



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. APPL. NO. 6 OF 2019

REPUBLIC...../APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

CHIEF MAGISTRATE COURT AT KITALE.....3RD RESPONDENT

AND

VIPUL RATILAL DODHIA.....INTERESTED PARTY

***EXPARTE* - ERICK WEKHOMBE WAFULA**

DIRECTIONS

1. These are Directions on the entire Judicial Review Notice of Motion dated **13th June 2019**.

2. The Notice of Preliminary Objection dated **3/7/2019** raised by the Interested Party in this matter. He seeks to have the entire judicial review proceedings struck out with costs on the grounds which are set out verbatim below:

1. That this court lacks the jurisdiction to hear and determine the application in accordance with Article 162 (2) (b) of the Constitution of Kenya 2010 and Clause 13 of the Environment and Land Court Act, 2011.

2. That the acts complained of is (sic) not premised on rights and procedures arising out of the environment and the use and occupation of, and title to, land by virtue of Article 162 (2) (b) of the Constitution of Kenya 2010 and Clause 13 of the Environment and Land Court Act, 2011.

3. That the present application affronts (sic) the provisions of Article 165 (5) of the Constitution of Kenya 2010.

4. That the affidavit in support of the application is fatally defective and goes to the root of the application and ought to be struck out and as a consequence of which the application ought to be struck out as well for being naked and without factual foundation.

3. The applicant filed written submissions on the preliminary objection on **20/9/2019** while the interested party filed his submissions **29/7/2019**. I have considered those submissions.

4. The interested party's first submission is in respect of whether this court has jurisdiction to hear and determine the suit. He cites **Article 162 (2) (b)** and **Article 165 (5)** of the **Constitution** as well as **Section 13(1)** and **13 (2)** of the **Environment and Land Court Act**.

5. He maintains that the order sought by the applicant cannot obtain because the interested party has been charged with offence of malicious damage to property under **Section 339** of the penal code and that the "*offence acts and commissions*" of the interested party do not fall within the confines of **Article 162 (2) (b)** of the Constitution as the complaint arises purely from a criminal act. He further submits that the jurisdiction of this court is only limited to the disputes contemplated by **Article 162 (2) (b)** of the Constitution and **Section 13** of the Act and all other disputes not falling within that category should be directed to the High Court. He cites **Capital Fish Ltd -vs- Monnatz Ltd & 2**

Others [2014] eKLR. The applicant submits that leave was granted to bring the application albeit in the High Court before the judicial review application was filed and that the judge must have looked at the substratum of the application before directing it to this court. It is averred that the issues in this application revolve around land and the Presiding Judge having directed that the file be transferred to this court the preliminary objection is misconceived. It is suggested that instead of raising the preliminary objection the interested party should have applied for a review of the order transferring this matter to this court or appealed against it or by an application sought to have the matter re-transferred to the High Court. It is also submitted that a preliminary objection presupposes that a suit filed before a court lacking in jurisdiction. He prays that the preliminary objection be struck out.

6. The issue for determination in this preliminary objection are whether this court has jurisdiction to hear or determine the judicial review application or not.

7. I have examined the history of this matter. It is correct as the applicant's states that the matter, having been initially filed before the High Court, came up before the Presiding Judge of the High Court Kitale on **4/6/2019** when he granted leave to apply for orders of prohibition and certiorari against the respondents and ordered that the main motion the judicial review be filed within 21 days.

8. On **17/6/2019** when the matter came up before him again in Chambers he took notice of the fact that leave had been granted but the documents in support of the application were sufficient evidence to warrant the transfer of this matter to this court and he accordingly transferred the same on the same date.

9. In the verifying affidavit the applicant avers that he is an elected member of the County Assembly of Trans-Nzoia (MCA) representing Hospital Ward in Kiminini Sub-county and that he is concerned with the rampant alienation of land used for public purposes to private entities; that he enquired by letter from National Land Commission over allocation of land to private persons in his ward and obtained a response thereto; that he maintains that the wall that he was charged with maliciously damaging was built across a public road maintained by County Government of Trans-Nzoia and which had been used by members of the public; that the County Government on 9/1/2019 contracted a construction firm to conduct routine maintenance of the road; that he received information that someone was digging across a public road on 29/1/2019 and informed the County Government and the Officer Commanding Station that that action would hinder access by public; that he visited the site together with the County Government Engineers, the Contractor and the County Women Representative; that while on site the County Government bulldozers arrived, filled up the trenches and re-opened the road whereupon he went and made a formal report to the Kitale police station on the same day seeking that the alienation of the public road be investigated; that however he was not issued with any OB number; that subsequently he went to the police station on 31/1/2019 and was issued with OB number; that later the re-digging of the trenches and building of the wall resumed under the protection of the police; that subsequently during a meeting at which the interested party was present it was decided the road would be opened while a solution was sought and it was so re-opened by the County Government using its own machinery with the assistance of the interested party's own machinery and that the applicant did not incite the members of the public to destroy the wall; that in February, 2019 one **Avir Kanti Shah** lodged **Kitale ELC No. 11 of 2019 Avir Kanti Shah -vs- County government of Trans-Nzoia and Eric Wafula** alleging that he is the registered owner as land known as reference No. **6624** (Original No. **1792/4**) Kitale Municipality which he was in possession of having purchased it from KGGCU but the defendants were interfering with his peaceful possession of the said land and that they should be enjoined from doing so. He also sought a declaration that he is the registered and rightful owner thereof and that the defendants had no rights to interfere with his quiet enjoyment and possession thereof. That another suit **Kitale ELC No. 13 of 2019 Grace Maghova Wanjala -vs- Vipul R. Dodhia** had been lodged in which the defendant had been enjoined from trespassing on Plot No. **Kitale Municipality Block 21/Mahali/18** owned by the estate of the late John Makesi Wanjala.

10. Article 162(2)(b) of the Constitution of Kenya provides as follows:

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

(a) employment and labour relations; and

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

11. Section 13 of the Environment And Land Act, an Act of Parliament to give effect to **Article 162(2)(b) of the Constitution**; to establish a superior court to hear and determine disputes relating to the environment and the **use and occupation of, and title to, land**, and to make provision for its jurisdiction functions and powers, and for connected purposes provides as follows:

(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 threat 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 subsections (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)

(6)

(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;

(g) restitution;

(h) declaration; or

(i) Costs. (Emphasis mine)

12. From a plain reading of the provisions of **Article 162** of the **Constitution** and **Section 13** of the Environment and Land Act, it is clear that the determination of disputes relating use and occupation of land is within the mandate of this court. This court is therefore not confined to handling disputes concerning title.

13. However, in this case what is sought to be prohibited is the arrest arraignment or prosecution of any criminal charges against the ex-parte applicant in a criminal case and an order of certiorari to remove into this court and quash a decision made by the Director Of Public Prosecution to prosecute the ex-parte applicant in respect of alleged malicious damage to property. Though the impugned proceedings are before the 3rd respondent, they have been commenced by the 1st respondent. Noteworthy is the fact that there is no dispute regarding title, use or occupation of the land arising between the applicant and the respondents. The only question is whether on the **29th January 2019** at Gatua Farm in Kiminini sub-county within Trans Nzoia the applicant, jointly with others not before the magistrates court, wilfully and unlawfully damaged a concrete perimeter wall, the property of the property of the interested party in these proceedings.

14. After full consideration, I find that the matters contained in the Notice of Motion arise from the exercise of power on the part of the Director of Public Prosecutions under **Article 157** of the Constitution to investigate the conduct of and to commence criminal proceedings against the applicant in **Kitale Chief Magistrate Criminal Case Number 3255 of 2019 -Republic Vs Erick Wafula**.

15. Criminal proceedings may revolve around many different themes; this court can not assume it has jurisdiction in this matter on the basis of the fact that the matters that gave rise to the criminal case revolve around the issue of land. It is my view that the dominant issue in the motion is the challenge raised against the exercise of the Director's powers under **Article 157(4)** and **157(6) (a)** and not the issue of title to or use of or occupation of land as provided for by **Article 162(2)(b)**. This court can not therefore pronounce itself on the dispute as it is the preserve of the **High Court**.

16. The upshot of the above is that as this matter does not fall under **Article 162(2) (b)** of the **Constitution**, this court has no jurisdiction to try the same and the transfer of this matter to this court must have been erroneous. Instead of dismissing the judicial review notice of motion as proposed by the objectors or waiting for the objectors to file a transfer application as proposed by the applicant, I hereby order that the same be re-transferred back to the High Court for hearing and final disposal. This matter will be placed before the Presiding Judge of the High Court Kitale on **Monday 18th November 2019** for his further directions.

It is so ordered.

Dated, signed and delivered at Kitale on this 14th day of November, 2019.

MWANGI NJOROGI

JUDGE

14/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga holding brief for Ngeywa for Applicant

N/A for Respondent

COURT

Directions given in open court.

MWANGI NJOROGE

JUDGE

14/11/2019