



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO 1 OF 2019

MUTHITHI INVESTMENTS LIMITED.....PETITIONER

AND

GIDEON MBUVI SONKO.....RESPONDENT

RULING

1.The Petitioner filed this petition on 14/1/2019 seeking the following orders against the respondent:

a) The Honourable Court be pleased to hold and declare that the respondent has acted in breach of the national values and principles of governance under Article 10 of the Constitution of Kenya 2010.

b) The Honourable Court be pleased to hold and declare that the respondent has acted in breach of Chapter Six of the Constitution on the responsibilities and conduct of state officers embodied in Articles 73 and 75 of the Constitution of Kenya 2010.

c) The Honourable Court be pleased to hold and declare that the respondent has undermined the judicial authority of the Republic of Kenya vested in the judiciary under Articles 159 and 160 of the Constitution of Kenya, 2010.

d) The Honourable Court be pleased to hold and declare that the respondent has violated, breached and impinged on the petitioner's rights to equal protection of the law, property and security of land rights and access to justice decreed and protected under Articles 27, 40, 60 (1) (b) and 48 of the Constitution of Kenya.

e) An order of prohibition be and is hereby issued prohibiting the respondent, his servants, agents, employees or staff working under him in Nairobi City County any manner (sic) whatsoever from interfering with the petitioner's occupation, ownership, possession and enforcement of his rights to possess his property, Land Reference No. 23917 (IR NO. 87206) Nyama Villa Estate, Komarock, Nairobi, as decreed in the judgment and decree of the ELC Court in Nairobi ELC Suit No. 498 of 2004 (now ELC Case 457 of 2013), Muthithi Investments Limited vs Andrew S. Kyendo & 22 others.

f) An order of permanent injunction directed at the respondent, his agents, officers or any person whosoever or howsoever acting on his behalf from interfering in any way whatsoever with the petitioner's proprietorship or possession or title to Land Reference No. 23917 (IR No. 87206) Nyama Villa Estate, Komarock, Nairobi, as decreed in the judgment and decree of the ELC Court in Nairobi ELC Suit No. 498 of 2004 (now ELC Case 457 of 2013), Muthithi Investments Limited vs Andrew S. Kyendo & 22 others.

g) The Honourable Court be pleased to award the petitioner general damages against the respondent for losses and inconveniences suffered by the petitioner.

h) The Honourable Court be pleased to award the petitioner exemplary damages against the respondent for breach of the petitioner's sacred fundamental rights decreed and protected under the Constitution of Kenya, 2010.

i) The costs consequent upon this petition be borne by the respondent in any event on indemnity basis.

j) The Honourable Court do award interest on (g), (h), and (i) at the prevailing court rate of 14% from the date of filing of the petition till payment in full.

k) The Honourable Court do make any such other or further orders as it may deem just and expedient in the circumstances to remedy the violation of the petitioner's fundamental rights.

2. On 22/1/2019, the respondent brought a notice of preliminary objection challenging this court's jurisdiction on the following grounds:-

1. **The suit seeks to claim relief connected with 2 specific suits, to wit, HCC 457 of 1999 Nairobi City Council versus Commissioner of Lands and 2 others and ELC 498 of 2004 (now ELC 457 of 2013) Muthithi Investments Limited versus Andrew S. Kyendo & 22 others as against the respondent. By operation of Section 34 of the Civil Procedure Act, no new suit such as has been lodged can be entertained relating to the claims under the 2 suits.**
2. **To the extent that the claimant seeks to bar any claims made in the 2 suits by means of this suit, the same is impermissible in law and is a violation of Article 48 of the Constitution in respect of any claims levied against the claimant in those suit posts.**
3. **To the extent that the claimant seeks to have the respondent declared in violation of Chapter Six of the Constitution, the statutory forum of complaint is the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution.**
4. **The claimant has not exhausted the dispute resolution mechanism availed to him by operation of the law by the reason of which the suit is incompetent and the court is divested of jurisdiction to entertain it.**

3. Parties presented both written and oral submissions on the preliminary objection, Mr Harrison Kinyanjui, counsel for the respondent in the petition, argued that the petition was preceded by two suits relating to the suit property, namely: (i) **Nairobi HCCC No 457 of 1999 Nairobi City Council v Commissioner of Lands and 2 others; and (ii) Nairobi ELC 498 of 2004 (now Nairobi ELC 457 of 2013) Muthithi Investments Limited v Andrew S Kyengo & 22 others.** He contended that under Section 34 of the Civil Procedure Act, the Petitioner was by dint of the two preceding suits precluded against bringing a fresh suit against the respondent. It was the respondent's view that the petitioner should have taken proceedings in the two preceding suits as opposed to bringing a fresh suit. Reliance was placed on the cases of: (i) **Motor Vehicle M.V Lilian v Caltex oil (Kenya) Limited (1989) KLRI** and (ii) **Nandial Jivraj Shah & 2 others v Kingfisher Agencies (2018) eKLR;**

4. Counsel for the respondent further argued that the procedure for enforcing Chapter 6 of the Constitution is elaborately spelt out in the Leadership and Integrity Act. He contended that the petitioner had ignored that procedure. It was further submitted that the responsibility of overseeing and enforcing implementation of the Leadership and Integrity Act lies with the Ethics and Anti-corruption Commission and not this Act. Reliance was placed on the following cases to buttress this point: (i) **Eutyclus Mwangi Karanja & others v KTDA and Another (2014) eKLR;** (ii) **Kimani Wanyoike v Electrol Commission Civil Appeal No. 213 of 1995;** (iii) **International Centre for Policy and Conflict & 5 others v Attorney General & 5 others (2013) eKLR;** (iv) **Diana Kethi Kilonzo & Another v Ahmed Isaack & Another (2014) eKLR.**

5. Lastly, it was submitted that this petition was *re judicata* because the issues raised in the petition had been adjudicated upon. Reliance was placed on the case of **Stanley Kilimon Kore v Edward Katama Ngeywa & 2 others (2013) eKLR.** The respondent, through counsel, urged the court to strike out the petition and award costs to him.

6. In response, the petitioner through Mr James Ochieng Oduor submitted that Section 34 of the Civil Procedure Act applies to litigants who were parties to the preceding suit, and that it only applies when the questions in issue relate to the execution, discharge or satisfaction of the decree of the court in the preceding suit. He contended that the respondent was not a party to the two preceding suits in which the petitioner had been adjudged to be the lawful proprietor of the suit property. He contended that Section 34 cannot therefore be invoked to bar the Petitioner against seeking redress against the respondent's transgression upon the petitioner's right to property. Counsel further argued that the petition herein is not about the execution or satisfaction of the decrees in the two preceding suits. Reliance was placed on the cases of: (i) **Mukisa Biscuits Company v West End Distributors Limited (1969) EA;** (ii) **Mwangi Stephen Muriithi v Daniel T Arap Moi & Another (2017) eKLR;** (iii) **Karonya Auctioneers v Maurice O Odhoch & Another (2003) eKLR;** and (iv) **Josepha Lishenga v Muganda Wasilwa t/a Keysian Auctioneers (2018) eKLR.**

7. Counsel for the petitioner further submitted that the Constitution at Article 3(1) directs each person to respect, uphold and defend the Constitution and Article 258(1) permits each person to institute proceedings claiming that the Constitution had been contravened or was threatened with contravention. He added that the respondent had an obligation to uphold the Constitution. Counsel argued that this court is properly bestowed with jurisdiction to interpret the Constitution or deal with constitutional matters arising from the exercise of its broad jurisdiction under Article 162(2) of the Constitution and Section 13 of the Environment and Land Court Act. Reliance was placed on the cases of (i) **Ferdinand Ndungu Waititu v Benson Riitho Mureithi & 2 others (2018) eKLR** and (ii) **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NAGA) Kenya & 6 others (2017) eKLR.** The petitioner urged the court to dismiss the preliminary objection.

8. I have considered the grounds set out in the preliminary objection together with the parties' rival submissions. I have also considered the jurisprudence relating to preliminary objections. Similarly, I have considered the constitutional and statutory framework relevant to the issues raised in the preliminary objection. The preliminary objection raises two key issues to be determined. The first issue is whether Section 34 of the Civil Procedure Act bars the petitioner against bringing the present petition against the respondent by dint of the two preceding suits. The second issue is whether this court's jurisdiction is ousted by the inclusion of reliefs anchored on Chapter 6 of the Constitution. I will deal with the two issues in that order.

9. Before I dispose the two issues, I will comment on the issue of *res judicata* which was raised by the respondent in one of the closing paragraphs of his written submissions. This issue was not raised in the preliminary objection under consideration. It would therefore be wrong for this court to make a pronouncement on the issue when it is not one of the grounds set out in the notice of preliminary objection under consideration. I will therefore refrain from making pronouncement on the issue.

10. The principles upon which this court exercises jurisdiction to dispose a suit through a preliminary objection was set out in the celebrated case of **Mukisa Biscuits Company v West End Distributors Limited (1969) EA** as follows:

“A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the presumption 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”

11. Secondly, the principle upon which this court exercises jurisdiction to strike out a suit *in limine* was outlined in the case of **D T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another (1980 eKLR)** by Madan JA as follows:

“ No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real live by amendments, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

12. Echoing the same principle in **Yaya Towers Limited v Trade Limited (in liquidation), (2000) eKLR**, Lakha JA, quoting verbatim the Court of Appeal in **Paola Muri v Glan Batista Muri & Another, CA No. 59 of 1999**, observed as follows:

“the power to strike out was one which should be exercised only in plain cases.”

13. The preliminary objection under consideration focuses on the issue of jurisdiction of this court in relation to Section 34 of the Civil Procedure Act and Chapter 6 of the Constitution in the context of the jurisdictional framework set out under Article 162(2) of the Constitution and Section 13 of the Environment and Land Court Act. Prior existence of the two suits was pleaded by the petitioner and does not therefore require further ascertainment. Secondly, the second key issue in the preliminary objection raises pure points of law based on the pleadings. I am therefore satisfied that the issues raised in the preliminary objection can properly be raised as points of preliminary objection.

14. The first issue is whether Section 34 of the Civil Procedure Act bars the petitioner against bringing the present petition by dint of the fact that there existed previous suits relating to the suit property. Section 34 of the Civil Procedure Act provides as follows:

“34. Questions to be determined by court executing decree

1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

15. My understanding of the above framework is that it deals with questions which fall for determination by a court executing a decree. Secondly, jurisdiction under Section 34 is exercised when the questions before court relate to execution of a decree and involve parties or representatives of parties to the suit in which the decree was passed. I do not therefore agree with the view that Section 34 of the Civil Procedure Act bars the petitioner against bringing the present petition. I say so because the respondent in the present petition was not a party to the two preceding suits. Secondly, the alleged cause of action in the present suit is the allegation that on 20/12/2018 and 2/1/2019, the respondent, by his utterances, threats, insults, intimidation and conduct, breached the petitioner’s fundamental right to property and acted in defiance of judicial authority. In my view, the petition herein seeks redress against the alleged transgression. The alleged conduct, if proved, would constitute a distinct cause of action which would be deemed to have arisen on the alleged dates. It is therefore my finding that Section 34 of the Civil Procedure Act does not bar the petitioner against bringing the present petition.

16. The second issue relates to the question as to whether this court’s jurisdiction is ousted by the inclusion of reliefs anchored on Chapter 6 of the Constitution. The broad jurisdiction of this court is set out under Article 162 of the Constitution which provides as follows:

“162 System of Courts

1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)

2) Parliament shall establish courts with the status of the High Court to here and determine disputes relating to-

a) Employment and labour relations; and

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

3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

4) *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with the Article.*”

17. The broad constitutional framework in Article 162(2) (b) is elaborated under Section 13 of the Environment & Land Court Act which provides as follows:

“13 Jurisdiction of the Court

1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

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;

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.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threats to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in sub sections (1) and (2) the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court

5) Deleted

6) Deleted

7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

a) interim or 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. The present petition invites the court to determine whether the respondent, through the alleged utterances, threats, insults, intimidation and conduct on 21/12/2018 and 2/1/2018, breached the petitioner’s right to property and constituted a breach of the ethics and integrity principles set out in the Constitution. In my view, the forum for determining whether the respondent has breached the petitioner’s right to property (land) is this court. The respondent’s view is that this petition should be struck out *in limine* for want of jurisdiction because it seeks, *inter alia*, declarations relating to Chapter 6 of the Constitution. It is my view that if at trial it is established that this court cannot grant declarations relating to Chapter 6 of the Constitution, the other issues raised in the petition relating to the right to property will still be properly disposed within the jurisdictional framework outlined in the preceding paragraphs. It is therefore my finding that the inclusion of reliefs relating to Chapter 6 of the Constitution does not oust the jurisdiction of this court to entertain the present petition. The issue of jurisdiction of this court to grant reliefs anchored on Chapter 6 of the Constitution should, in my view, be canvassed at the substantive hearing of the petition. It cannot be a basis for exercising the draconian jurisdiction of striking out the petition *in limine*.

19. In light of the foregoing, the respondent's preliminary objection dated 22/1/2019 is disallowed with costs to the petitioner.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF MAY 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Okeyo and Mr Obunga for the petitioner

Mr Kinyanjui for the respondent

June Nafula - Court Clerk