



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONSTITUTION PETITION NO. 4 OF 2017

IN THE MATTER OF: ARTICLE 122 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 10, 19, 20, 23, 47, 162 (3) AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

CHARLES COSMAS MDARI.....PETITIONER/APPLICANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

RULING

1. The National Land Commission sued as the 3rd Respondent filed a preliminary objection dated 3rd July 2018 raising the following issues:

1. The application for Committal of the Chief Executive Officer/Accounting officer of 3rd Respondent herein is incurably defective for want of form as it offends the provisions of the law as prescribed under Section 30 (1) of the Contempt of Court Act, Cap 480, Laws of Kenya.

2. The entire Petition offends the provisions of section 13 (4) of the Environment and Land Court Act which provides that this Honourable Court can only exercise Appellate and not original jurisdiction over matters relating to compulsory acquisition of land under section 13 (2) (b) of the Environment and Land Court Act since the 3rd Respondent sits as a tribunal with the powers of a Court when conducting inquiry into compulsory acquisition of land and this Honourable Court as moved lacks the jurisdiction to hear and determine the Motion and Petition before Court.

3. That the Notice of Motion and Petition before Court is an abuse of the Court process and it ought to be dismissed with costs.

2. The parties opted to argue the preliminary objection by filing of written submissions. The 3rd Respondent herein referred to as the applicant submitted on the provisions of section 30 (1) of the Contempt of Court Act which required that before starting contempt proceedings against a state officer, a 30 day notice to show cause must be issued to the said officer. The applicant also submitted that this Court lacks jurisdiction to entertain the petition and the application. He relied on the holding in the **Lilian 'S' case and Mutanga Tea & Coffee Co. Ltd vs Shikara Limited & Another (2015) eKLR** that discussed the subject of jurisdiction. It is the applicant's case that this Court can only exercise appellate jurisdiction on matters touching on compulsory acquisition of land.

3. The Petitioner in opposing the preliminary objection submitted that section 30 (1) of Contempt Act does not apply as their application does not mention any undertaking given by the alleged contemnor to the Court. The Petitioner proceeded to reproduce the provisions of section 13 (2) (b) and 13 (4) of the Environment and Land Court Act 2011. That the provisions of section 13 (2) (b) gives this Court jurisdiction to hear and determine disputes relating to compulsory acquisition of land hence the preliminary objection ought to be dismissed.

4. The Petitioner further submitted that prayer 3 of their application as worded can be equated to a notice to show cause. That the present application is distinguishable from the facts of the case in **John Kariuki Macharia vs National Land Commission ELC No 251 of 2013**. The Petitioner relied on my decision in the case on a similar objection in the case of **Crispus Maina Gaitho vs National Land Commission & 3 Others, (2017) eKLR**.

5. In regard to the objection relating to the provisions of section 30 (1) of the contempt of Court Act I do agree with the petitioner's submissions that a provision for notice to show cause has been made within the application. Prayer 3 of the motion dated 8th May 2018 is pleaded thus;

“That Mr Tom Aziz Chavangi the Chief Executive Officer of the 3rd Respondent be summoned to appear before this Honourable Court on a date to be issued by the Deputy Registrar to show cause why he should not be found in contempt of this Honourable Court's orders made on 23rd January 2018 and issued on 30th January 2018.”

6. The 3rd Respondent's Chief Executive Officer has a right in law to file a response to the said prayer and apply the notice to show cause be heard first before the Deputy Registrar before the remainder of the orders proceeded for hearing. The 3rd Respondent did not explain to me what is incurable in having the notice to show cause being filed together with rest of the prayers. I am thus not satisfied that the preliminary objection is meritorious on this limb.

7. In reference to the issue of jurisdiction raised, the provisions of section 13 (2) (b) & 13 (4) does not oust this Court's original jurisdiction in hearing disputes touching on compulsory acquisition. In the Mutanga Tea & Coffee Company Ltd case *supra*, all the Court stated is that:

“(i) where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Such alternative dispute resolution mechanism normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area and the dispute is amicably resolved more expeditiously and in a cost effective manner...”

8. The case cited refers to jurisdiction given by both the Constitution and an Act of Parliament which also grants this Court powers under article 40 (3) of the Constitution and also section 13 (2) (b) of the Environment and Land Court Act respectively. I do not agree that the finding quoted above took away this Court's jurisdiction. Instead it only emphasized that where there are alternative dispute resolution mechanisms, the same should be opted for to achieve expeditious disposal of cases. However where a party has approached this Court and the Court clothed with jurisdiction to determine the dispute, the said party cannot be chased away from the seat of justice merely because there is an alternative avenue to pursue his claim. I do find that the objection raised on jurisdiction is also frivolous. Accordingly I dismiss it.

9. In conclusion, I find that all the grounds raised by the 3rd Respondent seeking to strike out the application and the petition to be lacking in merit. The same is dismissed with costs to the Petitioner.

Dated, signed & delivered at Mombasa this 7th March 2019

A. OMOLLO

JUDGE