



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 7 OF 2014

1. KIBWANA ALI KARISA
2. KAZUNGU WANJE IHA.....PETITIONERS

=VERSUS=

1. SAID HAMISI MOHAMED
2. FATUMA HASSAN FUNDI
3. THE PRINCIPAL MAGISTRATE'S COURT KILIFI
4. THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS

RULING

Introduction:

1. On 16th July 2014, the Petitioners filed a Petition dated 11th July 2014 alleging that the Principal Magistrate's Court, Kilifi, acted ultra vires and in excess of its jurisdiction in entertaining CMCCC No. 544 of 2010 when the matter should have been heard by the Environment and Land Court.
2. The Petitioners are praying that the proceedings in Kilifi CMCC No. 544 of 2010 should be declared null and void.

The Preliminary Objection:

3. The 4th Respondent filed a Notice of Preliminary Objection in which he averred that the Magistrate's court had and still have the requisite jurisdiction to hear and determine matters involving land before them by virtue of Gazette notice No.16268 of 9th November 2012; that the Petition is an appeal cleverly disguised as a Petition and that the filing of the Petition is an abuse of the court process.

Submissions:

4. The parties agreed to dispose off the Preliminary Objection by way of written submissions.
5. The 3rd and 4th Respondents' counsel submitted that the Petitioners' prayers have been overtaken by events as there is no suit to be stayed in the subordinate court, the case having been concluded on 18th October 2013.
6. Counsel submitted that the subordinate courts have jurisdiction to hear and determine disputes concerning land. Counsel relied on the case of **Edward Mwaniki Gaturu & Another Vs Hon. Attorney General & 3 Others (2013) e KLR**.
7. The 1st and 2nd Respondents' counsel associated himself with the submissions of the 2nd and 3rd

- Respondents' counsel.
8. The 1st and 2nd Respondents' counsel submitted that the Petitioners are seeking for orders of Mandamus and Certiorari which can only be made with the leave of the court; that the Petitioners have not complied with the Law Reform Act and Order 53 of the Civil Procedure rules and that CMCC No. 544 of 2010 has already been determined.
 9. The Petitioners' advocate submitted that the Judgment in Kilifi PMCC No. 544 of 2010 was delivered on 18th October 2014; that a notice of delivery of the Judgment by the Magistrate has never been issued thus rendering the Petitioners unable to file an appeal in good time because they learnt of the Judgment on 24th January 2014, and that the Petition cannot be dismissed by way of a Preliminary Objection.
 10. The Petitioners' counsel submitted that the Petition is in reference to the infringement of the Petitioners rights pursuant to Article 22, 23, 40 and 162(2) (b) of the Constitution.
 11. Counsel submitted that the 3rd Respondent acted ultra vires in its statutory mandate in hearing and determining the complaint made before it because the suit was filed after the promulgation of the Constitution; that all disputes concerning land are to be handled by the Environment and Land Court and that the directions by the Chief Justice were issued on 9th November 2012 after the matter had been listed for hearing.

Analysis and findings:

12. It is not in dispute that vide a Plaint dated 11th October 2010, the 1st and 2nd Respondents herein sued the Petitioners in Kilifi PMCC No. 544 of 2010. The suit in the lower court was in respect of an unsurveyed plot measuring 40 ft by 60 ft. The 1st and 2nd Respondents herein prayed for a permanent injunction to issue restraining the Petitioners herein from interfering with the suit property.
13. The Petitioners herein filed a Defence dated 22nd October 2010 in which they admitted the jurisdiction of the court.
14. After hearing the parties, the Senior Resident Magistrate delivered his Judgment on 18th October 2013 in which he allowed the 1st and 2nd Respondents' claim.
15. The Petitioners claim is that the trial court in PMCCC Number 544 of 2010 did not have jurisdiction to deal with the dispute because the suit in the lower court was filed after the promulgation of the Constitution and consequently should have been heard by the Environment and Land Court as established pursuant to the provisions of Article 162 (2)(b) of the Constitution.
16. On the other hand, the Respondents contention is that the Petitioners recourse would have been to file an appeal against the decision of the lower court or to file Judicial Review proceedings and not a Petition.
17. The only issue that I am supposed to determine at this stage is whether the subordinate court had jurisdiction to deal with the dispute that was before it, and if not, whether the filing of a Petition challenging the decision of the Magistrate is the proper forum. Those two issues, in my view, are pure points of law as defined in the **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696** case.
18. Article 162(2)(b) of the Constitution provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of and title to land.
19. Article 162(3) of the Constitution has mandated Parliament to determine the jurisdiction and functions of the Environment and Land court. Pursuant to that Article, Parliament enacted the Environment and Land Court Act which came into force on 30th August 2011. The Act, at Section 13, sets out the jurisdiction and functions of the court.
20. Although the Constitution established the Environment and Land Court, the court can only be said to have become operational with the enactment of the Act, which was on 30th August 2011.
21. The Constitution recognized the fact that the new courts under Article 162 (2) would not be established immediately. It is because of that reason that the framers of the Constitution provided at Section 22 of the Sixth Schedule that all judicial proceedings pending before any court were to continue being heard and determined by the same court or a corresponding court established under

- the Constitution or as directed by the Chief Justice or the Registrar of the High Court.
22. On 9th November 2012, the Chief Justice, published “Practice Directions on Proceedings Relating to the Environment and the use and occupation of title to land” in gazette notice number 16268.
23. Rule 7 of those directions provides as follows:

“Magistrates Courts' shall continue to hear and determine all cases relating to the environment and the use and occupation of and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction.”

24. The said Rule was reproduced verbatim in the subsequent Practice Directions that were issued by the Chief Justice in gazette notice number 5178 of 28th July 2014.
25. The direction by the Chief Justice “clarifying” the jurisdiction of the Magistrates court in handling disputes relating to the Environment and Land was informed by the provisions of section 13 (1) of the Environment and Land Court Act which provides that the Environment and Land Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution.
26. To that extent, I shall agree with the pronouncement of Lenaona J in **NRB Petition No. 72 of 2013, Edward Mwaniki Gatura & Another Vs The AG & two others. The learned Judge held as follows:**

“.....It therefore follows, that the Magistrate's courts have jurisdiction to determine matters falling within the Jurisdiction of the Environment and Land Court Act and their decision will be subject to appeals preferred to the Land and Environment Court.....sadly therefore I do not think that the Applicants can sustain the argument that the Environment and Land Court has exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land and the environment because the law does not bar them out.”

27. However, I hasten to add that the Magistrates courts have jurisdiction to determine disputes relating to land pursuant to the provisions of the Magistrate's Act and Rule 7 of the Practice Directions only to matter relating to unregistered land, and not land registered under the repealed Registered Land Act, Registration of Titles Act, and currently the Land Act the Land Registration Act, and the Land Acquisition Act.
28. The jurisdiction of the subordinate courts in relation to disputes relating to land registered under the repealed Registered Land Act, pursuant to Section 159, is land whose value does not exceed Kshs.500,000.
29. Once the value of the land registered under the RLA (repealed) exceeds Kshs.500,000, the Magistrate courts would not have jurisdiction to deal with any civil suit relating to the title to or the possession of land, or to the title to a lease or charge, registered under the Act notwithstanding the provisions of the Magistrate's Court Act, section 13 (1) of the Environment and Land Court Act and the Practice Directions of the Chief Justice.
30. In respect to parcels of land registered under the Registration of Titles Act (repealed), the Land Act and the Land Registration Act, 2012, it is only the Environment and Land Court that can deal with disputes relating to the use, occupation of and title to such land, the value of such land notwithstanding.
31. I say so because the Registration of Titles Act has defined “the court” to mean the “High Court” while the Land Registration Act, 2012 has defined “the court” to mean “the Environment and Land Court as established under the Environment and Land Court Act 2011”.
32. The same argument is applicable to suits that are filed pursuant to the provisions of the Land Act and the Land Acquisition Act which have defined the court to mean the “High Court” and the “Environment and Land Court” respectively.
33. Consequently, the practice directions by the Chief Justice in the Kenya gazette of November 2012 and 25th July 2014 conferring on the Magistrates jurisdiction to hear and determine all cases relating to the environment and the use and occupation of, and title of land in which they have the requisite pecuniary jurisdiction is limited in the terms I have enumerated above. That jurisdiction is only limited to unregistered parcels of land, and in case of land registered under the repealed

- Registered Land Act, to land whose value does not exceed Kshs.500,000. The practice directions by the Chief Justice cannot confer jurisdiction on Magistrate's where such jurisdiction has been ousted by statute.
- 34.The Petition in this matter is challenging the decision of the Principal Magistrate for having dealt with a dispute relating to ownership of unregistered land measuring 40 ft by 60 ft.
- 35.In view of the fact that the land in dispute was not registered under any of the statutes that I have discussed above, and considering that it is not in dispute that the Principal Magistrate did not have the pecuniary jurisdiction to deal with the matter, I find and hold that the learned magistrate had the requisite jurisdiction.
- 36.The issue as to whether the Petitioners' right to own property was infringed is what was before the magistrate in Kilifi PMCCC No. 544 of 2010. Having lost the case, the Petitioners' only recourse was to file an appeal challenging the said decision and not to file a Petition in this court.
- 37.It is inappropriate for the Petitioner to challenge the decision of the Magistrate by way of a Petition in a matter where the said magistrate had the requisite jurisdiction just because the time within which to lodge an appeal has lapsed. That, in my view, is an abuse of the court process.
- 38.For those reasons, I allow the 3rd and 4th Respondents' Preliminary Objection dated 25th July 2014 and dismiss the Petition dated 11th July 2014 with costs.

Dated and delivered in Malindi this 13th day of March, 2015.

O. A. Angote

Judge