



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 147 OF 2018

BETWEEN

KISAUNI BRIDGE LIMITED..... APPELLANT

AND

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

THE MINISTER FOR ROADS.....2ND RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya

at Mombasa (E.K. Ogola, J.) delivered on 5th October, 2017

in

H.C. Petition No. 31 of 2012.)

JUDGMENT OF THE COURT

1. This is an appeal against the ruling and orders of the High Court which allowed the respondents' application dated 31st May, 2017 for transfer of the subject suit from the High Court to the Environment and Land Court.
2. The gravamen of the matter before us which pitted *Kisauni Bridge Limited*, (the appellant) against *Kenya Urban Roads Authority* and *the Minister for Roads*, (the respondents) is with respect to the proprietorship of parcels of land known as *Mombasa/Block XLVI/174, Mombasa/Block XLVI/175, Mombasa/Block XLVI/176, Mombasa/Block XLVI/177, Mombasa/Block XLVI/179, Mombasa/Block XLVI/180, Mombasa/Block XLVI/181, Mombasa/Block XLVI/182, Mombasa/Block XLVI/183 and Mombasa/Block XLVI/184*, (the suit properties).
3. In its petition filed on 5th April, 2012, the appellant sought, *inter alia*, a declaration that its rights under **Article 40** of the **Constitution** had been threatened by the respondents' intended unlawful and illegal demolition of the suit properties; a declaration that the respondents' intention to acquire and demolish the suit properties was null and void; and an order of judicial review in the nature of prohibition to prohibit the respondents from revoking the titles to the suit properties.
4. The respondents opposed the petition and also filed a cross-petition seeking, *inter alia*, a declaration that the titles to the suit properties were acquired illegally; and an order cancelling the same. They also sought a permanent injunction to restrain the appellant from selling or transferring the suit properties or in any way dealing with them.
5. On 31st May, 2017, the respondents filed an application seeking transfer of the suit from the High Court to the Environment and Land Court. The application was made on grounds:-

“1. That the Cross Petition raises issues of use, occupation of and validity of title to land which falls under the Environment and Land Court (ELC) per Art.162 (2)(b) of the Constitution of Kenya, 2010.

2. That the present court as set up is enamored (sic) with the power to enforce the Bill of Rights and the issues emergent herein

transcend such jurisdiction.

3. That a transfer of this cause to ELC will afford the parties an opportunity to canvass those issues unfettered or beyond realm/remit of the Bill of Rights.

4. That it is only fair, just and expedient that the cause be transferred to ELC so as to facilitate to all-encompassing determination of the issues.”

6. The appellant opposed the application stating, *inter alia*, that the Environment and Land Court has no jurisdiction to hear the petition as it seeks protection of fundamental freedoms and rights under the Constitution and therefore falls within the realm of the High Court.

7. In his ruling allowing the application, the learned judge concluded as follows:-

“30. It is evident that the Environment and Land Court being a court with the status of the High Court as the Employment and Labour Relations court is, has the jurisdiction to deal with issues relating to denial, violation or infringement of, or threat to, rights and fundamental freedom in matters envisioned by Article 162 (2) (b) and Section 13 of the Environment and Land Court Act. Thus, the issues raised and remedies sought in the Petition and subsequent cross-petition herein can be dealt with by the Environment and Land Court.”

The Court held that it had no jurisdiction to deal with the matter as it falls within the jurisdiction of the Environment and Land Court and ordered that it be transferred there.

8. Being dissatisfied with the said ruling, the appellant preferred an appeal to this Court stating that the learned judge erred: in making a finding that the High Court sitting in its capacity as a Constitutional Court had no jurisdiction to hear and determine the constitutional petition and cross-petition; in holding that the issues arising therefrom fall within the jurisdiction of the Environment and Land Court thus ordering that the matter be transferred to that court; and in failing to give proper consideration to the constitutional issues raised in the petition.

9. The appeal was canvassed by way of written submissions that were briefly highlighted by counsel. At the hearing of the appeal, **Mr. Sanjeev Khagram**, appeared for the appellant, while **Mr. Nguyo Wachira**, State Counsel, appeared for the respondents. Mr. Khagram faulted the learned judge for declining jurisdiction to hear the petition for the reason that the claim relates to “the occupation and title to the suit properties,” a matter falling within the jurisdiction of the Environment and Land Court as provided under **Article 162 (2)** of the **Constitution**.

10. Counsel further submitted that this Court in **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others [2017] eKLR**, held that Parliament did not intend that the Environment and Land Court should have exclusive jurisdiction to hear and determine matters related to the environment, the use and occupation of land and title to land. Counsel also cited a High Court decision, **Republic v Kenya Urban Roads Authority & 2 Others Ex-parte Tamarind Village Limited [2015] eKLR**, where the court issued orders in a Judicial Review application. The prayers sought were more or less the same as in the matter herein. The common denominator in the cited High Court matter above and the petition that was before the court was that both sought protection against arbitrary deprivation of property pursuant to **Article 40** of the **Constitution** which falls within the purview of **Article 23** of the **Constitution**. Counsel added that only the High Court has jurisdiction to determine matters for redress of a denial, violation or infringement of such right.

11. In response, Mr. Wachira submitted that although the appellant claimed to have lawfully acquired and developed the suit properties, the respondents in their cross-petition argue that the suit properties were illegally acquired by the appellant because they lie on road reserves. It follows, therefore, that the occupation and title to the suit properties is disputed, hence the dispute falls within the jurisdiction of the Environment and Land Court as provided for by **Article 162(2)** of the **Constitution**.

12. Mr. Wachira urged this Court to find that the learned judge was right in declining jurisdiction and ordering transfer of the suit to the Environment and Land Court and proceed to dismiss the appeal.

13. We have considered the record of appeal, submissions by counsel and the cited authorities. The determination of this appeal is pitched on the interpretation of **Articles 23, 162(2)** and **165(3)** of the Constitution against **section 13(3)** of the Environment and Land Court Act.

14. **Article 23** of the Constitution grants the High Court jurisdiction, in accordance with **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

15. **Article 165(3)** of the **Constitution** provides as follows:

“3. Subject to clause (5), the High Court shall have-

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

- (d) *jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-*
- i. *the question whether any law is inconsistent with or in contravention of this Constitution;* (Emphasis supplied).
 - ii. *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;* (Emphasis supplied).
 - iii. *any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
 - iv. *a question relating to conflict of laws under Article 191; and*
- (e) *any other jurisdiction, original or appellate, conferred on it by legislation.”*

Article 165(5) stipulates that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the Environment and Land Court.

16. On the other hand, *section 13* of the *Environment and Land Court Act* states that:-

“(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. (Emphasis added)”

17. A court’s jurisdiction flows from the Constitution or legislation or both. The Supreme Court in *Application 2 of 2011* in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR* buttressed this position in law when it expressed itself thus:-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

18. *Article 165(5)* of the *Constitution* precludes the High Court from entertaining matters that are exclusively reserved for the Environment and Land Court as well as the Employment and Labour Relations Court. Whereas, on the face of it, the appellant’s petition raised issues that fall within the jurisdiction of the High Court, at the core of the dispute is the question of occupation and title to the suit properties. The respondents’ cross-petition alleged that the appellant illegally acquired ownership of the suit properties. This is an issue that falls squarely within the constitutional and statutory jurisdiction of the Environment and Land Court. Whatever constitutional questions that may arise in the dispute can be handled by that court.

19. For those reasons, we are satisfied that the learned judge’s ruling is unassailable. Consequently, we dismiss this appeal with costs to the respondents.

Dated and delivered at Malindi this 14th day of November, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR