IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 133 OF 2016

BETWEEN

ABDULLA AKIIO.....1ST APPELLANT

JARED ARUWA.....2ND APPELLANT

BIBIANA NZISA.....3RD APPELLANT

(Suing for themselves and on behalf of the 374 traders as members of Tena Small Scale Traders Group

VERSUS

KENYA URBAN ROADS AUTHORITY.....RESPONDENT

(Appeal from the judgment /decision of the High Court of Kenya at Nairobi (Mumbi Ngugi J.), dated 17th March, 2016,

in

Constitutional Petition No. 53 of 2015)

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JUDGMENT OF THE COURT

[1] On 17th February, 2015 the appellants filed suit by way of a constitutional petition on their behalf and that of 374 traders carrying on business on a portion of land (suit premises) within Tena Estate Nairobi measuring approximately 1 acre against the respondent before the Constitutional and Human Rights Division of the High Court. The Kenya Urban Roads Authority's (KURA) is a State Corporation charged with the responsibility of *inter alia* the management, development, rehabilitation and maintenance of urban roads in the Republic of Kenya. In the said petition, the appellants claim was that their rights under **Articles 40 and 47** of the Constitution were violated by the respondent following the acquisition of their property for the expansion of the Outer Ring Road, Nairobi.

[2] The appellants' case was that the respondent violated their constitutional right to property, among others, following the acquisition of the land on which the Tena Community Market is located. They claimed that they were the lawful owners of the suit premises and were dissatisfied with the proposal by the respondent to pay them a meagre compensation which is inadequate for their properties. The appellants claimed that the various stalls comprising of the suit premises were allocated to them by the defunct City Council of Nairobi way back in July 2002. They have invested heavily in transforming the suit premises to a decent market which was originally an open wasteland and a breeding ground for mosquitoes and reptiles that posed a danger to residents. On the other hand, the market provided a market facility for residents of Tena Estate, thereby decongesting the paths and walkways within the estate that were converted into stalls or kiosks.

[3] What precipitated the filing of the suit was a notice issued in the print media on 7th January, 2014 informing the appellants of the Kenya Government's intention to expand the Outer Ring road. Prior thereto on or about September, 2013, the respondent had informed the appellants of the same intention and that they would be affected by the Outer Ring road project and they needed to relocate. According to the appellants, the respondent took detailed census of all the traders at the market and details of their businesses including the value of their investments in the permanent stalls. The appellant insisted on their right to property and fair compensation if they were to be relocated. Nonetheless, the appellants were only paid Ksh 50,000 despite their substantial investments in and lawful occupation of the suit premises. That was the basis of the petition that sought several declaratory orders that the appellants were legally entitled to the suit premises; any

attempt to relocate the appellants without adequate compensation was unconstitutional, null and void and judicial review orders of *certiorari* and *mandamus* to quash any decision meant to relocate or evict the appellants respectively.

[4] The petition was opposed by the respondents who raised two fundamental issues of law; that the petition was an abuse of the court process as another suit over the same suit premises was filed in ELC No. 1484 of 2014, against the respondent. In that suit, the bone of contention was the quantum of disturbance allowance awardable to the traders as they relocate to pave way for the implementation of the Outer Ring Road expansion project. According to the respondent, while the suit was pending, the appellants applied for conservatory orders and after inter parties, the EL Court granted the petitioners a maximum of forty- five days reprieve to enable them leave the market as the court prepared to hear the suit on merit to determine the quantum of disturbance allowance. However, that suit was abandoned and a petition was filed only that it was disguised as a constitutional petition with the only difference being that the Attorney General and Nairobi City County Government were left out. The other issue raised was in regard to jurisdiction of the High Court in dealing with matters of land in view of **Article 162 (2) (b)** of the Constitution.

[5] The learned Judge heard the parties and in a well-considered judgment found that matters relating to title to land and compulsory acquisition thereto are within the mandate of the Environment and Land Court; thus, the petition was in the wrong court. More importantly, the learned Judge held the petitioners filed the petition to avoid and defeat the decision and orders made by the court with the requisite jurisdiction. As regards the claim on violation of **Article 47** of the Constitution, on the right to a fair administrative action, the learned Judge found this claim without merit in view of the fact that the respondent involved the appellants through consultative meetings on the relocation and resettlement plans. The petition was dismissed with no orders as to costs.

[6] The above orders have given rise to the present appeal that is predicated on some 7 grounds of appeal which can be summarized as; the learned Judge erred in law and fact in dismissing the petition for lack of jurisdiction when it was brought under **Articles 22, 23, 40** and **47** of the Constitution; in failing to transfer the petition to the appropriate registry or forum; in holding the appellants were heard by the respondent prior to the impugned decision; in failing to declare the appellants had acquired rights and interests over the suit land; failing to uphold the precepts of **Article 159 (2)** of the Constitution and for failing to follow the pleadings, submissions and precedent.

[7] During the plenary hearing, Mr. Miyare learned counsel for the appellant relied on his clients' written submissions and made some oral highlights. On the issue of jurisdiction, counsel stated that the court was seized of the matter when it gave directions and admitted it for hearing and as a result ELC No 1484 of 2014 was withdrawn. In the worst case scenario, the petition should have been transferred to the court with jurisdiction. The question of jurisdiction ought to have been at the earliest opportunity and when it was raised before the petition was heard; the learned Judge must have affirmed jurisdiction by proceeding to give directions for the hearing and determination of the petition; it was therefore erroneous to revisit the same issue after hearing the petition on its merit thereby leaving the appellant who had withdrawn another suit before the ELC without a remedy.

[8] The appellants had demonstrated that they acquired interest/rights over the suit premises which rights are guaranteed under **Article 40 (2) (a)** of the Constitution by virtue of the letter of allotment issued by the defunct Nairobi City Council. In this regard, counsel cited the case of **Wreck Motor Enterprises –versus- The Commissioner of Lands & 3 Others** Civil Appeal No 71 of 1997 where it was held;-

> **"Once an allotment letter is issued and the allotee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest."**

[9] In further arguments, counsel stated that the appellants were not heard prior to the arbitrary deprivation of the suit premises contrary to the provisions of **Article 40 (3)** of the Constitution as well as Land Act 2012 which prescribe due process of compulsory acquisition before one is deprived of their property. According to counsel, the respondent did not have any authority to acquire the suit premises for public purposes on behalf of either the National or County Governments that being the mandate of the National Land Commission. Since there was no formal hearing conducted before the appellants' were divested of their right to property, they had a valid claim based on legitimate expectation that should their right to the suit premises be taken away, then they would be compensated adequately. Counsel urged us to allow the appeal.

[10] The appeal was opposed; Mr. Matunda, learned counsel for the respondent relied on his clients' written submissions and made some brief highlights. Counsel supported the judgment which he stated was sound and in accordance to the dictates of the Constitution which provides for an establishment of courts with the status of the High Court to hear and determine disputes relating to the environment, use and occupation of title to land. As the petitioners case over the same suit premises had been filed before the ELC and was withdrawn in a manner to suggest that they were not ready to abide by the orders issued therein, the Judge dismissed the petition and rightly so as jurisdiction is everything. Counsel urged us to dismiss the appeal.

[11] This petition was determined on affidavit evidence submissions. Thus, from the above summary of what transpired before the High Court, we have distilled three issues for determination, that is whether the petition was filed in the wrong court; was it an abuse of the court process in view of ELC No 1454 of 2015 where certain orders were made and finally whether the appellants were entitled to the declaratory and judicial review orders sought. It has been stated time without number that jurisdiction of a court is everything, indeed many authorities have defined it as the foundation and basis that every court or tribunal must establish before embarking on a matter. Where a court or tribunal takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before a court can issue a valid judgment or order. See the case of The ***Owners of Motor Vessel„ Lillian "S? " vs Caltex Oil (Kenya) Ltd [1989] KLR 1.*** It was emphasized that establishing jurisdiction is a condition precedent to the whole case as set out and mandated by statute or the Constitution. **Nyarangi, J.** (as he then was) had this to say;-

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court**

seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[12] The Court of Appeal also emphasised the importance of a court or tribunal establishing its jurisdiction prior to considering the matter before it in **Joseph Njuguna Mwaura and 2 others vs Republic,** Nairobi Criminal Appeal No. 5 of 2008 when it stated that;

"It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function."

However, we are of the view there is no hard fast and rule in this as an issue of jurisdiction is always a legal issue and in some cases it may not appear so obvious until the court has interrogated certain matters. The issue may be embedded within the evidence and in keeping with the overarching objective in the administration to facilitate, just, expeditious proportionate and affordable resolution of dispute, a court may wish to hear the entire matter and make a determination of all the issues on merit and not to merely limiting itself to the issue of jurisdiction. We think such were the circumstances in the instant case where the learned Judge had to look into affidavit evidence against the pleadings as well as the submissions. There was justification in doing so as one of the complaints advanced by the appellant was the fact that they were not given a fair hearing before the suit premises where they conducted their business was repossessed for the expansion of the road.

[13] We find the learned Judge was highly conscious of the dictates of the Constitution as she recited the provisions of **Articles 165 (3)** of the Constitution that gives the High Court unlimited original jurisdiction in criminal and civil matters and a jurisdiction to determine the question of whether a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. This is line with the holding by the **Supreme Court of Kenya in the case of Samuel Kamau Macharia vs Kenya Commercial Bank Ltd &2 Others [2012] e KLR stated that;-**

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred (to it) by the Constitution or other written law. It cannot abrogate to itself jurisdiction exceeding that which is conferred upon it by the law"

[14] It is clear to us that the learned Judge also applied the rules of interpretation of the constitution as stated in Chapter 17 of the Constitution that embody the principles of interpretation that should *inter alia:*

"(a) Promote its purpose, values and principles;

(b) Advance the rule of law and human rights and fundamental freedoms in the Bill of Rights;

(c) Permit the development of the law and the human rights and fundamental freedom in the Bill of Rights;

(d) Permit the development of the law; and

(e) Contribute to good governance."

Also in the case of **South Dakota V North Carolina 192 US 268 (1940) L ED**, the US Supreme Court said at page 465: which has been quoted by this Court severally emphasized the need to give a global overview of all the provisions of the constitution and not to isolate a particular provision as thus;-

"Elementary rule of constitutional construction is that no one provisions of the constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the general purpose of the instrument."

[15] The learned Judge observed the cardinal Rules of interpretation of the Constitution as she went on to consider the provisions of **Article 162 (2)** which provides for the establishment of courts with the status of the High Court determine the environment and the use and occupation of, and title to land. The principle dispute raised in the appellants' petition was in regard to their right to occupy the suit premises or the fair compensation after what they termed compulsory acquisition or the quantum of compensation. All these are disputes that fall under the jurisdiction of the Environment and Land Court. Moreover, the same issue was indeed before the said court as explained here above in **ELC No. 1484 of 2014**. We entirely agree with the conclusions drawn by the learned Judge in paragraphs 59 and 60 of the judgement where she posited as follows;-

"To reiterate, the petitioners allege that they are the owners of the property on which Tena Market stood, and which has now been utilized for the expansion of the Outer Ring Road. They are aggrieved with the amount of compensation that the respondent offered on what they term compulsory acquisition, but which the respondent terms as a disturbance allowance for requiring persons with no legal right to the land to move. Whatever term one gives it, the proper forum for the determination of the matter was the Environment and land court, not his court.

The Environment and Land Court had in ELC, No 1484 of 2014, heard the parties on the plaintiffs' application for conservatory orders, and had determined that they needed to move from the road reserve and ventilate their claim with regard to compensation or disturbance allowance thereafter. That the petitioners were misguided enough or misadvised to withdraw that suit and file the present petition is a matter of regret, for it demonstrates a misuse of the court process which this Court cannot countenance."

[16] We entirely agree with the above conclusions which are clearly supported by the pleadings and the affidavit evidence. It is not disputed the two suits were dealing with the same subject matter and the same parties trading at the Tena market who were affected by the expansion of Outer Ring Road. By filing two cases in the High Court and ELC, the petitioners must have been forum shopping, while forgetting the cardinal principle that he who seeks justice must do so with clean hands and play the game with all the card facing up and not some hidden in the pocket. Having found the appellants had abused the court process, the Judge had no obligation to exercise her discretion to transfer a suit that was found in the wrong court purposely to steal a match to the right court. The fate of such a suit was dismissal.

[17] Having expressed ourselves, as we have on the issue of jurisdiction, the practice would be for us to down our tools at this stage, but since the learned Judge considered other issues raised in the petition such as the violation of A**rticle 47** of the Constitution on the Right to fair administrative action and deprivation of property which we will tackle together. The petitioners claim was that they were not given a hearing before a decision was made to dispossess them of their property. They termed the acquisition of their property unlawful, arbitrary and unconstitutional limitation to the right to property by way of compulsory acquisition. The appellants claim that they were lawful allottees by the City Council of Nairobi of the various stalls forming part of the Tena Market and they exhibited some allotment letters dated September 2007 which were given subject to certain conditions as follows;-

"…I am therefore pleased to inform you that the City Council of Nairobi has confirmed the allocation of stall No C50 to you. The following conditions will apply;-

1. Payment of non-refundable deposit of Ksh 2,600/= within 14 days from the date of this letter.

2. You will also obtain a single business permit for your business you operate in the stall

3. You will also pay rates to the City Council of Nairobi as per the Chief Valuers recommendation

4. You will adhere to all other Council By-Laws and conditions as pertains to such schemes.

5. The conditions are subject to review from time to time.

6. The plot will remain a property of the City Council of Nairobi."

[18] In answer to the claim of land, the respondent filed very detailed deposition sworn by Mr. Wandarua showing the procedures that were adopted first to sort out claims by parties who had titles to the plot. Such cases were referred to the National Land Commission for processing the relevant acquisitions and/or reviews as the case may be. But for those without titles like the appellants a comprehensive resettlement and or relocation process took place first by the City Council of Nairobi ceasing to renew the temporary occupational licences from 2012 for all the traders along Outer Ring thereby bringing its reserved legal occupancy to an end to pave way for the construction works. This therefore gave way for the relocation phase and various options including relocation to available spaces within existing City Council Markets or lieu thereof an ex-gratia payment dubbed disturbance allowance or token which was proposed at Ksh 50,000 for the stall allottees and Ksh 10,000 for their tenants. In this regard, the respondent worked closely with officials of the appellants. The learned Judge found these averments were not controverted by the appellants.

[19] On our part and in the circumstances of the aforesaid evidence and findings by the Judge, we agree the appellants were not able to demonstrate any violation of their rights either of property ownership or under fair administrative action. The letters of allotment of the stalls were temporary, it was not an allocation of land as the letter clearly indicated the plot remained the property of the City Council. There were consultative meetings held with the appellants as deposed to on behalf of the respondent which was not denied by the appellant.

[20] In the upshot, we find no merit in this appeal, which we hereby order dismissed. Due to the nature of these proceedings that involve individuals who were seeking Constitutional interpretation of what they perceive to be their rights as against a public corporation, we make no order as to costs. Each party shall bear their own costs.

Dated and delivered at Nairobi this 16th Day of February 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR