



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L PETITION NO. 2 OF 2013

Formerly HCC Petition No 5 of 2013

**IN THE MATTER OF BREACH OF THE PROVISIONS OF SECTION 75,84 AND 114 OF THE
INDEPENDENCE CONSTITUTION**

AND

**IN THE MATTER OF ARTICLES 21, 22, 23, 40, 45, 50 AND 64 OF THE CONSTITUTION OF
KENYA 2010**

**AND IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOM
CONTRARY TO ARTICLES 27, 40, 43 AND 47 CHAPTER 4 OF THE CONSTITUTION OF
KENYA**

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT

AND IN THE MATTER OF THE REGISTERED LANDS ACT CHAPTER 300

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012 LAWS OF KENYA

AND IN THE MATTER OF LAND REGISTRATION ACT NO 3 OF 2012 LAWS OF KENYA

BETWEEN

MOHAMMED SAIDPLAINTIFF

VS

COUNTY COUNCIL OF NANDI.....1ST RESPONDENT

MATHEW KENUIYOW.....2ND RESPONDENT

(Matter instituted by way of Constitutional Petition alleging breach of various provisions of the Constitution in relation to land; Case of the petitioner that he was entitled to be allocated the suit land by the County Council of Nandi; preliminary objection raised that the Environment and Land Court has no jurisdiction to hear a Constitutional Petition unless it falls within Articles 42,69 and 70 of the Constitution; Jurisdiction of the Environment and Land Court; Whether Environment and Land Court can hear disputes alleging breach of fundamental rights and freedoms not falling within Articles 42,69 and 70 of the Constitution)

RULING

A. BACKGROUND

1. This ruling is in respect of a preliminary objection raised by the 2nd respondent. The preliminary objection is founded on three grounds as follows :-

1. THAT both Application and Petition are premised in Section 75 , 84, and 115 of "The Independence Constitution" which does not exist after the same became extinct upon promulgation of the new constitution.

2. THAT the said Application together with the Petition are also premised on Registered Land Act CAP 300 which was Repealed after the enactment of the Land Registration Act, Act No. 3 of 2012.

3. THAT the petition and the Application does not fall within the ambit of Section 13(1) and (3) of Land & Environment Court Act, Act No. 19 of 2011 and it is therefore clear that the Petition and Application fall outside the jurisdiction of the court as provided under the Articles 42, 69 and 70 of the new Constitution.

2. It will be seen that the objection, especially the third ground, goes to jurisdiction of this court and I directed that the objection be argued before we proceed any further with this matter.

B. SUBSTANCE OF THE SUIT

3. This matter is a Constitutional Petition. The Petition is said to be brought vide the provisions of Sections 75, 84, and 115 of the Independence Constitution; Articles 27, 40, 43 and 47, and Chapter 4, of the Constitution of Kenya; The Local Government Act; The Registered Land Act (CAP 300) Laws of Kenya; The Land Act, Act No.6 of 012; and The Land Registration Act, Act No. 3 of 2012. It is a petition filed by Mohammed Said against the County Council of Nandi and one Mathew Kenduiywo as the 1st and 2nd respondents respectively.

4. The case of the petitioner as laid out in the petition is that he has a home in the land known as Plot No.56 (unregistered) within Kaptumo Trading Centre. He has averred that his family inherited the said land from his deceased father, one Said Mohamed, who in turn had inherited it from the petitioner's grandfather, one Mbarak Mohamed, who is said to have settled therein long before survey was done. It is stated that when survey was done in the 1970s, a strip of land along the main road within Kaptumo Centre was created and registered as parcel No. 330 which was registered in the name of the County Council of Nandi. The ancestral home of the petitioner fell within this land parcel No.330. Later this parcel was subdivided into several parcels including the Plot No. 56.

5. The petitioner has stated that the County Council of Nandi then set up a committee known as Kaptumo Centre Committee which was tasked with the responsibility of determining who was to benefit from the allotment of the resultant plots. The petitioner has stated that the committee assured the petitioner's family that the portion where the homestead is situated would not be allocated to any other person. However, on 23rd January 2013, the petitioner came to learn that the said plot No.56 was allocated to the 2nd respondent in 1985. The petitioner has stated that this allocation was unjust as the County Council of Nandi failed to take into account the fact that the said plot accommodates the only home that the petitioner has lived on and that the 1st respondent failed to provide an alternative home to the petitioner

and his family.

6. The petitioner has averred that the allocation of the plot No. 56 to the 2nd respondent was in breach of his fundamental rights under the Constitution. The particulars of breach of the petitioner's fundamental rights are stated to be as follows :-

(i) Allocating Plot No. 56 to the 2nd respondent thereby exposing the petitioner's home to the risk of alienation or demolition which is in breach of the petitioner's right to shelter.

(ii) Failing to give the petitioner a chance to own the land in which his home is situated, thereby breaching the petitioner's right to being accorded fair and or equal opportunity in allocation of public resources.

(iii) Allocating trust land in a discriminatory manner.

(iv) Allocating the petitioner's only home to the 2nd respondent without compensation.

The petitioner has thus sought the following declaratory orders :-

- 1. A declaratory order holding that the allocation of Plot No. 56 in Kaptumo trading center to the 2nd respondent was irregular because Kaptumo Centre Committee, which is tasked with responsibility of recommending suitable allottees was not involved.*
- 2. A declaratory order holding that the allocation of Plot No. 56 in which the petitioner's home is situated without affording the petitioner an opportunity to own the same is in breach of the petitioner's constitutional right to shelter.*
- 3. A declaratory order holding that the allocation of Plot No. 56 to the 2nd respondent without affording the petitioner a chance to own the same was in breach of the petitioner's right to a fair and or equal opportunity in allocation of public resources.*
- 4. A declaratory order holding that the allocation of Plot No. 56 together with the developments thereon to the 2nd respondent, without making provisions for compensation at current market rate is in the breach of the petitioner's right to property.*
- 5. An order of cancellation and or revocation of the allocation of Plot No. 56 situated in Kaptumo trading centre to the 2nd respondent.*
- 6. An order of permanent injunction restraining the respondents or their agents from evicting the petitioner and his family from Plot No. 56 within Kaptumo Trading centre.*
- 7. An order that the petitioner be given an opportunity to own Plot No. 56 located in Kaptumo Trading centre.*
- 8. Any other relief that this honourable court may deem just to grant.*
- 9. costs*

7. Alongside the Petition, the petitioner filed an application seeking conservatory orders and orders of injunction to restrain the respondents from evicting the petitioner and his family from the said Plot No. 56 pending the hearing and determination of the petition.

8. The respondents filed Replying Affidavits to oppose both the petition and application. The 2nd respondent also filed the preliminary objection which I had alluded to above. For purposes of this preliminary objection, it is not necessary for me to go into the details of the respondents replying affidavits.

C. ARGUMENTS OF COUNSEL ON THE PRELIMINARY OBJECTION

9. Mr. J. Kirui learned counsel for the 2nd Respondent urged me to allow the preliminary objection. Much of his submissions centered on ground 3 of the preliminary objection. He pointed me to Section 13 (1) and (3) of the Environment and Land Court Act, Act No. 19 of 2011, as the section providing for the jurisdiction of the Environment and Land Court pursuant to the provisions of Article 162 (2) (b) of the Constitution. He stated that Article 162 (2) (b) gives the Environment & Land Court power to hear

disputes on the environment and use and occupation and title to land. He stated that these proceedings do not fall within the provisions of Article 162 (2) (b). It was his view that under the provisions of Section 13 (3) of the Environment & Land Court Act, the Environment & Land Court, can only hear disputes touching on infringement of Constitutional rights under Articles 42, 69 and 70 of the Constitution. He pointed out that the petition herein is premised on Articles 27, 40, 43 and 47 of the Constitution which in his view are outside the jurisdiction of the Environment & Land Court as provided in Section 13 (3) of the Environment & Land Court, Act. He stated that since the petition is not grounded upon Articles 42, 69, and 70 of the Constitution, the court with jurisdiction to hear the matter is the High Court pursuant to the provisions of Article 23 of the Constitution.

10. He made only one statement in arguing grounds 1 and 2 by stating that the petition is grounded upon provisions in the former constitution which have since been repealed.

11. Mr. Maritim, for the 1st respondent, supported the preliminary objection. He stated that the petitioner's case is founded on an alleged breach of the bill of rights. He argued that the court with jurisdiction to redress a breach of the bill of rights is the High Court pursuant to Article 23(1) of the Constitution. He supported the argument of Mr. Kirui that the Environment & Land Court can only hear petitions that fall under Articles 42, 69, and 70 of the Constitution.

12. Mr. M.K. Chebii, counsel holding brief for Mr. Kipnyekwei for the petitioner, averred that the Environment & Land Court has jurisdiction to hear this matter under the provisions of Article 159(2) (d). He stated that judicial authority is vested in all courts and that the same ought to be administered without due regard to technicalities. He further stated that Article 162 (2) (b) of the Constitution establishes the Environment & Land Court to hear disputes related to the environment and land. He pointed out that the dispute herein relates to land. He averred that if the Environment & Land Court is of the view that it has no jurisdiction, then the avenue is not to dismiss the petition but to have it transferred to the High Court. He pointed out that when the petition was filed, it was titled "High Court" and it is not the petitioner's fault that the matter is now before the Environment & Land Court.

D. DECISION OF COURT

13. I have considered the preliminary objection. I will deal with all the three grounds of objection but in my view the core objection is ground No. 3. The view of the respondents is that the Environment and Land Court, does not have jurisdiction to entertain a Constitutional petition which does not fall within Articles 42, 69 and 70 of the Constitution. The question that I need to answer is whether the Environment and Land Court can only hear Constitutional petitions founded solely on breaches of Articles 42, 69 and 70 of the Constitution.

14. A question not too dissimilar to what is before me, but now dealing with the jurisdiction of the High Court to handle petitions on land matters, was posed in the case of ***Omar Tahir Said vs Registrar of Titles & Another, Mombasa High Court Petition No. 22 of 2012, (2013) eKLR***. In the petition, filed in the High Court in Mombasa, the petitioner inter alia claimed that the cancellation of his title to land by the Registrar of Titles and claimed breach of several of his constitutional rights. He inter alia sought declarations that the revocation of his title was unconstitutional and sought to quash the decision of the Registrar of Titles. A preliminary objection was raised that the matters in the suit fell squarely within the jurisdiction of the Environment and Land Court pursuant to the provisions of Section 13 of the Environment and Land Court Act as read with Article 162 (2) (b) of the Constitution of Kenya, 2010. The view of the petitioner was that by dint of the provisions of Article 23 of the Constitution, it was the High Court with jurisdiction to hear a petition for the enforcement of the bill of rights. The court held that jurisdiction in the matter lay with the Environment and Land Court and not the High Court. Tuiyott J. who decided the matter stated as follows in his judgment :-

"The E and L Court has juridical likeness or similarity with the High Court. In this juridical likeness, the E and L Court would have authority to entertain applications for the redress of a denial, or violation, or threat to a right or fundamental freedom in the Bill of Rights in matters falling under its jurisdiction. It is in acknowledgement of this, I suggest, that the Legislature, by Section 13(3) of the E and L Court Act,

expressly recognized the authority of the Court to enforce the fundamental rights under Articles 42, 69 and 70 of the Constitution. Yet to limit the Courts authority to the fundamental rights specified in Section 13(3) would be to unduly constrict the Constitutional intent of establishing a Court Under Article 162(2) (b) that would determine disputes relating to the Environment and the use and occupation of, and title to, land."

The learned judge proceeded to refer the matter to the Environment and Land Court at Mombasa for disposal.

15. I am in total agreement with the decision in the case of ***Omar Tahir Said***.

The Environment and Land Court is a new court created vide the provisions of Article 162 (2) (b) of the constitution. To properly understand its position in the Kenyan judiciary, I lay out the provisions of Article 162 which sets up the courts in Kenya. The same provides as follows :-

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

16. It will be seen that the Environment & Land Court is one of the superior courts supposed to be established pursuant to Article 162 of the Constitution. The purpose of establishing the Environment & Land Court was to have a court solely to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Article 162 of the Constitution obligated Parliament to pass legislation to establish the court and determine its jurisdiction and functions. Parliament did not however have discretion to impose any other jurisdiction on the court save for that under Article 162 (2) (b).

17. Pursuant to the provisions of Article 162 (2) (b), Parliament enacted the Environment and Land Court Act, Act No. 19 of 2011. Section 4 of the Act establishes the Environment and Land Court which is a superior court of record with the status of the High Court. The jurisdiction of the court is laid out in Section 13 of the Act, and I think it is best that I set it out in full.

13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes?

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) (Deleted by 12 of 2012, Sch.).

(6) (Deleted by 12 of 2012, Sch.).

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

b) prerogative orders;

(c) award of damages;

(f) compensation;

(g) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

17. The general jurisdiction is set out in Section 13 (1) which emphasizes that the E&LC has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the Environment & Land Court Act, or any other law applicable in Kenya relating to environment and land. Section 13 (2) clarifies the general jurisdiction in Section 13 (1), probably to avoid ambiguity as to what a matter touching on land and environment is. Section 13 (3) emphatically states that nothing is to preclude the jurisdiction of the Environment & Land Court to hear applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. A plain reading of Section 13 (3) will demonstrate that the jurisdiction of the court is not limited only to hearing matters touching on violations of Articles 42, 69, and 70 of the Constitution. That section does not state that the E&LC is only to hear the matters set out in Articles 42, 69 and 70 of the Constitution. The section for whatever reason, is emphasizes the jurisdiction of the court to hear petitions touching on the environment. There is no preclusion to hear any other petition, grounded on any other Article of the Constitution, so long as it falls within the purview of land and environment.

18. Indeed, the High Court has no jurisdiction in respect of matters that fall within the jurisdiction of the Environment and Land Court or that falling within the jurisdiction and the Industrial Court. This is set out in Article 165 (5) of the Constitution that states as follows :-

165 (5) *The High Court shall not have jurisdiction in respect of matters—*

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

19. As correctly pointed out in the ***Omar Tahir Said v Registrar of Titles*** case, the High Court has no jurisdiction to hear petitions touching on environment and land. These are to be heard and determined by the Environment and Land Court. The same goes to jurisdiction touching on "employment and labour relations". The High Court has no jurisdiction to hear and determine such disputes even when they are filed as Constitutional Petitions. This was indeed the holding in the case of ***United States International University (USIU) vs Attorney General, Nairobi High Court Petition No.170 of 2012 (2012) eKLR*** cited with approval in the case of ***Omar Tahir Said***. The issue in the case of ***USIU vs Attorney General***, was whether the High Court ought to continue to hear matters related to labour and employment in light of the establishment of the Industrial Court. An argument was raised by counsel for the petitioner that the totality of Articles 162 and 165 of the Constitution left no doubt that the High Court has a constitutional mandate to determine questions concerning the enforcement of fundamental rights and freedoms despite the claw-back provision of Article 165(5). It was contended that the question of interpretation of the constitution was vested expressly in the High Court under Article 165 (3) (d) of the constitution.

20. This argument was not upheld the court. The court (Majanja J) held that :- *"The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain."*

21. It is the same issue with the Environment and Land Court. The Court has jurisdiction to interpret the constitution and fundamental rights and freedoms over matters which fall under the subject matter of environment and land.

22. I do not agree with counsel for the 2nd respondent that the Environment and Land Court can only hear petitions touching on Articles 42, 69 and 70 of the Constitution. The jurisdiction of the Court is not restricted only to hearing petitions falling under Articles 42, 69 and 70. It can hear any constitutional petition under any provision of the constitution so long as the matter relates to the environment and the use and occupation of, and title to, land.

Ground 3 of the Preliminary objection fails.

23. As to grounds 1 and 2 of the preliminary objection, it was the argument of counsel that the petition is incompetent as of cites provisions of the repealed constitution, and further, that it is incompetent because is cites provisions of the Registered Land Act, which is now repealed. I see nothing wrong, if it is the case of the petitioner, that the rights he is seeking to enforce accrued to him under the regime of the former constitution and under the regime of the former Registered Land Act. The rights that were granted under the former constitution were not obliterated by the promulgation of a new constitution. So too any rights under the Registered Land Act. These are of course subject to any provision to the contrary as may have been set out in the transitional provisions in the constitution. Counsel has not cited any provision of law that precludes the petitioner from asserting such rights.

24. For the above reasons, I find the preliminary objection to be unmerited. I dismiss the same but make no orders as to costs.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JULY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. J.K. Kipnyekwei of M/s Nyekwei & Co. Advocates for the petitioner.

Mr. E.K. Maritim of M/s Kalya & Co. Advocates for the 1st respondent and also holding brief for M/s S.K. Kitur & Co. Advocates for the 2nd respondent.