



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 160 OF 2016**

COAST WATER SERVICES BOARD.....PETITIONER

-VERSUS-

KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> RESPONDENT

CHINA BRIDGE & CONSTRUCTION

COMPANY (K) LTD.....2<sup>ND</sup> REPENDENT

ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have raised a preliminary objection summarized as follows:

**(i) This Court does not have jurisdiction to hear and determine the dispute or issue the orders sought under article 22 (3) as read with article 23 and 165 (3) of the constitution.**

**(ii) The procedure denies the Respondents the right to the rules of natural justice and in particular the right to a fair hearing by side stepping the express provisions of the Civil Procedure Act/Rules and the Land Act.**

2. The parties agreed to argue the preliminary objection by filing written submissions. I have read and considered the submissions filed. The background of this matter is that it was first filed in the Constitutional and Judicial Review division of the High Court at Mombasa before it was transferred to the Environment and Land Court. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents submitted that the case pleaded is not a “*constitutional matter.*” They went ahead to itemise the issues for determination as follows:

**a. Whether the Court has jurisdiction to try the complaint and resolve the dispute by exercise of its Constitutional Jurisdiction?**

**b. What is the nature and extent of the petitioner’s proprietary interest in the subject suit property if any?**

**c. Whether the said interest is being violated or threatened with infringement?**

3. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents’ contention is that the pleadings raise ordinary civil dispute for payment of

money and there are mechanisms for resolving the dispute without invoking the Constitutional jurisdiction of the Court by making references to the provisions of section 150 of the Land Act and Section 13 of the Environment and Land Act. I have perused the various sections of the Acts of parliament referred to by the Respondents and nowhere do any of the sections take away the jurisdiction of this Court. I have analyzed the grounds of the objection and the submissions rendered in support thereof and reached a conclusion that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents complaint fall first; on want of form and or procedure in the manner in which the petitioners have presented their claim before the Court and the second limb is that parliament has provided mechanisms for resolving the dispute under sections 112, 118, 119 and 120 of the Land Act. Therefore there is no need to invoke the inherent jurisdiction of this Court. They have referred the Court to the decision of the Court of Appeal in **Mutanga Coffee Ltd vs Shikara Apartment Ltd & Another (CIV APPEAL NO 54 of 2014)**.

4. In answering the first limb of the objection, I will make reference to the provisions of article 159 2 (d) of the Constitution which states that justice shall be administered without undue regard to procedural technicalities. Further, section **1B** of the Civil Procedure Act mandates this Court to handle all matters presented to it for the purpose of attaining

**(i) Just determination of proceedings**

**(c) Efficient use of the available judicial and administrative resources**

And section **1A(1)** gives the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. The same principle is laid out in section 3 of the Environment and Land Court Act. In the Kenyan and commonwealth jurisprudence, there are two classifications of matters before the Courts i.e. Criminal process and or the Civil process. The further classification under civil process is governed by the Legislation which bestows the right on a litigant.

5. In the instant case, the Respondents contend that the claim before the Court should have been brought as an ordinary civil suit. This may be true however I have looked at the petition and note that the petitioner's right is recognized both under the Constitutional and the Land Act. Under article 40 (3) (b) of the Constitution provides **that where the land is acquired for public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament (ii) allows any person who has an interest in or right over that property a right of access to a Court law"**

6. The Constitution therefore guarantees a person a right to access the Court in article 40 under which this claim is founded. The availability of alternative mechanisms provided for under the Land Act cannot thus take away this right. Further under section 13(2) of the E & L Court Act, this Court has power to hear and determine disputes relating to the environment and land including –

**2(b) relating to compulsory acquisition of land**

**2(e) any other dispute relating to environment and land**

7. The Respondents have not filed any rejoinder to the Petition to plead that the dispute before the court does not relate to the matters particularized under section 13(2) of the ELC Act Consequently the argument put forth by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents that this Court lacks jurisdiction for the proposition of the existing alternative mechanisms to resolve the dispute as provided under the Land Act does not take away this court's powers to hear the dispute.

8. On the issue of form that it will deny the Respondents a fair hearing by not getting an opportunity to interrogate facts and documents does not constitute a pure point of law as is defined in the renowned case of **Mukisa Buscuits vs West End Distribution Ltd (1969) E A 696**. There is nothing that stops this Court from giving directions as may be appropriate in the manner of how the matter should proceed. Therefore the prejudice if at all to be suffered by the Respondents as alleged can easily be cured. I find no basis to strike out the petition on this account too.

9. In conclusion, I find no merit in the preliminary objections raised by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and I hereby proceed to dismiss the same with costs to the Petitioner.

**Dated, signed at Mombasa this 16<sup>th</sup> November 2017.**

**A. OMOLLO**

**JUDGE**

**Delivered at Mombasa this 17<sup>th</sup> November 2017 by**

**L. KOMINGOI**

**JUDGE**