



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**PETITION NO. 7 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 2 (1), 3(1), 10 (1), a, b, & c, 27 & 73 OF THE**

**CONSTITUTION AND IN THE MATTER OF ARTICLES 20 (1),(2),**

**(3) a, b (4) a & b ARTICLE 21 (1), 22 (1), (2), & 23 (1) & (3) a,**

**b,c, d & e OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF**

**FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ESHRINED**

**UNDER ARTICLE 27, 28, 40, 42, 43 AND 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (JURISDICTION, PROTECTION**

**OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH**

**COURT PRACTICE RULES 2006 AS READ WITH CLAUSE 19 OF THE**

**CONSTITUTION OF THE REPUBLIC OF KENYA, TRANSITIONAL**

**CLAUSED AND CONSEQUENTIAL PROVISIONS OF THE**

**SCHEDULE TO THE CONSTITUTION.**

**CHRISPINUS MUNYANE PAPA.....1<sup>ST</sup> PETITIONER**

**ANZELIMO OMUSE.....2<sup>ND</sup> PETITIONER**

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1<sup>ST</sup> RESPONDENT

KIBOS SUGAR & ALLIED INDUSTRIES.....2<sup>ND</sup> RESPONDENT

RULING

1. The Petitioners commenced this proceedings through the petition dated the 15<sup>th</sup> October 2018, that was filed contemporaneously with the notice of motion under certificate of urgency of even date, seeking for some conservatory orders. The motion was certified urgent on the 15<sup>th</sup> October 2018 and directions that it be served in three (3) days for hearing on the 23<sup>rd</sup> October 2018 issued. That when the application came up for hearing on the 23<sup>rd</sup> October 2018, 2<sup>nd</sup> Respondent had not entered appearance. The court had the Counsel for the Petitioner and 1<sup>st</sup> Respondent and granted the Conservatory and restoration orders in terms of prayers (ii) and (iii) respectively. The court then directed the matter to be mentioned on the 27<sup>th</sup> November 2018.

2. That the 2<sup>nd</sup> Respondent entered appearance through filing the notice of appointment of Advocates dated 30<sup>th</sup> October 2018. They also filed the notice of motion under certificate of urgency dated 30<sup>th</sup> October 2018 seeking **“to stay prayer 1 and 2 of its orders issued on the 23<sup>rd</sup> October 2018”** among others. The application was on 31<sup>st</sup> October 2018 certified urgent and directions that it be served in three (3) days and that it be mentioned before the Deputy Registrar on the 7<sup>th</sup> November 2018 to fix a hearing date for interpartes hearing on priority basis issued. That on the mention date, the application was fixed for hearing on the 5<sup>th</sup> December 2018. The matter was then mentioned on the 27<sup>th</sup> November 2018 in respect of the Petitioners’ notice of motion dated the 15<sup>th</sup> October 2018 as earlier directed. The Counsel for the Petitioners and 2<sup>nd</sup> Respondent addressed the court and the hearing date of 5<sup>th</sup> December 2018 was confirmed for the motion dated 30<sup>th</sup> October 2018. That by that date, the 2<sup>nd</sup> Respondent had filed and served the notice of preliminary objection dated the 26<sup>th</sup> November 2018 raising the ground that the petition has been filed in a court without proper jurisdiction to hear and determine it. The Preliminary Objection was based on the ground that the Land Parcel No. “Bhukhayo/Kisoko/5540” is in Busia County and therefore the petition should be struck out with costs.

3. That on the 5<sup>th</sup> December 2018, Mr. M. M. Omondi and Mr. Onyango, learned Counsel for the Petitioners and the 2<sup>nd</sup> Respondent respectively, agreed to have the preliminary objection heard first. Mr. Onyango for the 2<sup>nd</sup> Respondent submitted that the suit land is admittedly situated within Busia County, which has a functional Environment and Land Court before which the petition should have been filed. The learned Counsel for the Petitioners Mr. Omondi, conceded that the suit land is within Busia County. He further submitted that **Section 12 and 15 of the Civil Procedure Act** allowed a suit to be filed in the nearest court with jurisdiction to the subject matter or the defendant’s residence. That the petitioners had opted to file the petition in this court as the 2<sup>nd</sup> Respondent is a resident of Kisumu County. The learned Counsel for the 2<sup>nd</sup> Respondent responded that the provisions for the Civil Procedure Act and Rules do not apply in Constitutional petitions like this one. That the Mutunga Rules of 2012 are the ones to apply in this petition.

4. The court has carefully considered the ground raised in the notice of preliminary objection, the oral rival submission by both counsel and come to the following determinations;

a) That in the case of **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd, [1969] EA 696**, the Court held as follows:

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion. The improper raising of points of fact by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”**

That the issue in this case is whether or not this court has territorial jurisdiction to hear and determine this petition in view of the fact that the land parcel “Bhukhayo/Kisoko/5540” is in Busia County. The issue is therefore admittedly one of law and not fact. That both the Petitioners and 2<sup>nd</sup> Respondents counsel are in agreement that the suit land is situated within Busia County and that there is an Environment and Land Court that is operational and functional in that County.

b) That it has long been settled that where the court finds it has no jurisdiction in a matter before it, then it downs its tools. See the case of **The Owners of Motor Vessel “Lillians” vs Caltex Oil Kenya Ltd (1989) KLR I** where Nyarangi JA held;

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it, the moment it held the opinion that it is without jurisdiction.”**

That the learned counsel for the 2<sup>nd</sup> Respondent has asked the court to find that it has no territorial jurisdiction to deal with the petition and proceed to strike out the petition with costs.

c) That the provisions of **Article 162 (2) (b)**, as read with **Articles 165 (5) (b) of the Constitution, 2010**, and **Section 13 of Environment and Land Court Act No. 19 of 2011** confers this court with unlimited original and appellate jurisdiction in disputes relating to **“the environment and the use and occupation of, and title to land.”** That there are Environment and Land Courts in

various stations in the Country including Busia, Bungoma, Kakamega, Kisumu, Kisii, Kericho and Migori just to list those in the neighbourhood. That it is the 2<sup>nd</sup> Respondent's submissions that as the petition herein is about a parcel of land situated within Busia County, then this court is without jurisdiction as the nearest court to the property would be ELC Busia. The Petitioners Counsel did not dispute the submission that the suit land was within Busia County. The Counsel submitted that their choice of filing the petition in this court was based on being the nearest court to the place of residence of the 2<sup>nd</sup> Respondent.

d) That unlike in other suits where **Section 12 to 15 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, gives the person suing the option of approaching the nearest Court with Jurisdiction to the place the cause of action occurred, immovable property is situated, or where the person sued actually and voluntarily resides or carries on business, or personally works for gain, the **Constitution of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013** do not give similar options. It provides as follows at **Rule 8** on the place of suing;

**“8 (1) Every case shall be instituted in the High Court within whose Jurisdiction the alleged violation took place”**

That the said rule do not give the Petitioners other option of filing a petition in the nearest court to where the Respondents resides or carries on business, or works for gain. That however, as the said **Practice and Procedure Rules 2013** are subordinate to the Constitution, they do not limit the Court's Jurisdiction to deal with the issues raised in the Petition but provide guidance on where matters should be filed for the Court's good governance and operations.

e) That though the court finds the 2<sup>nd</sup> Respondent Preliminary Objection has merit, as the nearest court to the suit property is ELC Busia and not this court, the submission that the petition be struck out with costs do not appear to be the only option under the circumstances.. The court has considered the decisions in **Nguruman Limited vs David Nkedianye & 6 Others [2018] eKLR** and **Margaret Wairimu Magugu vs Investment Limited & 4 Others [2017] eKLR**, which though not dealing with Constitutional petitions, orders to transfer suits to the courts nearest to the suit properties were made. That though those decisions are not binding to this court, the court is nevertheless in agreement with their finding that the transfer order was in keeping with the courts overriding objective to facilitate the just, expeditious, proportionate and accessible resolution of disputes as provided for in **Section 3 (1) of the Environment and Land Court Act**, which has similarities to **Rule 3 of the Constitutional of Kenya (Protection of Rights And Fundamental Freedoms) Practice and Procedure Rules 2013**.

f) That flowing from (e) above, the court finds that to strike out the petition, merely because it was filed before a court that is not the one nearest to the suit property, would go against the overriding objective set out in **Section 3 (1) of the Environment and Land Court Act**. That it would also be contrary to **Rule 3 of the Constitution of Kenya (Protection of Rights And Fundamental Freedoms) Practice and Procedure Rules, 2013** which provides as follows;

**“ Rule (3)**

**(1) .....**

**(2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.**

**(3) These rules shall be interpreted in accordance with Article 259 (1) of the Constitution and shall be applied with a view to advancing and realizing the -**

**a) rights and fundamental freedoms enshrined in the Bill of Rights; and**

**b) .....**

**(4) The Court in exercise of its Jurisdiction under these rules shall facilitate the just expeditious, proportionate and affordable resolution of all cases.**

**(5) For the purpose of furthering the overriding objective, the court shall handle all matters presented before it to achieve the -**

**a) just determination of the proceedings;**

**b) efficient use of the available and administrative resources;**

**c) timely disposal of proceedings at a cost affordable by the respective parties; and**

**d) .....**

**(6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the court to further the overriding objective of these rules and in that regard to -**

**a) participate in the processes of the court; and**

b) comply with the directions and orders of the court.

(7) .....

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

**(8) Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

g) That the striking out of the Petition would not stop the Petitioners from filing a fresh petition before the court with territorial jurisdiction to the suit land. That however, the striking out of the petition would mean additional costs, both in time and money already spent by and to the parties. That it would also mean wasted judicial time in terms of the processes so far dealt with before this court. That so as to facilitate the just, expeditious, proportional and cost effective resolution of this matter, and in adherence to **Article 159 (2) (d) and (e) of the Constitution, 2010**, the court finds this is an appropriate case to exercise its inherent power and order this petition to be transferred to the court with territorial jurisdiction nearest to the suit property.

h) That the suit property is described in the petition as “Bhukhayo/Kisoko/5440”. The notice of Preliminary Objection however describes the suit property differently, as “Bhukhayo/Kisoko/5540” That the mis-description of the suit property parcel number in the notice of Preliminary Objection does not however affect the court’s finding that the nearest Court with territorial jurisdiction to the Suit Land is ELC Busia.

5. That in view of the foregoing the Court finds merit in the 2<sup>nd</sup> Respondent’s Preliminary Objection and orders as follows;

- a) **That the nearest court with territorial jurisdiction to the suit land, Bhukhayo/Kisoko/5440, is ELC Busia.**
- b) **That accordingly, this petition be and is hereby transferred to ELC Busia for further directions.**
- c) **The costs of the preliminary objection to abide the outcome of the petition.**

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF DECEMBER 2018**

**In the presence of:**

Petitioners     Absent

Respondents   Absent

Counsel        Mr. Omondi for Petitioners

Mr. Olel for 2<sup>nd</sup> Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**