



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 63 OF 2017

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLES 2, 3, 10, 22, 23, 35, 60, 61, 62, 73, 165, 171, 172, 174, 232, 258
AND 260 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010**

BETWEEN

CHRISTOPHER NGUSU MULWA & 28 OTHERS.....PETITIONERS

VERSUS

THE COUNTY GOVT. OF KITUI1ST RESPONDENT

DR. JULIUS MALOMBE2ND RESPONDENT

AND

THE NATIONAL LAND COMMISSIONINTERESTED PARTY

RULING

1. In the Notice of Motion dated 12th February, 2016, the Petitioners are seeking for the following orders:

a) That upon inter partes hearing of this Application and pending the hearing and determination of the substantive constitutional petition herein a conservatory order be issued suspending any and all further construction processes and activities on the land known as Kyangwithya/Misewani/112.

b) That the costs of this Application be provided for.

2. The Application is premised on the grounds that the impugned construction project is unconstitutional and does not represent a fair and equitable use of the suit land; that the construction project is unconstitutional because it was not preceded by due consultations with the affected members of the public and that there has been no public participation in the implementation of the project.

3. In response, the Respondents filed a Notice of Preliminary Objection in which they averred that this court does not have jurisdiction to adjudicate on the Petition by virtue of the express provisions of Article 165(5) as read together with Article 162(2) of the Constitution; that the Petition does not disclose what

right or fundamental freedom has been denied, violated or infringed and that the Petition is incompetent because it is a Land and Environment dispute disguised as a Constitutional Petition.

4. In the Replying Affidavit, the 1st Respondent's Assistant County Secretary deponed that there was public participation before the initiation of the impugned project; that after the conclusion of the consultations, the County Government of Kitui procedurally procured the services of Jomer Services Ltd to carry out the construction works and that the project is half way done.

5. In the Further Affidavit, the Petitioners have deponed that the Respondents cannot use land reserved for a nursery school for any purpose other than that that the land is reserved for and that such a change of use can only be implemented with the full participation of the people.

6. The Petitioners have further deponed that there is nothing to show how the alleged public participation meetings were convened; that the Respondents have not shown any notices that were given regarding the scheduled meeting and that in any event, the record of the meeting does not show whether or not the members of the public were given an opportunity to speak during the meeting.

7. The Petitioners finally deponed that some of the people mentioned in the 1st Respondent's Affidavit as having participated in the process of consultation did not sign the minutes; that the issue of forgery of the minutes by the 1st Respondent has been reported to the police and that the suit land was donated to the Catholic church by their forefathers who put up a nursery school.

8. The Petitioners' advocate submitted that the suit property is public land; that the construction of a Ward office on the land does not constitute equitable, efficient, productive and sustainable use of the land and that the said office is being build in the middle of a field which is used by the community for meetings and social events.

9. The Petitioners' counsel submitted that the Respondents never carried out any public consultations before sanctioning the project and that the Respondents contravened the provisions of Article 35 of the Constitution by not providing the necessary information regarding the use of the land.

10. The Respondents' counsel submitted that under Article 165(3) of the Constitution, the jurisdiction to determine questions on a right or fundamental freedom in the Bill of rights is vested in the High Court; that the Environment and Land Court does not have the jurisdiction to hear and determine matters relating to any of the constitutional issues raised in the Petition and that the Environment and Land Court Act allows the court to only hear constitutional rights and fundamental freedoms relating to the Environment and Land under Articles 42, 69 and 70 of the Constitution.

11. The Respondents' counsel submitted that it has not been demonstrated how the construction of the Ward offices does not represent a fair equitable use of the suit land and that the said offices will serve the wider community than a single nursery school.

12. The Respondents' counsel finally deponed that all that is required is public participation and not public concurrence and that the current Application does not satisfy the requirements set out in the ***Giella vs Cassman Brown*** case.

13. The first issue that I am supposed to determine is whether this court has the jurisdiction to determine the issues in the current Petition.

14. In the Petition before the court, the Petitioners have averred that they are members of Kwa Ukungu Community of Kitui County; that before adjudication, the suit land was held by the residents under customary tenure; that the community donated a parcel of land known as Kyangwithya/Misewani/111 to the County Government of Kitui and that the 1st Respondent went ahead to grab the adjacent land which is the suit land.

15. According to the Petitioners, they are entitled to be consulted on the land use in the area and that the ongoing project on the suit land has not been authorized by the Interested Party.

16. The Petitioners are therefore seeking for the following prayers: a declaration that the suit land is public land; a declaration that the use of the suit land for the purposes of constructing a Ward Office does not constitute equitable, efficient and sustainable use of land and an order stopping the said construction.

17. The Petitioners are therefore seeking for the interpretation of Articles 62 of the Constitution which deals with the holding, use and management of public land, amongst other provisions of the Constitution.

18. The Respondents' counsel has submitted that under Article 165(3) of the Constitution, the jurisdiction to determine questions on a right or fundamental freedom in the Bill of rights or to hear any question respecting the interpretation of the Constitution is vested in the High Court and that the Environment and Land Court does not have jurisdiction to hear and determine questions relating to rights and freedoms, except those rights and freedoms under Articles 42, 69 and 70 of the Constitution.

19. The above argument by the Respondents' counsel is not novel in nature. Indeed, the said argument has been heard by the High Court and this court before.

20. In the case of *Ifdid Ole Tauta & others vs Attorney General (2015) eKLR*, a three judge bench held as follows:

“having regard to constitutional provision under Article 165(3) (b) and Section 13(3) of the Environment and Land Court Act, in constitutional matters touching on the violation and/or infringement of the fundamental Bill of rights and freedoms as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and a party could bring such matters either before the High Court and or before the Environment and Land court.”

21. In *Patrick Musimba vs. National Land Commission & 4 others (2015) eKLR*, a bench of five judges held as follows:

“Both the High Court and the Environment and Land Court had a concurrent and or coordinate jurisdiction and could determine constitutional matters raised and do touch on the environment and land. Neither the Constitution nor the Environment and Land Court Act limited the High Court’s jurisdiction in that respect. While a closer reading of the Environment and Land Court Act revealed that the Environment and Land Court’s jurisdiction was limited by Parliament in so far as constitutional issues touching on land and environment were concerned, the Court of Appeal; in Mugendi expressed the view that the Environment and Land Court when dealing with disputes concerning the environment and land could also deal with claims of breaches of fundamental rights touching on the subject at hand. In matters of Constitution, the Environment and Land Court had jurisdiction not just when it involved clean and healthy environment but also land.”

22. The above position on the jurisdiction of the Environment and Land Court to hear Petitions involving land issues was followed by another bench of three Judges in the case of *Leisure lodges vs. Commissioner for Lands & 767 others (2016) eKLR*.

23. While I am in agreement with the above decisions, I do not associate myself with the holding by the Judges that both the High Court and the Environment and Land court have a concurrent and or coordinate jurisdiction in constitutional matters touching on the environment and land.

24. I say so because under Article 162(2) (b) of the Constitution, it is the Environment and Land Court that is mandated to hear and determine disputes relating to the environment and land. Article 165(5) on the other hand prohibits the High court from hearing disputes relating to the environment and land.

25. Indeed, the wording of Article 165(3) of the Constitution shows that while the High Court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, it ought to be alive to the limitation provided for under Article 165(5) of the Constitution.

26. It is because of the limitation imposed on the High Court by the Constitution to determine matters relating to land and the environment, be it by way of a Complaint, a Petition, an Originating Summons etc that Article 165(3) of the Constitution starts with the words “*subject to clause (5)...*”

27. The position that I have taken above that the two courts cannot have concurrent or coordinate jurisdiction in disputes relating to the environment and land – whether filed as constitutional petitions or ordinary suits - is informed by the Constitution and the Supreme Court’s decision in the case of ***Republic vs Karisa Chengo & others, Supreme Court. Petition No. 5 of 2015*** in which the court held as follows:

“From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court.”

28. Consequently, and considering that a dispute relating to land and or the environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters. The two courts cannot have concurrent jurisdiction in such matters because they are two distinct courts.

29. For those reasons, the Respondents’ objection that this court does not have jurisdiction to determine the Petition before it is unmeritorious. Indeed, it is only this court that has the jurisdiction to hear land disputes, notwithstanding how those disputes are commenced.

30. It is not in dispute that the suit property is what used to be known as Trust land under the repealed Constitution and the repealed Trust Land Act.

31. It is also not in dispute that the suit property was registered in favour of the 1st Respondent and specifically for the purposes of a nursery school.

32. The 1st Respondent has admitted in its Replying Affidavit that indeed what is being constructed on the suit land is a Ward office.

33. The Respondents have not adduced evidence to show that the residents of the area within which the suit property is situated were informed about the change of use of the land from a nursery to a Ward Office.

34. Considering that under Article 62(2) of the Constitution, the Respondents holds public land in trust for the residents in the County, the Respondents cannot legally use public land in any manner they deem fit before consulting the residents of the area or their elected representatives.

35. The assertion that indeed the residents of the area were consulted before the construction of the Ward office commenced has been disputed by some of the people who are said to have been consulted.

36. Indeed, the issue of whether there was any public participation before the change of user of the land can only be fully ventilated during the hearing of the Petition.

37. Suffice it to say that the Petitioners have established a *prima facie* case with chances of success.

38. For those reasons, I allow the Application dated 12th February, 2016 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE