



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT OF KENYA**  
**AT MILIMANI**  
**ELC CASE NO. 1448 OF 2016**  
**HOLY SPIRIT ASSOCIATION**  
**FOR THE UNIFICATION OF THE WORLD**  
**CHRISTIANITY .....PETITIONER**  
**=VERSUS=**  
**UKWALA SUPERMARKETS LIMITED....RESPONDENT**  
**CHOPPIES SUPERMARKETS.....INTERESTED PARTY**  
**RULING**

**BACKGROUND**

1. The Petitioner is the registered owner of LR No.209/2794. The Respondent was a tenant of the Petitioner on premises on the Petitioner's property. The Respondent was operating a Supermarket in the Petitioner's premises under the name of Ukwala Supermarkets. The Respondent entered into negotiations with the interested party who wanted to take over the Respondent's business as a going concern.

2. The Respondent sought consent of the Petitioner for it to be allowed to bring in the interested party as a tenant of the Petitioner on terms which the Respondent was operating. The Petitioner delayed in giving the consent forcing the Respondent to file a reference to the Business Premises Rent Tribunal (Tribunal). The Tribunal ordered that the Respondent transfer its tenancy to the interested party. The Petitioner which was aggrieved with the Tribunal decision filed a Notice of Appeal against the Tribunal's decision. In the meantime, the Petitioner filed a Petition before this Court in which it filed a Notice of Motion seeking conservatory orders restraining the Respondent from transferring tenancy to the interested party.

**The Preliminary Objection.**

3. Before the Notice of Motion could be heard, the Respondent raised a preliminary objection against both the Notice of Motion and the Petition on the ground that the Petition was res-Judicata, was an abuse of the process of the Court and this Court lacked jurisdiction to entertain the Petition.

4. The Court directed that the preliminary objection be disposed of by way of written submissions. The Respondent filed its submissions on 9<sup>th</sup> May 2017. The Petitioner filed submissions on 31<sup>st</sup> May 2017.

## **Jurisdiction.**

5. The Respondent contends that this Court is only given jurisdiction to entertain a Constitutional Petition under Article 42,69 and 70 of the Constitution. That if the intention of parliament was that the Court deals with other matters brought under other Articles of the Constitution parliament would not have singled out the three Articles of the Constitution. The Three Articles relate to right to clean environment. The Respondent therefore argues that other than under the aforesaid Articles, it is only the High Court which has jurisdiction to entertain the question of whether a right or fundamental, freedom in the Bill of Rights has been denied, violated, infringed or threatened. That it is only the High Court which has jurisdiction to determine the question, whether any law is inconsistent with, or is in contravention of the Constitution.

6. The Petitioner contends that what this Court is being asked to do in the Petition is not to determine whether any law is inconsistent with or is in contravention of the Constitution. This is the preserve of the High Court under Article 165 (3) (b) of the Constitution which gives the High Court exclusive jurisdiction. The Petitioner contends that whereas Section 13 (3) of the Environment and Land Court Act gives this Court jurisdiction to deal with rights under Article 42,69and70 of the Constitution,that Section is not exhaustive and that the Environment & Land Court is at liberty to deal with violations of rights relating to matters under Article 40 which deals with right to property.

7. In support of the Petitioner's contention that this court can handle matters relating to other Articles of the Constitution touching on land and use thereof, the Petitioner cited the case of **Patrick Musimba Vs National Land Commission & 4 Others (2015) eKLR** in which a five Judge bench of the High Court held as follows:-

**“ In view of the 2012 amendments to the ELC Act one would be tempted to conclude that on a true construction of Section 13(3) of the ELC Act the jurisdiction of ELC in so far as enforcement of constitutional rights was concerned, was limited and restricted by parliament to matters relating to a clean and healthy environment under Articles 42,69,70 and not environment and land generally under Article 40 of the Constitution. The Court of Appeal's decision in Mugendi as read together with Section 13 of the ELC Act however lead to the plausible conclusion that the ELC has jurisdiction to determine matters of a constitutional nature as well. We also say so as it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised”.**

8. The Petitioner also relied on the case of **Leisure Lodge Limited Vs Commissioner of Lands & 67 Others (2016) eKLR** where a three judge bench of the High Court held that the High Court and the Environment and Land Court have con-current and coordinate jurisdiction and would determine constitutional matters when raised touching on the Environment and Land and neither the Constitution nor the Environment and Land Court Act Limited the Court's jurisdiction. The petitioner further relied on the case of **United States International University Vs Attorney General ( 2012) eKLR** where Majanja J held as follows:-

***“ In light of what I have stated, I find and hold that the industrial court as constituted under industrial Court Act 2011 as Court with status of the High Court is competent to interpret the constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within section 12 of the industrial court Act”.***

9. It is clear that though Section 13(3) of the Environment and Land Court Act singles out Articles 42,69 and 70 of the Constitution, this Court has jurisdiction to deal with matters touching on fundamental rights and freedoms under Article 40 of the Constitution which relates to protection to right to property. The Petition herein is primarily brought under Article 40 of the Constitution and this Court has jurisdiction to entertain the same. I therefore find that the preliminary objection on grounds of jurisdiction must fail.

## **Res-Judicata and Abuse of process of Court.**

10. The principle of res-judicata is predicated on Section 7 of the Civil Procedure Act which provides as follows:-

***“ No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.***

11. A look at the petition herein as well as the Notice of Motion shows that the Petitioner is attacking the Ruling of the Tribunal. The reliefs being sought include the setting aside of the Tribunal’s Ruling delivered on 9<sup>th</sup> September 2016. The issues being raised in this Petition were the same issues which were raised before the Tribunal and were decided upon by the Tribunal which had jurisdiction to entertain the same. In **Civil Appeal No. 42 of 2014, John Florence Maritime Services Ltd & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** the Court of Appeal judges had this to say;-

***“ In a nutshell, res-judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res-judicata being a fundamental principle of law relates to the jurisdiction of the court may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prevent abuse of the process under Rule 3 (8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. On the whole, it is recognised that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution based litigation cannot be subjected to the doctrine of res-judicata”.***

12. The Petitioner had manifested its intention to prefer an appeal against the decision of the Tribunal by filing Notice of Appeal. Before exhausting the process of Appeal, this petition was filed. Some of the complaints in this petition are that the Tribunal refused to give the petitioner a copy of the Ruling and proceedings for appeal purposes. As I said hereinabove, this Petition wants to have the Tribunal decision set aside. The issues raised herein were the same issues raised before the Tribunal. The parties were the same. I find that this Petition is re-judicata.

### **CONCLUSION.**

13. A practice is emerging where a party who loses a matter in a Tribunal or other Courts moves to another court and files a constitutional petition seeking to annul the earlier decision. This is what has happened in this Petition. This practice is a total abuse of the process of the Court and the practice must be deprecated. The Petitioner’s Petition is not only res-judicata but an abuse of the process of the Court. The Petition as well as the accompanying Notice of Motion is hereby struck out with costs to the Respondent.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 31<sup>st</sup> day of October, 2017.**

**E.O.OBAGA**

**JUDGE**

In the presence of :

Mr Mudanyi for Mr Wambola for Petitioner

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**