



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC PETITION NO.1 OF 2019

IN THE MATTER OF ARTICLE 22(1), 23, 71(1) AND ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 2, 10, 21, 28, 29, 31, 40, 42, 47(2), 60(1)(B) AND 69 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF OPENING AND WIDENING OF VILLAGE ROAD ADJACENT TO PETITIONERS PARCEL OF LAND KERICHO/CHEMOIBEN/186 WITHOUT NOTICE AND OR COMPENSATION BY THE COUNTY GOVERNMENT OF KERICHO ON 19TH DECEMBER TO 21ST DECEMBER 2018

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTIONS 10 AND 11 OF PUBLIC ROAD ACCESS ACT

AND

IN THE MATTER OF SECTIONS 107, 108, 109, 111, 112, 113, 114, 115, AND 118 OF LAND ACT 2012

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION (PRACTICE AND PROCEDURE RULES) 2013

BETWEEN

JOEL KIPRONO MUTAL.....PETITIONER/APPLICANT

AND

THE COUNTY GOVERNMENT OF KERICHO.....1ST RESPONDENT

THE CHIEF OFFICER ROADS COUNTY GOVERNMENT OF KERICHO....2ND RESPONDENT

RULING

Introduction

1. The Petitioner herein instituted a suit against the 1st and 2nd Respondent's by way of a Constitutional Petition dated 15th January, 2019 claiming that the Respondent had violated his rights under articles 2, 3, 10, 28, 29, 31, 40, 42, 47 (2), 60 and 69 of the constitution of Kenya. In the said Petition, the Petitioner seeks the following reliefs:

1. A declaration that the Respondents actions in the Petitioner's parcel of land known as KERICHO/CHEMOIBEN/186 are in contravention of Articles 2, 3, 10, 28, 29, 31 40, 42 , 47 (2) , 60 and 69 of the Constitution of Kenya and are therefore illegal hence null and void.

2. A declaration that the Petitioner should be compensated for.

- a) Loss of 38 trees aged 41 years at kshs. 3,800,000.
- b) Cost of landscaping and restoration of the fence destroyed including flora and fauna at Kshs 868,200.
- c) Loss of 135 tea bushes being Kshs. 35,952
- d) Cost of re-fencing being Kshs. 1,341,846
- e) Cost of 110 iron sheets being Kshs. 100,000
- f) Cost of engaging 3 security officers fore 3 months at kshs. 10,000 per month

Total being Kshs. 6,415,998 together with interest from the date of filing suit

3. A declaration that the Respondents do pay exemplary damages to the Petitioner for violating various provisions of the Constitution with impunity

4. A declaration that the Respondent do pay general damages to the Petitioner for the illegal acts visited on him and his land

5. A permanent injunction restraining the Respondents by themselves, their servants, agents or otherwise howsoever from continued alienation, disturbing of original boundaries and trespass on the Petitioner's land being land parcel number KERICHO/CHEMOIBEN/186

6. Any other and further orders as this Honourable court may deem fit

7. Costs of this suit together with interest.

2. Contemporaneously with the Petition, the Petitioner filed and Notice of Motion seeking the following orders:

1. THAT pending the inter partes hearing of this application and petition this Honourable Court be pleased to order the Respondents by themselves, their servants or agents against causing wanton destructions over his property, trespassing, and alienating his land being KERICHO/CHEMOIBEN/186, without due process of the law.

2. THAT pending the inter partes hearing of this application this Honourable Court be pleased to order the Respondents by themselves, their servants or agents against causing wanton destructions over his property, trespassing, and alienating his land being KERICHO/CHEMOIBEN/186, without due process of the law.

3. THAT pending the hearing and determination of the Petition herein this Honourable court be pleased to order the Respondents by themselves, their servants or agents or otherwise howsoever from continued alienation ,disturbing the original boundaries and trespassing on the petitioners land being parcel KERICHO/CHEMOIBEN/186.

4. THAT costs of this application be in the cause.

3. Upon being served with the application, the Respondent filed a Notice of Preliminary Objection raising the following grounds:

a) The this Honourable Court lacks the requisite jurisdiction to hear and determine the Applicant's application as the matter falls under the Chief Magistrates Courts established under Article 169 (1) of the Constitution.

b) That the application and Petition dated 15th January 2029 can be determined by the Chief Magistrates Court as it has the pecuniary jurisdiction as provided for by section 7 of the Magistrates Courts Act.

c) That the application and Petition dated 15th January 2015 is vexatious, frivolous and an abuse of the court process and the same should be dismissed with costs to the Respondents.

4. The court directed that the Preliminary Objection be canvassed by way of written submissions and both parties filed their submissions which I have considered.

Issues for determination

5. There are two main issues for determination:

1. Whether this court has jurisdiction to hear and determine this matter.
2. Whether the Magistrates Courts have jurisdiction to hear this matter.

Analysis and determination

6. As was stated by Court of Appeal in the celebrated case of **The Owners of Motor Vessel Lillian “S” V Caltex Oil Kenya Limited 1989 KLR 1653**

“Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”

7. Learned counsel for the Respondent has submitted that this court has no jurisdiction to hear this matter as the value of the subject matter falls within the pecuniary jurisdiction of the Magistrates Court. He has submitted that the Chief Magistrates Courts have jurisdiction to hear and determine environment and land cases subject to their pecuniary limits pursuant to section 7 (1) of the Magistrates Courts Act. These cases include claims relating to environmental planning and protection, climate issues, land use planning, title to land, tenure, boundaries, rates, rent, valuation, mining, minerals and other natural resources, compulsory acquisition, land administration and management.

8. Further, the Magistrates Court has jurisdiction over claims relating to violation of human rights guaranteed under Article 25 of the Constitution which deals with freedom from torture and cruel and degrading treatment or punishment and article 25 (b) of the Constitution which deals with freedom from slavery or servitude pursuant of section 8 of the Magistrates Court Act 2015

9. His argument is that since the Petition is for compensation in the sum of Kshs. 6,414,998, it ought to be heard by the Chiefs Magistrate’s court in accordance with section 11 of the Civil Procedure Act which provides that:

“every suit shall be instituted in the court of the lowest grade to try it.”

10. Counsel however acknowledges in his submissions that Article 162 (2) of the Constitution of Kenya 2010 confers the Environment and Land Court with unlimited original jurisdiction in matters under its purview.

11. In his submissions learned counsel for the Respondent has argued that the applicant’s counsel has intentionally ignored the express provisions of Section 8 (3) of the Magistrates Court Act 2015.

12. In order to appreciate the extent of the Magistrates courts’ jurisdiction with regard to Petitions it is important to set out the provisions of section 8 in its entirety. The said section provides as follows;

13. Subject to Article 165(3) (b) of the Constitution and the pecuniary limitations set out in section 7 (1) a Magistrate’s Court shall have jurisdiction 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) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.

(3) Nothing in this Act may be construed as conferring jurisdiction on a Magistrate’s Court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right of fundamental freedom in the Bill of Rights

(4) The Chief Justice shall make rules for the better exercise of jurisdiction of the Magistrate’s Courts under this section

14. In this Petition, the Petitioner is seeking declaratory orders as well as compensation for damages suffered as a result of certain violations of his rights. The Magistrates Court therefore has no jurisdiction to entertain the Petitioners’ application and the Petition. On the other hand, the Environment and Land Court has original jurisdiction to hear and determine matters touching on land and environment. Under section 13 (2) of the Land and Environment Act In exercise of its jurisdiction under article 162 (2) (b) Of the 15. Constitution the court shall have power to hear and determine disputes relating to environment and land including disputes

a) Relating to environmental planning and protection, trade, climate issues, land use planning, title tenure, boundaries, rates, rent, valuation, 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 interest in land and

e) Any other dispute relating to land and environment

16. Additionally, under section 13 (3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial or violation or infringement of , or threat to rights or fundamental freedoms relating to the environment and land under article 42,69 and 70 of the Constitution.

17. Under section 13(7) the court has power to make any order and grant such relief as the court deems fit and just including:

- a) Interim and permanent preservation orders including injunctions;
- b) Prerogative orders;
- c) Award of damages;
- d) Compensation;
- e) Specific performance;
- f) Restitution;
- g) Declaration or
- h) costs

18. From the foregoing it is clear that this court has jurisdiction to hear and determine this matter. Accordingly, the Preliminary objection is hereby dismissed.

Dated, signed and delivered at Kericho this 27th day of March, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Kemboi for the Petitioner
2. Miss Cheruiyot for Kamau Lagat for the Respondent
3. Court assistant - Rotich