



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**PETITION NO 9 OF 2017**

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27(1) AND (2), 40 (1) (A), (B), 2(A), (B) AND (3), 47(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND OR**

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 64(B) AND 75(1) (A), (B) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION 39 AND 40 OF THE TRUST LAND ACT, CAP 288 (REPEALED)**

**GARDER GENERAL TRADING LIMITED.....PETITIONER/APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF KILIFI, DEPARTMENT OF LAND,**

**HOUSING AND PHYSICAL PLANNING.....RESPONDENT**

**MILLY FRUITS PROCESSORS LIMITED.....INTERESTED PARTY**

**RULING**

1. I have before me for determination two applications. The first application dated 22<sup>nd</sup> May 2017 was filed by the Petitioner seeking orders of injunction to restrain the Respondent and the Interested Party from further implementing a decision cancelling a Lease Agreement dated 16/9/2010 and/or in any manner whatsoever interfering with 3,500 Hectares contained in the said Lease Agreement. The Petitioner is further seeking that it be allowed to deposit in Court rent arrears for the years 2016 and any such subsequent rent as may accrue until the hearing and determination of the Petition.

2. The said application is supported by a number of grounds enumerated on the body thereof as follows:-

*i) That prior to the cancellation of the lease agreement dated 16/9/2010, the Petitioner was neither given an opportunity to be heard nor allowed to defend herself.*

*ii) That prior to the said cancellation the Petitioner was not served with a notice by the Respondent/Lessor for forfeiture of the leased parcel of land.*

*iii) That consequent to the arbitrary acts above stated, petitioner's fundamental rights under Article 22 (of the Constitution) have been denied, violated, infringed and/or threatened to be further violated by the Respondent.*

*iv) That the Respondent is further in the process of adopting the decision of cancellation of the said lease in Land Case Number 115 of 2014 Malindi fixed for mention on 15<sup>th</sup> June 2017 for purposes of confirmation of the cancellation of the said lease; and*

*v) That it shall be in the interest of justice to issue the Orders prayed for.*

3. The Second Application dated 8<sup>th</sup> June 2017 and filed herein on 13<sup>th</sup> June 2017 has been brought by the Interested Party. It is the Party's

application that the Petition dated and filed on 22<sup>nd</sup> May 2017 be struck out for being an abuse of the Court Process. The Interested Party's application is based on the grounds also set out in the body thereof and which may be summarized as follows:-

**i) That the Petitioner at paragraph 10 of the Petition confirms that the relationship with the Respondent is based on lease dated 16<sup>th</sup> September 2010 where the Respondent's predecessor in title (the County Council of Malindi) leased to the Petitioner approximately 3500 hectares of land;**

**ii) That the Petitioner confirms at paragraphs 12 to 19 of the Petition that it is aggrieved by the Respondent's decision contained in a letter dated 27<sup>th</sup> January 2016 wherein the Respondent cancelled or forfeited the lease dated 16<sup>th</sup> September 2010.**

**iii) That the Petition is an abuse of the Court Process for attempting to elevate pure civil disputes and presenting them as Constitutional issues against clear statutory procedures provided in the Civil Procedure Act, the Land Act No. 6 of 2012, the Land Registration Act No. 3 of 2012, the Laws of Contract Act and the repealed Trust Land Act; and**

**iv) That it is therefore an abuse of the Court Process to ignore the available statutory remedies and an existing civil suit to pursue a Constitutional remedy.**

4. On their part the County Government of Kilifi, the Respondent herein also filed near similar Grounds of Opposition dated 27<sup>th</sup> June 2017 in which they challenge the approach taken by the Petitioner in filing this Constitutional Petition.

5. At the hearing hereof, it was agreed that the Interested Party's application dated 8<sup>th</sup> June 2018 be treated as a response to the petitioner's application dated 22<sup>nd</sup> May 2017 and that a joint determination be made thereon.

6. I have considered the two applications as well as the Grounds of Opposition filed by the Respondent herein.

7. From the Supporting Affidavit of Hassan Abdullahi Yusuf sworn on 22<sup>nd</sup> May 2017 in support of the Motion, the genesis of this petition which is brought pursuant to Articles 22 and 159 of the Constitution lies in a lease agreement executed between the Petitioner and the Respondent on 16<sup>th</sup> September 2010. The said Agreement annexed to the Affidavit and marked "HAY-2" granted the Petitioner the right to use approximately 3,500 hectares of all that land comprised in a parcel of land situated in Matolani Location within the then County Council of Malindi and more particularly known as Matolani Ranch for a period of 33 years. It is the Petitioner's case that by a letter dated 27<sup>th</sup> January 2016, the Respondent terminated the aforesaid lease agreement. The Petitioner did not however get to know of the cancellation until sometime on 3<sup>rd</sup> May 2017.

8. The Petitioner contends that the said termination was fraudulently undertaken by the Respondent in collusion with the Interested Party with the sole aim of leasing the said land to the Interested Party. It is their case that the said termination violated the principles of natural justice and that the same was biased, ultra vires, null and void. The Petitioner further avers that the Respondent's actions aforesaid have violated its rights as enshrined at Articles 10, 40, 47 and 64(b) of the Constitution.

9. Both the Respondent and the Interested Party however fault the Petitioner on the basis that the issues raised in the Petition are not Constitutional issues and that the same ought to be addressed through the ordinary dispute resolution mechanisms provided under the statutes.

10. Article 22(1) of the Constitution states that:-

***"Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."***

11. Article 258(1) of the Constitution on the other hand provides that:-

***"Every person has the right to institute Court Proceedings, claiming that this Constitution has been contravened or is threatened with contravention."***

12. Under Article 260 of the Constitution, the word "person" is defined to include a company, association or other body of persons whether incorporated or unincorporated.

13. The Petitioner herein is a limited liability company and therefore falls within the purview of the word "person" as described under Article 260 of the Constitution. Article 23(3) (c) of the Constitution provides that in any proceedings brought under Article 22, a Court may grant appropriate relief, including a Conservatory Order.

14. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Accordingly in my view, a strict interpretation of Article 23 (3) (c) would mean that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

15. From both the Petition and the Motion before me, the Petitioner alleges that the cancellation of the subject lease is in direct violation of Articles 40 and 47 of the Constitution which in the Petitioner's submissions guarantee the Petitioner the right to own land and to Fair Administrative Action before it can be deprived of the same.

16. While there is exists possibility that the Respondent may have breached the terms of the lease agreement between its predecessor the County Council of Malindi and the Petitioner, it would appear to me that the Petitioner's remedy if any, lies in an action for breach of contract and not in the nature of the Petition filed before me. In *Michael Osundwa Sakwa –vs- Chief Justice and President of the Supreme Court of Kenya & Another (2016)eKLR* it was stated that:-

**“.....an applicant for a Conservatory Order under Article 23 (2) (c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a prima facie basis that his rights or fundamental freedoms in the Bill of Rights or those of other persons have been denied, violated or infringed, or is threatened.**

17. Otherwise, and as was held in *Kemrajh Harrikissoon –vs- Attorney General of Trinidad and Tobago(1979) 3 WLR 63*:

**“ The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.**

18. Further as Odunga J stated in *Judicial Service Commission –vs- Speaker of the National Assembly & Another (2013)eKLR*:-

**“Conservatory Orders in my view are not ordinarily civil law remedies but are remedies provided for under the Constitution, the Supreme Law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.**

19. The same position was taken by the Supreme Court in *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014* where the Court held at paragraphs 86 ad 87 thus:-

**“Conservatory Orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the Public interest. Conservatory Orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory Orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the Constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...”**

20. Discussing the principle of Constitutional avoidance in *Gabriel Mutara & 2 Others –vs- Managing Director Kenya Ports Authority & Another(2016)eKLR*, the Court of Appeal sitting at Malindi cautioned against turning the Constitution into a thoroughfare for the resolution of every kind of common grievance and observed that:-

**“Where it is possible to decide a case without reaching a Constitutional issue that should be done. In the case of Communications Commission of Kenya & 5 Others –vs- Royal Media Services & 5 Others, Petition No. 14, 14A, B&C of 2014, the Supreme Court delivered itself thus on the issue:-**

**“(256) The appellants in this case are seeking to invoke the “principle of avoidance,” also known as “Constitutional avoidance.” The principle of avoidance entails that a Court will not determine a Constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S –vs Mhlungu, 1995(3) SA 867(cc) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows (at paragraph 59):-**

**I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a Constitutional issue that is the course which should be followed.”**

21. In the matter before me, the Petitioner entered into a contract with the Respondent. Any dispute arising out of the said contract is in my view of a private and commercial nature. Indeed, the matter complained of herein falls within the realm of private law, and are enforceable as such under various statutory enactments such as the Land Act, the Law of Contract and the Land Registration Act.

22. In any event, from the record, it is not contested that there is a civil suit pending determination in Malindi ELC No. 115 of 2014 wherein the parties herein are more or less the same. The petitioner is the 1<sup>st</sup> Defendant in that case and could easily take out a counterclaim or third party proceedings against the other parties. The petitioner before me does not reveal any special feature that would make a Constitutional relief more efficacious or suitable than what can be realised through the said civil suit No. 115 of 2014.

23. The upshot is that I find and hold that this is a purely private law matter and there is in place a statutory procedure capable of addressing the Petitioner's grievance. This petition is therefore wrongly being used as a substitute for ordinary civil dispute resolution systems. For those reasons, both the petition and the Notice of Motion dated 22<sup>nd</sup> May 2017 are struck out with costs.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of April, 2018.**

**J.O. OLOLA**

**JUDGE**