REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

PETITION NO. 20 OF 2018

FR. GABRIEL DOLAN...PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.......1ST DEFENDANT

SIBED TRANSPORT CO. LTD...................2ND DEFENDANT

RULING

1. The Petitioner herein filed an interlocutory application dated 20th November 2018 together with his Petition. The application is brought under Rule 4, 19 & 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013, Article 22 &23 of the Constitution of Kenya 2010 and all enabling provisions of the law. The orders sought are:

(a) Spent;

(b) Spent;

(c) That the court be pleased to issue conservatory orders restraining the 1st respondent from granting possession of the unsurveyed reserve land in Bangladesh, Jomvu, the suit property herein to the 2nd respondent pursuant to the purported lease agreement dated 9th may 2018 and the respondents be further restrained from evicting any of the residents or in any way interfering with the current use of the land as a playground for children and a collection point for water distributed by Mombasa Cement Company to the residents/dwellers of Bangladesh, Kwa Punda and Birikani informal Settlements in Changamwe, Mombasa pending the hearing and determination of this petition;

(d) Costs of the application be provided.

2. The application is supported by the facts and documents in the affidavits of Fr. Gabriel Dalan sworn on;

(a) 20th November 2018;

(b) 6th March 2019;

(c) 3rd May 2019.

Together with the grounds listed on the face of the application.

3. The Petitioner pleads that the suit property is currently being used inter alia as a playground & collection point for water distributed by Mombasa Cement Factory to the residents/dwellers of Bangladesh, Kwa Punda and Birikani informal Settlements. That there has been engagements between the County Government of Mombasa and the Bangladesh Community towards acquiring the suit property for purposes of establishing thereon a high school for public interest and an application was made for that purpose.

4. The Petitioner continued that he learnt in October 2018 that the 1st Respondent despite its representations made in the year 2009 that the property had been sold had leased out the property to the 2nd Respondent. That the 1st Respondent acted arbitrarily without following the procedure as set out in the Constitution of Kenya, the Kenya Railways Corporation Act and the State Corporations Act by failing to allocate the suitland to the residents who had a legitimate public interest of building a public secondary school for the residents of the informal

settlements.

5. In opposing the grant of the orders sought, the Respondents filed the following documents;

> **(a) Grounds of opposition dated 11th December 2018.**
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> **(b) Preliminary Objection filed on 14th March 2019.**
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> **(c) Replying affidavit sworn by Said Aden on behalf of 2nd Respondent on 11th March 2019.**
>
> **(d) Replying affidavit sworn by Justine Omoke on behalf of the 1st Respondent filed on 8th February 2019.**
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> **(e) List and bundles of authorities filed on 23rd April 2019.**

6. The 1st Respondent's case is contained in the replying affidavit sworn by Mr Justine Omoke and the grounds of opposition dated the 11th December 2018. In brief, the 1st Respondent states that it let out the suit property in compliance with its statutory powers under Section 13(2)(h) of the Kenya Railways Corporation Act. That the power to allocate public land for social amenities and or private settlements is vested on the National Land Commission by virtue of article 67(2) of the Constitution and Section 5 of the Land Act and not on the 1st Respondent. That if the conservatory orders are granted, it will cause the 1st Respondent to breach its contractual and statutory duties. That the Petitioner has come to court with unclean hands.

7. The 2nd Respondent on his part deposed that the land in question is fully owned by the 1st Respondent who therefore is entitled to deal with it in any manner consistent with its powers including the power to lease. That the lease agreement between them was negotiated openly and executed on 9th May 2018 as shown by copy of the application form dated 13th June 2016. The 2nd Respondent deposes that he had paid all the rents and premiums under the lease as shown in the copies of bankers cheques annexed to their replying affidavit. That the Petitioner does not have a right to occupy the land in the absence of a lease or licence or any instrument of permission from the 1st and 2nd Respondent. The 2nd Respondent further deposed that they are prejudiced by the delay in their construction works caused by these proceedings.

8. Parties filed written submissions in support of and opposition to the prayers sought. The Petitioner addressed himself on the headings of;

> **(i) Background facts of their case.**
>
> **(ii) Applicable law.**
>
> **(iii) Preliminary Objection raised by the Respondent as well as the question of jurisdiction.**
>
> **(iv) The issue of availability of alternative remedies as raised by the Respondents.**

The cases cited in their list nos 1-4 dealt with the issue of jurisdiction and preliminary objection raised by the Respondents. The case of **Centre for Rights Education and Awareness (CREAW) & 7 Others –versus- Attorney General(2011) eKLR** dealt with the merits of the application.

9. The Respondents on their part framed the following issues for determination i.e

> **(a) The private interest claim to occupy the suit property.**
>
> **(b) The public interest claim of alleged unlawfulness in the leasing process.**
>
> **(c) Whether the court has jurisdiction to try the issues raised in the Petition.**

10. Since the question of jurisdiction to determine the claim has been raised, I will deal with it first. The Respondents submit that the court lacks jurisdiction on account that the Constitution and the statutes provides for alternative dispute settlement mechanisms in which matters raised in this Petition can be addressed e.g the Public Procurement & Asset Disposal Act 2015 no 33 of 2015. The Respondents referred the court to the provisions of Section 8 and 9 of the said Act. The Respondents further cited the case of **Gabriel Mutava & 2 Others –versus- Managing Director, Kenya Ports Authority (2016) eKLR** where the Court of Appeal held as follows;

> **"Constitutional litigation is a serious matter that should not be sacrificed on the altar at all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes."**

11. This court derives its jurisdiction from both the Constitution in article 162(2)(b) and Section 13 of the Environment & Land Court Act. The dispute contained herein relates to use and occupation of land. The Respondents have not specified which article of the Constitution ousts the jurisdiction of this court from entertaining this Petition. Their complaints as can be deduced from their pleadings and submission is first that the Petitioner ought to have approached/exhausted available alternative bodies charged with resolving the disputes such as before

filing this Petition. Secondly that the dispute as presented can be addressed through an ordinary civil case and not as a Constitutional Petition as was stated as the Gabriel Mutava case supra.

12. In my view and I so hold, both points being fronted by the Respondents do not take away the powers of this court given to it by the Constitution and the Environment & Land Court Act. The Court of Appeal in the Gabriel Mutava case expressed itself that they were not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy and or other mechanisms for the resolution of the dispute. They also reiterated that the first post of call should always be suitable statutory under pinned forums for the resolutions of such disputes. The Court of Appeal further noted that a trial court could convert petitions into a plaint and or "statement of claim". The net effect of this decision in my understanding is that the Court of Appeal did not find that the jurisdiction of the court is ousted by the alternative mechanisms nor did they state that a dispute brought by way of a Constitutional Petition will be struck out in cases where the same ought to have been filed as an ordinary suit. Consequently, I conclude that this court does have jurisdiction to hear and determine both the Petition and the Notice of Motion.

13. The next issue is whether the orders sought in the motion should be granted. The Petitioner argues that he has demonstrated a prima facie case by stating that the suitland besides being used by the residents of Bangladesh, Kwa Punda and Birikani as Children's playground and water collection point, the said residents had expressed intention to put up a mixed day public secondary school for the public interest which interest outweighs the private interest for which the 1st Respondent has put the suit land to by leasing it to the 2nd Respondent. The Petitioner avers further that the leasing process was not done in an open manner taking into consideration the fact that the 1st Respondent had told them in the year 2009 ("annex GD2") that she had sold the suitland. That how did the 1st Respondent acquire back the property after disposing it in 2009?

14. The 1st Respondent on her part responded by stating that the power to allocate public land to social amenities and or private settlements is vested in the National Land Commission and not the 1st Respondent. That the conservatory orders if granted will hinder the lawful functions of the 1st Respondent and that the public interest of the whole country which far outweighs the disputed private property rights of the petitioners.

15. From the pleadings and submissions of both parties, it is not in dispute that the suit land belongs to the 1st Respondent. Whether the 1st Respondent sold it in 2009 or not is a question to be determined at the full trial of the Petition. At this stage, the court will limit itself on whether to grant conservatory orders sought which orders if given will stop the 2nd Respondent from taking control of possession of the suit premises.

16. The Petitioner had requested to be allocated the suit land by the 1st Respondent in the year 2009 (annex G-D-1) but which request was declined in April 2009 on the basis that the land had been sold. It appears however that the Petitioners continued to use the land until the 2nd Respondent came to put up a wall around the suitland necessitating the filing of this Petition. Besides the letter of 25th February 2009 and the response to it dated 6th April 2009, the Petitioner seems not to have engaged the 1st Respondent further. None of the letters annexed as **GD 3** was copied to the 1st Respondent. The 2nd Respondent annexed an application on 13th June 2016 made to the 1st Respondent to be leased the vacant land adjoining Changamwe flats (annex S-2). The same received positive response and a lease dated 9th May 2018 was executed between the 1st & 2nd Respondents (annex GD 4). The date of 9th May 2013 recorded in paragraph 8 of the affidavit of Mr Said Aden is an excusable error. Though the same has been taken up by the Petitioner in paragraph 5 of the supplementary affidavit of Fr. Gabriel Dolan, the document Fr. Dolan annexed in his affidavit in support of the motion clearly speaks for itself.

17. So the court is faced with a situation where it is being asked to give stop orders against an owner of land who has voluntarily entered into a contractual relationship (lease) with another being 2nd Respondent. In giving my answer, I take into consideration the question of who will bear the greater loss as between the Petitioner and Respondent if the orders are given or not and if such loss if any would not be compensated in the event the Petition succeeds/fails.

18. From the annexed documents, the suitland has been leased not sold. Secondly the Petitioners do not have any form of instrument from the 1st Respondent giving them permission to be in possession of the suit land. Until the petition is determined to answer the question whether or not the 1st Respondent flauted the law in leasing the suit land to the 2nd Respondent, it is my considered opinion and I so hold that the 2nd Respondent has a better interest to the suitland than the Petitioners. I hold so because;

(i) The 2nd Respondent is having permission of the land owner.

(ii) The Petitioner have not demonstrated that their prejudice if any is irreparable and cannot be undone if the Petition succeeds.

19. In the circumstances of this case, I am unable to find any merit to grant the orders sought in the Notice of Motion dated 20th November 2018. Accordingly the same is dismissed with an order that costs to be borne by each of the parties.

Dated, Signed and Delivered at Mombasa this 31st day of July 2019.

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A. OMOLLO

JUDGE.