Interested Party submitted that amongst the orders sought in the petition are for certiorari and prohibition. The Counsel added that the two are judicial review orders provided for under Article 23(1) of the Constitution of Kenya, 2010. The Counsel went on to submit that the substantive and procedural law with regard to judicial review applications is well settled in Kenya being the Law Reform Act, Cap 26 and Civil Procedure Rules, 2010 as well as the case law. The Counsel also pointed out that the procedural law provides for time frame and the procedure to be adopted in filing such applications. In this regard, the Counsel cited section 9 of the Law Reform Act which provides as follows:-

"(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court-

(a) Prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;

(b) Requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

(c) Requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) in the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

The Counsel further cited Order 53 Rule 1 of the Civil Procedure Rules which provides:-

"No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in

accordance with this rule”.

In addition the Counsel cited Order 53 Rules 2 and 3 of the Civil Procedure Rules which provide:-

“2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

3.(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.”

In light of the above, the Counsel submitted that for an order of certiorari to issue, an Applicant must seek leave of the court and secondly, the said leave must be obtained within a period of six months. The Counsel pointed out that the Petitioner is trivializing the clear provisions of the law by failing to seek leave of the court to seek an order of certiorari and also the fact that the order sought to be challenged is said to have been delivered on 30/10/2017 which is way over and above the stipulated period of six months within which one should apply for leave.

21. On whether the court has the requisite jurisdiction to entertain the matter, the Counsel for the Interested Party submitted that the Petitioner invoked Article 23 of the Constitution on jurisdiction which states as follows:-

“(1) 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.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts 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.”

In light of the above, the Counsel pointed out that this is an Environment and Land Court and although it has equal status with the High Court, it is not a High Court. The Counsel further submitted that Article 2 of the Constitution grants Parliament power to enact legislation conferring jurisdiction on similar matters to subordinate courts and not coordinate courts. The Counsel submitted that though taking cognizance that this court has jurisdiction to hear and determine issues of fundamental rights relating to matters it has jurisdiction, the jurisdiction does not include cases of pure Constitutional issues.

22. Arising from the above, the Counsel urged the court to dismiss the application with costs to the Interested Party.

23. On the other hand, the Counsel for the Petitioner/Applicant submitted that as regards locus standi, the Applicant applied for a limited grant of letters of administration ad litem vide succession cause number 18 of 2018. The Counsel pointed out the Applicant was issued with the said grant on the 02nd May, 2018 whereby the court allowed him to file suit which the Applicant brought by way of Constitution petition. The Counsel added that the Petitioner/Applicant has moved this court vide articles 10, 22, 23, 40, 47 and 258 with the aim of saving the suit premises. The Counsel pointed out that the suit is not brought by way of judicial review as is claimed by the 2nd Respondent and the Interested Party.

24. The Counsel cited Article 22 of the Constitution which provides as follows:-

22.(1) 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 or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

(a) A person acting on behalf of another person who cannot act in their own name;

(b) A person acting as a member of, or in the interest of, a group or class of persons;

(c) A person acting in the public interest; or

(d) An association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that-

(a) The rights of standing provided for in clause (2) are fully facilitated;

(b) Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum and in particular that the court shall, if necessary entertain proceedings on the basis of informal documentation;

(c) No fee may be charged for commencing the proceedings;

(d) The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) An organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

25. The Counsel further submitted that the Petitioner/Applicant seeks the protection of his right of ownership of property as is outlined under Article 40 of the Constitution. Article 40 provides as follows:-

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

i. requires prompt payment in full, of just compensation to the person; and

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

26. The Counsel cited the case of **Kiluwa Limited & Another v Commissioner of Lands & 3 others [2015] eKLR** where M. J. Anyara Emukule, J stated as follows:-

“I have considered the rival arguments as set out above. To answer the question – whether the Second Petitioner has locus standi to Petition herein, I set out below the provisions of both Articles 22 and 258 of the Constitution.

“22(1) 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 or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

(a) a person acting on behalf of another person who cannot act on their own name;

(b) A person acting as a member of, or in the interest of, a group or class of persons;

(c) A person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

(3) the Chief Justice shall make rules providing for the court proceedings referred to in this Article which shall satisfy the criteria that –

(a) the right of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to proceedings, including commencement of the proceedings, are kept to a minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organization or an individual with particular expertise may with leave of the court, appear as a friend of the court;

“258(1) Every person has the right to institute court proceedings claiming that this Constitution has been breached, contravened, or is threatened with contravention;

(2) In addition to any person acting in their own interest, court proceedings under Clause (1) may be instituted by-

(a) a person acting on behalf of another who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest or;

(d) an association acting in the interests of one or more of its members;”

The Counsel further cited the case of **John Mining Temoi & Another Vs. Governor of County of Bungoma & 17 others [2014] eKLR** where Mabeya, J held thus:-

“I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms.

A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right of fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties.....”

27. On the issue of jurisdiction, the Counsel for Petitioner/Applicant cited Section 13(2) of the Environment and Land Court Act No.19 of 2011 which provides as follows:-

“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;

(b) Relating to compulsory acquisition of land;

(c) Relating to land administration and management;

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

(e) Any other dispute relating to environment and land.”

The Counsel added that the aforementioned Section is reinforced by Article 162(2) of the Constitution which states that:-

“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.”

28. It was also the Counsel’s submissions that this court is within its powers to determine and hear the instant suit as is outlined under

Articles 23, 47 and 258 of the Constitution which provide as follows:-

23. Authority of courts to uphold and enforce the Bill of Rights

(1) 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.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts 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.

(3) in any proceedings brought under Article 22, a court may grant appropriate relief, including-

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or a fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –

(a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members

29. Lastly, the Counsel submitted that the Petitioner/Applicant seeks the right to fair hearing as is enshrined under Article 50(1) of the Constitution. The Article provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

The Counsel urged the court to dismiss the 2nd Respondents and the Interested Party’s preliminary objections with costs to the Petitioner/Applicant.

30. I have read the two preliminary objections filed by the 2nd Respondent and the Interested Party respectively. I have also read the submissions that were filed by the Counsel on record for the parties. There is no doubt the Petitioner/Applicant has moved this court by way of Constitution petition under Articles 10, 22, 23, 40, 47 and 258 of the Constitution. M. J. Anyara Emukule, J had this to say in the case of **Kiluwa Limited & Another v Commissioner of Lands & 3 others [2016] eKLR:-**

“What Article 23(3) of the Constitution does is to prescribe the various reliefs or remedies which the Court may grant upon determination of a petition. These reliefs include, a declaration of rights, an injunction, a conservatory order, a declaration of

invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order of compensation, an order of judicial review. There is no statutory period prescribed for commencement of petitions under Article 22 or 258 of the Constitution. The grant of those reliefs or remedies are consequently not subject to any statute or period of limitation either under the Limitation of Actions Act (Cap 22 Laws of Kenya), or the Law Reform aforesaid”.

31. I associate myself with the holding of M. J. Anyara Emukule, J. It is clear to me that there was no statutory period within which the Petitioner/Applicant ought to have filed this petition. Secondly, the grant of the reliefs or remedies in this matter are not subject of period of limitation either under the Limitation of Actions Act, Chapter 22 or the Law Reform Act Chapter 26 of the Laws of Kenya. A statute and rules made thereunder cannot override the Constitution.

32. As regards the jurisdiction of this court, I agree with the Petitioner/Applicant that this court is vested with jurisdiction. It is clear to me that the High Court has jurisdiction to uphold and enforce Bill of rights under Article 23 of the Constitution. However its jurisdiction is limited by Article 165(5)(b) of the said Constitution. This Article provides as follows:-

165. (5) The High Court shall not have jurisdiction in respect of matters-

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

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

33. Arising from the foregoing, my finding is that the 2nd Respondents notice of preliminary objection as well as the notice of preliminary objection by the Interested Party must fail. In the circumstances I hereby dismiss the two notices of preliminary objection with costs to the Petitioner/Applicant.

Signed, dated and delivered at Makeni this 18th day of January, 2019.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Kelly for the Petitioner

Mr. Kyalo holding brief for Mrs. Mutua for the Interested Parties

No appearance for the Respondents

Mr. Kwemboi – Court ssistant

MBOGO C. G.,

JUDGE,

18/01/2019.