



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC PETITION NO. 2 OF 2018

JOSEPH A. OREMO.....PETITIONER

VERSUS

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

ABDALLA AHMED SHEIKH.....4TH RESPONDENT

RULING

1. Abdalla Ahmed Sheikh, the 4th Respondent, filed the Notice of Preliminary Objection dated the 25th April, 2017 on the ground that the court lacks constitutional jurisdiction to hear and determine application for redress of denial, violation or infringement of, threat to, rights or fundamental freedom relating to **Articles 3, 10, 13, 22, 23(3), 24 and 40(1)** of the Constitution of Kenya and of any case under the African Charter of Human and Peoples Rights.

2. The preliminary objection came up for hearing on the 18th July, 2018 and directions on filing and exchanging written submissions were given. That by the time the matter was mentioned on the 31st July, 2019 and a ruling dated fixed, only the counsel for the 4th Respondent had filed written submissions dated the 28th December, 2018 on the 3rd January, 2019. The learned counsel submitted that this court's jurisdiction is settled in terms of **Article 162(2) (b)** and Section 13 of the Environment and Land Court Act No. 19 of 2011 to handle the matters for redress of denial, violation and infringement of, threat to, rights or fundamental freedom relating to clean and healthy environment **under Article 42, 60 and 70** of the Constitution. That matters under Article 3, 10, 22, 23(3) and 40(1) of the Constitution can only be addressed by the High court and those under **Article 13 and 24** of the African Charter on Human and Peoples Rights by the African court on Human and Peoples Rights established by virtue of **Article 1** of the protocol to the African Charter on Human and Peoples' Rights. The learned counsel referred the court to the celebrated case of Motor Vessel M. V. "Lilians" –Vs- Caltex Oil (**Kenya**) Ltd (1989) LLR 1653 Page 10 and submitted that this court is without jurisdiction to hear and determine this matter. The counsel sought for the petition to be struck out with costs to the 4th Respondent.

3. The issues for determination are first, whether this court has jurisdiction to hear and determine the issues raised in the petition; secondly who pays the costs.

4. The court has carefully considered the ground raised in the preliminary objection, the written submissions filed by counsel for the 4th Respondent, the petition, and come to the following determinations;

a. That these proceedings was commenced by Joseph A. Oremo, the petitioner in person, vide the petition dated 5th August, 2018 and filed on the 8th August, 2018. That it names the Commissioner of Lands, National Land Commission, the Attorney General and Abdalla Ahmed Sheikh as the 1st to 4th Respondent respectively.

b. That though the heading of the Petition has made reference to **Articles 10, 22, 23(3), 40(1) and 3** of the Constitution 2010 and **Articles 13 and 24** of the African Charter on Human and People's Rights, which counsel for the 4th Respondent submits concerns matters for the High Court and African court on Human and Peoples Rights respectively, the issues raised in the petition are primarily about right to ownership of the Plot known as Ref. No. 7212/XVIII, Plot No. 27, Manyatta Arab. The following extracts of the petition confirms that finding;

“2.That the petitioner is a resident of Manyatta Arab Estate within Kisumu.

3. That the petitioner was allotted plot known as Ref. No. 7212/XVIII, Plot No. 27 on 16th February, 2001, by the 1st Respondent.

8. That the said Manyatta Arab Estate was allotted to members, the plaintiff (sic) inclusive but exclusive of the 4th Respondent.

THE RESPONDENTS ACTION COMPLAINED OF

a. That the 1st Respondent herein without any valid reason allotted the plaintiff plot to the 4th respondent.

b. That the 1st Respondent action denied the petitioner his salient constitutional rights.

c. That the 4th Respondent has never been a member of Manyatta Arab Estate nor a heir to any member.

d. That vide court order dated 3rd December, 1998, vide High Court of Kisumu Misc. Civil Appeal No. 96/1998 the 1st and 3rd Respondent were prohibited from allocating plots contrary to an agreement reached between member of Manyatta Arab Estate and the District Commissioner Kisumu on 22nd March, 1996.

e.

f. That the Respondents herein have never given notice to the petitioner of cancellation of his allotment.”

That it is apparent from the paragraphs of the petition set out above that the petitioner is staking his claim to the title or entitlement of the property described therein. That contrary to the 4th Respondent’s learned counsel’s submissions, this court is the one with jurisdiction to hear and determine claims, howsoever commenced, including constitutional petitions, touching on title to land. That being the main claim or subject matter in the petition, the other issues of whether the 1st Respondents action of allocating the said plot to the 4th Respondent contravened or infringed his right to fair administrative action, and fair hearing under **Articles 40 and 50** of the Constitution are also matters to be decided by this court.

c. That the prayers or reliefs sought by the petitioner further confirms that the petition is before the court with **jurisdiction to grant them. The prayers are as follows;**

i. “A declaration that the issue of the 4th Respondent allotment is contrary to Orders granted on the 3rd December, 1998 and contrary to provisions of the law and constitution.

ii. An order of restitution to the petitioner plot No. 27, Ref. 7212/XVII.

iii. A declaration that the alienation of plot No. 27 Manyatta Arab by the 1st Respondent to the 4th Respondent was done in breach of rules of Natural justice, procedure and Administrative fairness.

iv. A declaration that the 1st and 3rd Respondent abused its office and acted illegally and unconstitutionally in alienating plot No. 27 to the 4th Respondent.

v. Costs of this application.”

That the above five prayers are among those that this court is empowered by both the Constitution and statute to grant.

d. That though the learned counsel for the 4th Respondent indicted in the preliminary objections that he petitioner had referred to **Article 3** of the Constitution in the petition, there is no such reference therein. That Article deals with defence of the Constitution.

e. That even though the petitioner and other Respondents did not file any submissions in respect of the 4th Respondent’s preliminary objection, the latter still had the obligation to prove their claim that the court was without jurisdiction. The court finds that the 4th Respondent has failed to discharge that duty.

f. That as the other parties did not participate in the hearing of the preliminary objection and they did not file submissions, the costs in the preliminary objection will be in the cause.

5. That flowing from the foregoing the court finds no merit in the 4th Respondent’s preliminary objections and the same is rejected with costs in the cause.

Orders accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 5TH DAY OF SEPTEMBER, 2019.

In presence of;

Petitioner Absent

Respondents Absent

Counsel Mr. Oguso for Odeny for 4th Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE