



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 13 OF 2017

MAKUPA TRANSIT LIMITED.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

1. By a Petition dated 29th November, 2017, the Petitioner has brought this petition against the Respondent seeking the following reliefs:

1. A declaration that the Respondent breached the Petitioner's Constitutional rights under Articles 38(1), 40(1), 42, 43(1)(b) and 47 of the Constitution of Kenya, 2010 by blocking and mutilating the only access to the Petitioner's CFS located at Makupa Mombasa County,

2. An order of Mandamus be and is hereby issued to compel the Respondent to immediately remove the heap of garbage dumped at the gate of Makupa Transit Shade Limited in Makupa Mombasa not later than three (3) days from the date of this order.

3. An order of Mandamus be and is hereby issued to compel the respondents to permit the petitioner to effect and undertake repairs of the damaged access and property at the costs of the respondents.

4. An order of prohibition be and is hereby issued to restrain the Respondent herein, its servants, agents, employees and/or any other persons acting pursuant to its authority from blocking, occupying, trespassing on, or in any manner whatsoever interfering with the petitioner's CFS business located on plot NOS.MOMBASA/BLOCK 1/437, MOMBASA/BLOCK 1/438 and TITLE NUMBER MN/VI/3910 and the access thereto.

5. A declaration that the petitioner is entitled to compensation from the Respondent for loss of business, damage to the petitioner's business reputation and damage to the petitioner's property.

6. The compensation under prayer 5 above to be assessed by this Honourable Court.

7. An order of mandamus be and is hereby issued to compel the Respondent to compensate the petitioner within thirty (30) days of assessment of the petitioner's compensation by the court.

8. Costs of this petition be borne by the Respondents

9. Any further Relief or orders that this Honourable court shall deem just and fit to grant.

2. The petitioner has stated that it is Container Freight Station (CFS) based at Makupa in Mombasa County on two parcels of land known as **NUMBER MOMBASA/BLOCK 1/437** and title **NUMBER MOMBASA/BLOCK 1/438** and obtained Business Permit No. CGM006-000042 from the Respondent to undertake its business. That on 15th June, 2011, the Petitioner, entered into an Exclusive User Agreement with MAT International terminal limited pursuant to which the petitioner integrated **PLOT NOS.1/437** and **1/438** with **TITLE NO. MN/VI/3910** to provide access by constructing a bridge and a four lane paved and well-lit roadway from the CFS to the Municipal (County) roadway adjacent to **PLOT NO. MN/VI/3910** and further into Mombasa- Nairobi Highway in which it obtained necessary approvals from the National Environment Management Authority.

3. The petitioner further stated that on 15th November 2017, the Respondent, through its authorized officers and with the help of the police,

without any colour of right, authority and/or legal sanction visited the road access to **PLOT NO.3910/VI** and blocked the only access thereto by heaping a very huge mound of garbage across the road in front of the gate to the petitioner's CFS and mutilate the access road by digging up and removing a substantial part of the paved road surface. That the Respondent purported that its decision to block the access was necessitated by the petitioner's disobedience of the Court of Appeal Order issued on 2nd November 2017 in Civil Application No.43 of 2017 which arose pursuant to a dispute in Mombasa Judicial Review Case No.11 of 2017. It is the petitioners contention that the Respondent's action was illegal and unlawful for the reasons, inter alia, that the Court of Appeal did not restrain the petitioner from proceeding with its operations at the CFS which is located on totally different plots other than **PLOT NO.4106/MN/IV** which was the subject of the injunctive orders of the Court of Appeal. The petitioner claims that the Respondent's action was in breach of the petitioner's fundamental rights as guaranteed by the constitution of Kenya and statute.

4. The respondent opposed the petition and filed a replying affidavit sworn by Paul Manyala on 6th November 2017 which inter alia, denied the existence of a CFS belonging to the petitioner on **PLOT NUMBER MN/VI/3910** and that the four **PLOTS NO. MSA/BLOCK 1/437, 438, MN/VI4106 AND 23910** were subject of other litigations, namely Judicial Review Application No.11 of 2017 and HCCC No.394 of 2017, Civil Application No.43 of 2017. The Respondent also filed a Notice of Preliminary Objection dated 6th December 2017 against the entire petition on the following grounds:

i. The petitioner's cause of action herein is predicated on the averments at paragraph 20 of its petition, on allegations, that a heap of garbage has been deposited at the entrance to its property.

ii. The foregoing core of the petitioner's claims do not amount to pure constitutional matters, to be resolved through the medium of a constitutional petition.

iii. The petitioner's allegations fall to be determined under other branches of law, and not through a constitutional petition which has only been resorted to, in addition to other pending litigations, filed by way of Plaint and Judicial Review

iv. The petition therefore ought to be struck out.

5. The preliminary objection was canvassed by way of written submissions. The respondents filed its submissions on 23rd August 2018 while the petitioner filed theirs on 1st October, 2018. Mr. Paul Buti, learned counsel for the respondent submitted that the issues raised in the petition are not constitutional issues and that there also pending litigations between the same parties by way of plaint and judicial review. He submitted that the petitioner makes reference to ELC Case NO.391 of 2016 and Judicial Review Case No.11 of 2017 as well as Civil Application No.43 of 2017. Mr. Buti further submitted that the petition raises issue of trespass which is a private claim and malicious damage to property which is a criminal offence. He added that the petition raises various commercial issues, noting that the petitioner should ever consider filing contempt proceedings instead of a petition. He further submitted that there is nothing in the petition which calls for interpretation of the constitution or application of the articles of the constitution and urged the court to strike out the petition. He relied on various authorities including the case of **Kiambu County Tenants Association -v- Attorney General (2016) eKLR** and **Eric Wambua Muli -v- Prime Bank Limited (2017) eKLR**.

6. Mr. Oluga, learned counsel for the petitioner submitted that the preliminary objection does not raise pure points of law as held in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969)EA 69**. He submitted that the preliminary objection is asking the court to consider facts pleaded in the petition which amounts to considering the merits of those facts. It was Mr. Oluga's submission that that can only happen after the hearing on merit, adding that the mere fact of existence of parallel proceedings is not a bar. He sought to distinguish the authorities relied on by the Respondent's counsel, adding that the petition raises fresh cause of action which has not been heard and concluded before.

7. I have considered the notice of preliminary objection, the submissions made and the authorities cited. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of Mukisa Biscuit **Manufacturing Co. Ltd -v- West End Distributors Ltd (1969)EA 696**, as follows:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. In the present objection the respondent argues that the petitioner's cause of action herein is predicated on the averments at paragraph 20 of the petition on allegations that a heap of garbage has been deposited at the entrance to the petitioner's property and that such claims do not amount to pure constitutional matters to be resolved through a constitutional petition. It is also argued that the petitioner's allegations fall to be determined under other branches of law which has already been resorted to in other pending litigations filed by way of plaint and Judicial Review. The court has to determine whether or not the issues raised have been dealt with in previous litigations. This will require further evidence and argument to establish their veracity or otherwise. These grounds in my humble view, certainly go to the root of the petition and they cannot be addressed before a fully pledged hearing. It would thus be prejudicial to the parties for this court to address those issues at this stage.

9. In the case of **D. T. Dobie & Company Kenya Limited - v- Muchina (1982) KLR** Madan JA stated as follows:

“... The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case”

10. An objection as to other former or pending suits touching on the same subject matters is a factual issues to be determined upon hearing of

evidence and opinion. The preliminary objection in so far as it raises the issues of facts therefore fails.

11. The result is that the preliminary objection has no merit and the same is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 7th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Mwanazuma holding brief for Oluga for Petitioner

No appearance for Respondent

Yumna Court Assistant

C.K. YANO

JUDGE

7/2/19