



**Mwangi & 33 others (Petitioning on their own and on behalf of 106 others)
v National Land Commission & 2 others (Environment & Land Petition
E018 of 2022) [2023] KEELC 16705 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16705 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E018 OF 2022
AA OMOLLO, J
MARCH 28, 2023**

BETWEEN

**HUMPHREY CRISPUS MWANGI & 33 OTHERS PETITIONER
PETITIONING ON THEIR OWN AND ON BEHALF OF 106 OTHERS**

AND

**THE NATIONAL LAND COMMISSION 1ST RESPONDENT
NAIROBI CITY COUNTY 2ND RESPONDENT
GIBSON KAMAU KURIA T/A KAMAU KURIA & COMPANY
ADVOCATES 3RD RESPONDENT**

RULING

1. The 2nd Respondent filed a notice of Preliminary Objection dated August 5, 2022 against the Petition and PO which raised the following grounds;
 1. That the Petition is res judicata as the issues raised therein were duly canvassed and determined in HCLAA No 1 to 84 of 1989 and the Judicial Review Misc No443 of 2018
 2. That the Petition is in contravention of the provisions of the Government Proceedings Act Cap 40 Laws of Kenya
 3. That the Petition does not raise any reasonable cause of action as against the 2nd Respondent
 4. That the Petition is therefore bad in law, vexatious and an abuse of the court process.
2. The 2nd Respondent and the Petitioners filed their submissions dated December 16, 2022 and February 12, 2023 respectively in arguing the PO. The 2nd Respondent gave an introductory overview of the Petition as filed by the Petitioners seeking for;



- i. orders that this Honourable Court be pleased to issue an Order of mandamus by way of Judicial Review compelling the 1st and 2nd Respondents by themselves and/or by their agents to pay the Petitioners an aggregate sum of Kshs 113,659,911.04 being the agreed compensation for the compulsory acquisition relating to the Petitioners' parcels of land within Ndakaini Dam of Muranga County;
 - ii. that an order of mandamus be issued by way of judicial review compelling the 1st and 2nd Respondents by themselves and/or their agents to pay the Petitioners the agreed compensation amount together with interest at the court's rates pursuant to section 26 of the [Civil Procedure Act](#) and pursuant to section 117 of the [Land Act](#) as from 1989 until payment in full;
 - iii. that this Court adopts the decision of the High Court in the HC Misc No 443 of 2018 – Nairobi Mwangi Mweru & 5 Others vs The Commissioner of Lands compelling the Respondents to pay the Petitioners and that an order of mandamus be issued compelling the Respondents to pay the Petitioners' disturbance fee at 15% of the awards pursuant to paragraph 4 of the Schedule to the [Land Acquisition Act](#) cap 295.
3. The 2nd Respondent stated that indeed about the year 1989, the then Commissioner for lands initiated the process of public acquisition of the Petitioners' land at Ndakaini Area to be utilized for the construction of the Ndakaini dam which was to provide water for its residents and its environs and that the alleged failure to compensate the Petitioners' for their land acquired led them to file suit HCLAA No 1 to 84 of 1989 against the 1st Respondent seeking for full payment of the agreed compensation and the parties agreed to record consents on settlement of the matter.
 4. The 2nd Respondent also submitted that in the year 2018, the Petitioners filed a Judicial Review application, HC Misc Civil Application No 443 of 2017 as against the 1st Respondent and enjoined the 2nd Respondent and the Nairobi City Water and Sewerage Company Limited seeking for full payment of their compensation and interest thereto and on March 16, 2018 the Court gave an Order compelling the 1st Respondent to pay them the sum of Kshs 3,448,234.16/= either by itself or through the 2nd or Nairobi City Water and Sewerage Company Limited with interest at the court's rate as from 1989 until payment in full. That in this instant petition, the petitioners have filed on the same subject matter seeking for Orders which are a replica of the Orders sought in HC Misc Civil Application No 443 of 2017 where the 1st and 2nd Respondents were parties.
 5. In submitting in support of the grounds raised in the preliminary objection, the 2nd Respondent stated that the petition as filed is *res judicata* as per the provisions of Section 7 of the [Civil Procedure Act](#). It relied on the decision of the Court of Appeal in [The Independent Electoral And Boundaries Commission Vs Maina Kiai & 5 Others](#), [2017] eKLR), and reaffirmed by the Supreme Court in [John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others](#) [2021] eKLR where that court held that:

“(86) We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and



d) There must be between the first and the second action identical parties, subject matter and cause of action.”

6. The 2nd Respondent submitted that the Petitioners in paragraph 3 of the Petition pleaded that this Court in HCLAA Number 1 to 84 of 1989 granted them an award of Kshs 932,525.00/= as against the 1st Respondent being the compensation for their land which was compulsorily acquired by the Government through the 1st Respondent. A similar averment is repeated by Humphrey Crispus Mwangi in his affidavit in support of the Petition. In paragraph 4 of the Petition the Petitioners also stated that pursuant to the decision in HCLAA No 1 to 84 of 1989 they proceeded to file the Judicial Review HC Misc Application No 443 of 2017, asking for Orders similar to the ones sought in this Petition. The 2nd Respondent argued that the prayers in the instant Petition are directly and substantially similar to the Orders of compensation sought and granted in HC Misc Application No 443 of 2017 on the same subject matter which involved same parties save for Nairobi City water and sewerage company limited and the matter was conclusively heard and determined by a court with competent jurisdiction.
7. The 2nd Respondent contended that the Petitioners have introduced new prayers in this petition which could have been substantively addressed and determined in HC Misc Appl 443 of 2017 and relied in the Court of Appeal’s decision in the case of *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others vs Permanent Secretary, Ministry of Energy & 17 others* where it was held that:

“*res judicata* would apply not only to situations, where a specific matter between the same persons litigating in the same capacity as previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in installments”
8. The 2nd Respondent also submitted that the petition does not raise any reasonable cause of action as against it because it was not privy to the proceedings in HCLAA No 1 to 84 of 1989 and the consent that ensued therefrom. Further that the decision issued by the court in Misc Application No 443 of 2017 did not directly and/or impliedly compel it to settle the amount due and owing to the Petitioners by the 1st Respondent since the order was directed at the 1st Respondent to pay amounts due and owing to the Petitioners either by itself or through the 2nd Respondent or through the Nairobi City Water and Sewerage Company Limited. That the orders issued by court was not issued jointly or severally as against the Respondents.
9. The 2nd Respondent also submitted that the Petition contravenes the provisions of the *Government Proceedings Act* Cap 40 Laws of Kenya stating that the Petitioners have failed in entirety to directly link the 2nd Respondent to the allegation of compulsory acquisition of their land and/or payment of the compensations due and owing to them by the 1st Respondent. Further, that the Petition as filed does not meet the threshold of section 21(1) of the *Government Proceedings Act* as it does not contain any Order that has been issued by any court directly compelling 2nd Respondent to pay the amounts due and owing to the Petitioners.
10. The 2nd Respondents also added that Petitioners failed to indicate before this court as to whether they complied with section 21 of the *Government Proceedings Act* to facilitate execution of the Orders issued



in HC Misc No 443 of 2017 as against the 1st Respondent stating that execution of money decrees against government requires one to procure a certificate of order against government and then serve on the accounting officer of the government/government institution as was held in David Kamau Ndege v Principial Secretary, Ministry of Health & 2 others; Public Service Commission & another (Interested Parties) that:

“ 50. The wording of section 21 of the Government Proceedings Act is in a way that the accounting officer cannot pay out sums of a decree to a decree-holder or his Advocate without the Certificate which I have said is an accounting document. It shall not make sense therefore to proceed to consider whether or not there has been contempt of the Court decree, when it is clear that the documents that would enable settlement of the decree have not been obtained by the Applicant, and availed to the accounting officer...51. In conclusion, let the Petitioner comply with the provisions of section 21 of the Government Proceedings Act and section 94 of the Civil Procedure Act. Have the costs taxed, extract and serve the certificate against Government. It is only after this and if there is failure to comply with the decree in any manner, that he shall be at liberty to initiate contempt proceedings.”

11. The Petitioners also gave a background of the pleadings and outlined the parameters of a preliminary objections as established in the Mukisa Case as that; -
 - A. Consists of a point of law which has been pleaded;
 - B. If argued may dispose of the suit;
 - C. Examples thereof are; - i. Objection to the jurisdiction of the Court; ii. A plea of limitation of action; and iii. Submissions that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration;
 - D. Is argued on the assumption that all facts pleaded by the other side are correct;
12. The Petitioners submitted that to establish whether the Petition herein is *res judicata* this Court has to look at facts which are not issues of law and need an application and that also the 2nd Respondent was not party to all the High Court Appeals No 1-84 of 1989. They submitted that the Petitioners herein were not party to the Judicial Review Misc No 443 of 2018 therefore the parties to the matters are different.
13. The Petitioners further submitted that the cause of action in the appeals No 1-84 of 1989 was an appeal against the awards made by the Commissioner of Lands after an inquiry while the cause of action in Judicial Review Misc No 443 of 2018 was an order of mandamus for payment of Kshs, 3,448,234.16. They contend that whereas the cause of action in this Petition is an infringement of the Petitioners' rights as enshrined in Articles 40, 47, 35, 27, 28 and 43 of the Constitution and it seeks for an order of mandamus for payment of Kshs 113,659,911.04, the issues raised are not similar to what was in issue in the previous suits hence the petition is not *res judicata*. They cited the case of Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others, [2017] eKLR in support of their submissions.
14. On the issue of the Petition contravening the provisions of the Government Proceedings Act, the Petitioners submitted that the issue before the court is an infringement of the Petitioners rights and not execution hence execution can only arise once this Court pronounces itself on whether there is infringement of the rights or not. The Petitioners also submitted that they have a sufficient cause of action as their lands were compulsorily acquired by the Respondents, they went through a process of



inquiry and awards made yet the Respondents have not paid them and therefore it is an infringement of their rights as enshrined in the constitution.

15. The Petitioners submitted that the filed Petition is a matter of public interest and that no harm shall be suffered if it is heard on merit relying on the Court of Appeal decision in dealing with the issue of land as a matter of public interest in Kenya Hotel Properties Limited V Willisden Investments Limited & 4 others [2013] eKLR where it held that; -

“...we wish to pause a question as to when public interest is put in motion. In the case of *East African Cables Limited Vs The Public Procurement Complaints, Review & Appeals Board And Another* [2007] eKLR the Court of Appeal indicated situations where public interest should take precedence in the following words:- “We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable”

Determination

16. I have considered the arguments put forth through the submissions. The Petitioners argued that the PO as raised does not meet the threshold of a PO as set out in the Mukhisa Biscuits case because the 2nd Respondent did not file an application to present to court what they argue were facts. They also stated that the matters in issue herein are different to the matters that were in issue in HCLAA 1-84 of 1989. The Petitioners submitted that in this Petition, their contention is that the awards made to them to be paid and which awards on appeal were enhanced but to date they have not been paid.
17. This line of submission put forth by the Petitioners in my understanding and interpretation amounts to a concession that there was a previous case. The particulars of the former case is pleaded in Paragraph 3&4 of the Petition. The question which begs the answer is whether or not this Petition is res judicata HCLAA 1 to 84 of 1989. The 2nd Respondent has paraphrased the conditions for res judicata as laid out in the case of IEBC vs Maina Kiai & 5 others (2017) EKLR and John Florence Maritime (*Supra*).
18. From the pleadings, this court deduces that the issues in contention in HCLAA concerned the amount awards granted to the Petitioners for compensation of their parcels of land that were compulsorily acquired. The Petitioners have since pleaded that those awards were enhanced on appeal when a consent was recorded in the matters in the year 1990. I have perused the reliefs sought in this Petition which relates orders of mandamus to compel the Respondents to pay the sums awarded to the Petitioners. The Petitioners pleaded that the failure to pay the awards has infringed on their right to property. The current Petition bear the face of execution proceedings hence it cannot be res judicata the proceedings in HCLAA No 1 to 84 of 1989 that was on substance of the award.
19. The second question is whether this Petition is Res Judicata HC JR MISC 443 of 2017. I have perused the judgement in Misc 443 of 2017 from the KenyaLaw portal where Odunga J. (as he then was) in his judgement in that case granted an order of mandamus compelling the Respondent to pay the Applicants the sum of Kshs 3,448,234 as decreed by the High Court in HCLAA 42 of 1989 together with interest at court rates. It goes without a doubt that the proceedings in Misc 443 of 2017 were executory proceedings as relates to judgement obtained in HCLAA No 42 of 1989.



20. Were these petitioners bound to have executed under Misc 443 of 2017 and their failure now make the current petition res judicata? Asked differently, is execution considered as a suit? In this case of [*IEBC vs Maina Kiai & 5 Others*](#) (supra) and under the provisions of Section 7, one of the conditions for a suit to be rendered *res judicata* is that the former suit was between the same parties under whom any of them claim and that those parties were litigating under the same title. In this case, each of the Petitioners received their awards which were given distinctly in each of the appeals running from numbers 1 to 84.
21. The Respondents were required in law to make payments due to each of the Petitioners. In my opinion and I so hold that since the decrees were distinct, any execution proceedings undertaken for payment in any one of cases cannot be used to bar execution for any pending decrees as long as those other decrees remained unpaid. The 2nd Respondent has not annexed to this court any order which consolidated the decrees. The purpose of *res judicata* was to make sure that parties brought all their cases at once and forbade litigating by instalments. However, in this instant, the decrees are out there unpaid and it is the non-payment which forms the cause of action in this Petition. I do not agree that the demand for payment made by filing of this this Petition is *res judicata* so dismiss the Objection under the head of *res judicata*.
22. The 2nd Respondent stated that the Petition did not comply with Section 21 of the [*Government Proceedings Act*](#) which provides thus;

“ 21. Satisfaction of orders against the Government;

- (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General. (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any



amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

23. The reliefs sought in the Petition are orders inter alia seeking to compel the Respondents to pay the Petitioners their compensation as awarded in HCLAA Nos 1 – 84 of 1989. This is part of execution process but it is not yet at the level anticipated under section 21 of Cap 40. It can only arise after judgement is entered for the Petitioner. On this limb, I find the PO was pre mature.
24. The last question is whether or not the Petition as filed raises any reasonable cause of action as against the 2nd Respondent. In arguing they have cause of action, the Petitioners submitted that they went through a process of inquiry and awards were made yet the Respondents have not paid the said awards thus infringing on their rights. That the objection is only meant to scuttle their quest for compensation.
25. The Petitioners already have a judgement arising from a consent order entered on July 6, 1990 in HCLAA No1 to 84 of 1989. The 2nd Respondent admits that the judgement entered in favour of the Petitioners HC JR in Misc 443 of 2017 allowing the notice of motion dated July 25, 2017 was directed at the 1st Respondent (who is the 1st Respondent in the current proceedings) either by itself or through the 2nd and 3rd Respondents to pay the Applicant an aggregate sum of Kshs 3,448,234.16 as decreed in HCLAA No 42 of 1989. The 2nd Respondent herein had been sued as the 3rd Respondent in the Judicial Review application.
26. The fact that the execution of the decree touches on the 2nd Respondent on whose behalf the suit parcels was being acquired, it is misleading to submit at this early stage that there is no cause of action as against it. Its argument that the order issued was not jointly or severally against the Respondents does not exempt the 2nd Respondent from culpability for as long as the debt has not been settled. I find this leg of the objection without merit and disallow it.
27. In conclusion, I hold that all the 3 grounds raised in the preliminary objection are without merit. The same is dismissed with costs to the Petitioners.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2023

A. OMOLLO

JUDGE

In the Presence of

Ms Gachugu h/b for Ambani for the Petitioners

Ms Lumumba h/b for Wachira for 2nd Respondent

N/A for 1st and 3rd Respondents

