



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 206 OF 2017

JOYCE MUTINDI MUTHAMA.....1ST PETITIONER

JEFFERSON MWENDWA MUTHAMA.....2ND PETITIONER

VERSUS

JOSEPHAT KYOLOLO WAMBUA.....1ST RESPONDENT

MIKE MULUNGA MUTUA.....2ND RESPONDENT

NATIONAL ENVIRONMENT TRIBUNAL.....3RD RESPONDENT

RULING

1. This Ruling is in respect to the Respondents' Notice of Preliminary Objection dated 9th January, 2017 in which the Respondents have averred that the Environment and Land Court does not have jurisdiction to entertain claims for redress of violation of fundamental rights that fall outside Articles 40, 42, 69 and 70 of the Constitution; that the Environment and Land Court does not have supervisory jurisdiction over inferior tribunals and that the Petitioners have not complied with the provisions of Section 9(2) of the Fair Administrative Actions Act.

2. The Petitioners finally averred that having filed National Environment Tribunal Case No. 173 of 2016, it is the 3rd Respondent that should determine if it has jurisdiction to entertain the claim or not and that the matters raised in the current Petition are subjudice NET Case No. 173 of 2016 which remains pending.

3. The Notice of Preliminary Objection proceeded by way of written submissions in which the 1st and 2nd Respondents (*the Respondents*) submitted that the supervisory jurisdiction of the Environment and Land Court was removed by Act No. 12 of 2012; that it is only the High Court that has jurisdiction to hear constitutional disputes touching on land and land rights and that the Environment and Land Court does not have the supervisory jurisdiction over the National Environment Tribunal (NET).

4. The Respondents' advocate submitted that the Petition is based on other Articles of the Constitution other than Articles 40, 42, 69 and 70 of the Constitution and that the enforcement of this Articles is within the jurisdiction of the High Court.

5. The Respondents' counsel finally submitted that the 3rd Respondent has jurisdiction to rule on whether it has jurisdiction or not and that the Petition herein is premature.

6. In his submissions, the Petitioners' advocate submitted that the 3rd Respondent is subject to the Environment and Land Court while executing its constitutional mandate; that the 3rd Respondent does not have powers to enforce constitutional rights and that the Petition is properly before the court.

7. Counsel submitted that prior to filing a complaint before the National Environment Tribunal (NET), the 1st and 2nd Respondents had instituted Nairobi ELC. Case No. 222 of 2016 and that it is only after they failed to obtain an injunction that they filed their complaint with the National Environment Tribunal (NET) and that the issues for determination in the Petition are distinct and different from the claims in the Environment and Land Court matter in Nairobi.

8. In their Petition, the Petitioners have averred that they are the owners and developers of land known as L.R. 12715/10192 and 12715/10193 in Syokimau area; that the 3rd Respondent has stopped all the activities on the suit land until the Appeal filed with the National Environment Tribunal (NET) is heard and determined by the Tribunal and that the 1st and 2nd Respondents have no locus to apply to or appeal to the 3rd Respondent.

9. According to the Petitioners, the Tribunal is entertaining an invalid appeal; that the Respondents' and the Tribunal's actions amount to harassment and are contrary to Article 47 of the Constitution and that their actions are discriminatory to the Petitioner and contrary to Article 28 of the Constitution because there is no valid zoning of the subject area

10. The Petitioners finally averred in the Petition that the Respondents have infringed on their right to residence, their right to own property; their right to adequate housing and reasonable standards of sanitation and that the Respondents should be refrained from interfering with their activities in respect to the suit land.

11. The Petition before the court is therefore to determine whether the Petitioners' rights to own property under Article 40, their right to adequate housing under Article 43 and their right not to be discriminated against under Article 28, amongst other rights, have been infringed by the filing of a dispute in the National Environment Tribunal (NET) by the 1st and 2nd Respondents.

12. The 1st and 2nd Respondents have submitted that this court does not have a supervisory role over the National Environment Tribunal (NET) and that in any event, the court can only determine a Petition in respect to Articles 40, 42, 69 and 70 of the Constitution and not any other Article.

13. The Environment and Land Court (ELC) was established pursuant to the provisions of Article 162(2) (b) of the Constitution. Under the said Article, the court is mandated to deal with disputes relating to the Environment and Land. Article 165(5) (b) of the Constitution divested the High Court from dealing with matters, constitutional or otherwise, falling within the jurisdiction of the Environment and Land Court and the Employment and Labour Relations Court.

14. The 1st and 2nd Respondents have argued that the Environment and Land Court does not have the jurisdiction to supervise tribunals like the National Environment Tribunal (NET). This submission has no basis in law considering that firstly, the Environment and Land Court has the same status as that of the High Court, meaning that it has the mandate of supervising all the tribunals that deal with disputes relating to land and the environment. Secondly, Section 13(4) of the Environment and Land Court Act stipulates that 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.

15. If the court has the jurisdiction to exercise appellate jurisdiction over the decisions of subordinate courts and tribunals, and considering that the court has the same constitutional status as the High Court, it follows that the court has a supervisory role over such subordinate courts and tribunals. It does not matter that the law does not expressly state so, or that the provision of the law stating that the court has such a supervisory role was deleted by Act No. 12 of 2012.

16. It is true, as submitted by the Respondents' counsel, that under Section 13(3) of the Environment and Land Court Act, the court has the mandate to hear and determine applications for redress of a denial, violation or infringement of, or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. However, the Act does not limit or preclude the court from hearing applications for redress of a denial or violation of any other right, if that right is in furtherance of a dispute relating to land and the environment.

17. It is trite that the right to own land and the right to a clean and healthy environment cannot be dealt with in isolation from other rights like the right to a fair hearing, the right not to be discriminated against, the right to a fair administrative action, the right to equal protection and equal benefit of the law, the right to adequate housing, amongst other rights.

18. All these rights have to be interpreted in the context of the Petitioners' right to own land and the right to a clean and healthy environment, and not in isolation as argued by the Respondents.

19. Finally, it is only this court that has the mandate of determining if indeed the Petitioners' constitutionally rights have been infringed upon or are likely to be infringed upon and not the Tribunal. Consequently, it cannot be said that those are issues that should have been raised at the Tribunal.

20. For those reasons, I find the Notice of Preliminary Objection dated 9th January, 2017 to be unmeritorious and I dismiss it with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE