



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Nesco Services Limited v Ethics and Anti-Corruption Commission & 3 others (Environment & Land Petition E035 of 2022) [2023] KEELC 17800 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17800 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E035 OF 2022**

**LN MBUGUA, J  
MAY 25, 2023**

**BETWEEN**

**NESCO SERVICES LIMITED ..... PETITIONER**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This suit was filed by way of a petition dated September 14, 2022 in which the Petitioner is inter-alia seeking orders to be declared as the legal owner of the suit parcel LR 209/13557, and a declaration that the threatened actions of the 1<sup>st</sup> respondent of inspection and valuation of the suit land are unlawful and unconstitutional as the land is private property. In the alternative, the Petitioner contends that if the suit land is found to have been irregularly allocated, then he seeks compensation at the market value.
2. The petition was filed contemporaneously with an application of even date in which the petitioner is seeking injunctive orders restraining the 1<sup>st</sup> respondent or its agent from interfering with the suit parcel by way of inspecting or valuing the same. The petitioner argues that such action would threaten its proprietorship rights under Article 40 of the *Constitution*.
3. Vide the interim ruling of November 3, 2022, this Court while declining to determine the Petitioner's application dated September 14, 2022 observed that it had perused the file ELC No 157 of 2017 where the Plaintiff, one Harun Osoro Nyambuki happens to be a director of the petitioner in the current suit and found that the subject matter herein Parcel No 209/13557 is the same in the 2 files. The court therefore directed the parties to address the court on whether this suit is properly filed before this court.



4. It was argued for the petitioners that under Article 23 of the *Constitution*, this Court has the same status as the High Court and has jurisdiction to uphold and enforce the Bill of Rights. It was stated that the Petitioner is a company which claims that the 1<sup>st</sup> Respondent through its actions infringes on its rights under Article 40. That the 1<sup>st</sup> Respondent intends to investigate title to the Petitioner's property and to carry out a valuation, yet the 1<sup>st</sup> Defendant is not a valuer and the Petitioner's property is private land.
5. It was pointed out that ELC Case No 157 of 2017 and this petition are not related as the former is a claim between private citizens where a service lane serving the Plaintiff's property is in contention. The Plaintiff in the said matter argues that the service lane was acquired illegally by the 1<sup>st</sup> Defendant with the help of other Defendants, hence the said suit is a private matter. He contrasts the said case with this petition arguing that the latter suit was filed against a state agency trying to abuse its powers.
6. Counsel for the 1<sup>st</sup> Respondent submitted that they have perused file No 157 of 2017 and the 1<sup>st</sup> Respondent is not a party in that suit, but the Plaintiff in the said suit is a director of the Petitioner herein. He adds that in suit 157 of 2017, the Plaintiff alleges to be the lawful owner of parcel LR 209/13557 which is the subject matter in this petition and the Petitioner seeks the same prayer as in the current suit (petition).
7. He submitted that the genesis of the petition was investigations conducted by the 1<sup>st</sup> Respondent on allegations that LR No 209/13557 is a public car park and the 1<sup>st</sup> Respondent has a mandate to investigate and can institute a recovery suit.
8. Counsel for the 2<sup>nd</sup> Respondent submitted that if the issue of ownership is in suit 157 of 2017, as well as in this Court, then the petition is not properly before the Court and the earlier suit should be handled first.
9. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the petition is subjudice and contravenes Section 6 of the *Civil Procedure Act*, thus it is not properly before this Court. It was submitted that the bone of contention seems to flow from 2 rulings issued in ELC 157 of 2017 by Justices Eboso and Obaga on valuation of the suit property respectively. He invited the court to examine paragraphs 25, 34 and 35 of the Petition as well as the amended plaint in ELC 157 of 2017 and discern that the Plaintiff in that matter is trying to prove ownership of the suit land. He relied on the case of *Muchango Investment Limited v Safaris African Limited [2009] eKLR* to submit that a party should have its day in Court only where there is something to be heard and not as a matter of routine. He added that the petition is an abuse of the court process and a waste of judicial time.

### **Determination**

10. The issue falling for determination is whether this suit is properly before this Court in light of the existence of another suit ELC Suit 157 of 2017.
11. I have duly perused the file ELC 157 of 2017. In the plaint dated March 9, 2017 and amended on December 6, 2021, the Plaintiff is one HARUN OSORO NYAMBOKI. He claims to have purchased land parcel LR No 209/13557 way back in 1997 and was duly issued with a certificate of title. He then proceeded to put up a development on the said land. He contends that the 1<sup>st</sup> defendant in the said suit KENELC SUPPLIES LTD conspired with the National Land Commission, the Land Registrar, The Permanent Secretary Ministry of Lands and Housing, Director of Survey and the Attorney General to grab and convert a public service lane into private use, yet the plaintiff was using the said service lane



to access his property. He further states that the title of land for parcel 209/18289 issued to Kenlec Supplies was obtained fraudulently and unprocedurally. He seeks the following orders in the said suit;

- a. A permanent injunction to issue against the 1<sup>st</sup> Defendant, its servants, employees and/or agents from encroaching into, blocking access entry, erecting any building and/or structure, preventing usage storing any materials, developing and/or dealing in any manner whatsoever with access service lane connected to the plaintiff's premises known as LR No 209/13557 situate along Lang'ata Road – Nairobi west within Nairobi Area.
  - b. An order of cancellation do issue directing the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally to cancel the 1<sup>st</sup> Defendant's title known as LR No 209/18289 and all entries in the register and all documents of ownership.
  - c. An order do issue directing the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants jointly and severally to restore the original service lane of 6 metres serving the plaintiff's premises known as LR No 209/13557.
  - d. Special damages of Kshs 7,575,971/=
  - e. General damages
  - f. Costs and interest
12. The case of the petitioner in the file no. Petition E035 OF 2022 was summarized at the beginning of this ruling. I however add that the supporting affidavit to the petition has been sworn by HARUN OSORO NYAMBOKI who introduced himself as one of the directors of the petitioner.
13. I find that the plaintiff in the case No 157 of 2017, who claims to own parcel 209/13557 desires the court to find that the title issued to Kenlec supplies was obtained fraudulently and unprocedurally, while in the petition E035 of 2022, the petitioner also claims ownership of parcel 209/13557 and has an alternative claim of compensation in the event that its title is found to have been issued irregularly. Thus in both suits (ELC 157 OF 2017 and Petition E035 OF 2022), the court is being called upon to delve into not only a claim of ownership of land, but the validity of the titles issued thereof.
14. Section 6 of the *Civil Procedure Act* provides that:
- ' No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.'
15. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR*, the Court stated that;
- ' ..... for the doctrine of sub judice to apply the following principles ought to be present:-  
(a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.'



16. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested parties) [2020] eKLR* the Supreme Court affirmed that;

' The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process & diminish the chances of courts with competent jurisdiction, issuing conflicting decisions over the same subject matter.'

Also see my decision in *Daniel Mesiri Kasoo & 7 others v Fredrick Nkonge Mutwiri & Another [2020] eKLR*.

17. It is clear beyond peradventure from a perusal of paragraph 7, 25, 33-35 of the petition that the issues being raised by the petitioner can adequately be raised in the suit E157 of 2017. Further, it is also clear that the claimant in ELC 157 of 2017 is the same one in the current suit, save that in the latter matter, he is fronting his company as the claimant.

18. While finding no justification in sustaining the suit in Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya (supra), the court stated thus;

' The mere addition of a party or parties does not alter the pith and substance of the suit...

The uncompromising manner in which courts have consistently enforced the sub judice rule was best explained in *Thiba Min Hydro Co Ltd v Josphat Karu Ndwiga*, [13] which held that it is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other.

The practice of parties converting every issue into a constitutional question and filing suits disguised as constitutional petitions when in fact they did not fall anywhere close to violation to constitutional rights was abhorred'

19. Equally, I find that the filing of this suit amounts to an abuse of the court processes and there is no justification in sustaining the same. The end result is that the Application dated September 14, 2022 and the entire Petition are hereby struck out with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Manyara for Petitioner

Biwott for 1<sup>st</sup> Respondent

Court assistant: Eddel

***ELC PETITION CASE NO. E035 OF 2022 (Ruling) Page 4 of 4***

