



Otieno (Suing as a representative of Kobunga Ranching Group) v Land Adjudication Officer Homa Bay & 2 others; Jokaete Ranching Group & 2 others (Interested Parties) (Environment and Land Constitutional Petition E003 of 2022) [2023] KEELC 18921 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E003 OF 2022**

GMA ONGONDO, J

JULY 19, 2023

**IN THE MATTER OF; ARTICLES 2 (1), 10, 19, 20,22,27,28,29, 40, 47, 48,
63, 68, 159, 162, 165, 258, 259, OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURES RULES, 2013**

**IN THE MATTER OF THE LAND ADJUDICATION
ACT CHAPTER 284 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF UNPROCEDURAL AND/OR ILLEGAL ADJUDICATION
AND SUDIVISION OF LAND TITLE NUMBER KANYAMWA /KABONYO/
KWANDIKU/475 INITIALLY MEASURING 105.40 HECTARES REGISTERED IN
FAVOUR OF THE PETITIONERS INTO THREE PORTIONS TO ALLOCATE THE
INTERESTED PARTIES PORTION TITLE NUMBERS KANYAMWA/KABONYO-
KWANDIKU/1940 AND KANYAMWA/KABONYO KWANDIKU/1941 MEASURING
35.0 HECTARES AND 36.0 HECTARES RESPECTIVELY AND LEAVING 1.4 HECTARES
UNACCOUNTED FOR IN THE SUBDIVISION AND OR ALLOCATION PROCESS.**

BETWEEN

**PAUL OBUNGA OTIENO PETITIONER
SUING AS A REPRESENTATIVE OF KOBUNGA RANCHING GROUP**

AND

**THE LAND ADJUDICATION OFFICER HOMA BAY 1ST RESPONDENT
THE DISTRICT LAND REGISTRAR HOMA BAY 2ND RESPONDENT
JOKODHUL RANCHING GROUP 3RD RESPONDENT**



AND

JOKAETE RANCHING GROUP INTERESTED PARTY
JULIUS OUMA JWAN INTERESTED PARTY
JOKODHUL RANCHING GROUP INTERESTED PARTY

JUDGMENT

1. By a petition dated April 7, 2022 and lodged in court on April 8, 2022, the petitioner through Migele and Company Advocates, is seeking the following orders;
 - a. A declaratory order be and is hereby issued to the effect that the petitioners are the sole owners of the entire parcel title number Kanyamwa/Kabonyo/Kwandiku/475 initially measuring 105.40 hectares to the exclusion of the interested parties, their associates, their agents and or representatives and successors.
 - b. An order of judicial review in the nature of Certiorari be hereby issued to remove from this Honourable court for purposes of quashing the decision of the respondents to issue any title and or give any legal proprietary interest over the parcel title numbers Kanyamwa/Kabonyo-Kwandiku/1940 measuring 35.0 hectares, Kanyamwa/Kabonyo-Kwandiku/1941 measuring 36.0 hectares and kanyamwa/Kabonyo-Kwandiku/475 now measuring 33.0 hectares to the interested parties.
 - c. A declaratory order be and is hereby issued to the effect that property title numbers Kanyamwa/Kabonyo-Kwandiku/1940 measuring 35.0 hectares, Kanyamwa/Kabonyo-Kwandiku/1941 measuring 36.0 hectares and Kanyamwa/Kabonyo-Kwandiku/475 now measuring 33.0 hectares all belong to the petitioners exclusively.
 - d. The petitioners further seek that the Honourable court herein finds and declare that the respondents did not follow the due process in effecting any proprietary interest over the parcel title numbers Kanyamwa/Kabonyo-Kwandiku/1940 measuring 35.0 hectares, Kanyamwa/Kabonyo-Kwandiku/1941 measuring 36.0 hectares and kanyamwa/Kabonyo-Kwandiku/475 now measuring 33.0 hectares.
 - e. The petitioner further seeks for a constitutional remedy of injunction in the nature of a permanent injunction restraining the respondents and any other person including the interested parties on the over parcel numbers Kanyamwa/Kabonyo-Kwandiku/1940 measuring 35.0 hectares, Kanyamwa/Kabonyo-Kwandiku/1941 measuring 36.0 hectares and kanyamwa/Kabonyo-Kwandiku/475 now measuring 33.0 hectares.
 - f. That the Honourable does issue an order directed to the 2nd respondent to issue title deed in favour of the petitioners in respect of parcel number Kanyamwa/Kabonyo-Kwandiku/475 initially measuring 105.40 hectares.
 - g. That the costs of the petition be borne by the respondents.
 - h. Such further and other orders and reliefs as the Honourable Court deem fit to grant.
2. In summary, the petitioner's case is that he presents this petition on behalf of Kobunga Ranching Group, the registered proprietor of the entire parcel number Kanyamwa/Kabonyo/Kwandiku/475 in it's initial form of 105.40 hectares by virtue of article 22 (2) (b) of *the Constitution* of Kenya,



2010 as a member of Obunga Ranching Group. That the said land was so registered in the first instance after completion of adjudication process. That the petitioners have it's original title and possess the same. That at the instigation of the respondents, the land has since been sub divided, and part of it being 71 hectares disposed of and registered in the name of the interested parties without adherence to the prescribed procedure. That the actions of the respondents and the interested parties constitute arbitrary deprivation of property and limitation of their property rights hence precipitating this petition.

3. The respondents are represented by the Hon Attorney General further to a memorandum of appearance filed on April 28, 2023. They were given a fair opportunity to respond to the petition and file submissions, if any, as disclosed in the proceedings of July 19, 2022 and October 25, 2022 in the spirit of Articles 48 and 50 (1) of *the Constitution* of Kenya, 2010 and *Halsbury's Laws of England*, 5th Edition 2010 Volume 61 paragraph 639. Nonetheless, they failed to file any response and submissions herein.
4. The interested parties through G.S Okoth and Company Advocates, reacted to the petition by a replying affidavit of fifteen paragraphs sworn on June 7, 2022 by John Otete Achienga, the chairman of the 1st interested party. It was averred therein, inter alia, that the petitioner has personally and actively pursued this dispute from the adjudication process and various court cases to-date. That the decision of Land Adjudication was upheld by the court and decision of the Minister was quashed. The interested parties annexed a copy of certificate of registration of the 1st interested party as a self –help group and a copy of Land Registrar's letter to the replying affidavit. They urged the court to dismiss the petition with costs.
5. Also, the interested parties deposed that the issues being raised in this petition were raised and argued extensively by the petitioners herein in Kisii HCCC No. 102 of 2003 (OS). That the court reached a decision which was upheld by the Court of Appeal in Civil Appeal No. 277 of 2012. That thus, the petition is res judicata in law, misconceived, based on erroneous facts, frivolous and vexatious.
6. On February 27, 2023, upon hearing learned counsel for the petitioner, learned counsel for the 1st and 2nd interested parties and in the absence of counsel for the respondents duly served, this court directed, inter alia;

“this petition be heard by written submissions.....”
7. The petitioner's counsel filed submissions dated March 20, 2023 on even date, summarized the parties' respective pleadings and framed five issues for determination including whether the petitioner is entitled to any relief herein. In analyzing the issues, counsel relied on articles 23 (3) and 40 of *the Constitution* of Kenya, 2010, *Kenya Akiba Micro Financing Ltd-vs-Ezekiel Chebii and 14 others* (2012) KLR and other authoritative pronouncements.
8. Counsel termed the petition and the entire evidence in support of it, uncontroverted. That constitutionally, this court is mandated to grant the orders sought in the petition thus, the same be allowed.
9. By the submissions dated May 30, 2023, learned counsel for the interested parties made reference to this petition, the interested parties' replying affidavit and that the petition was canvassed by written submissions. Counsel referred to Homa Bay ELCC No. 31 of 2021 (Formerly Migori ELCC NO. E19 OF 2020) determined on 27th October 2021 and Kisii HCCC No. 102 of 2003 (OS) which was upheld by the Court of Appeal in Civil Appeal No. 277 of 2012 thus, implored the court to find the petition res judicata.



10. Furthermore, counsel cited the [Land Adjudication Act](#) Chapter 284 Laws of Kenya, section 25 (1) of the [Land Registration Act](#), 2016 (2012), the Black's Law Dictionary, [Salama Beach-vs-Christopher Kenyariri](#) (2019) eKLR and Dr [Ali Wario-vs-Dr John Ngundu](#) (2011) eKLR on the principle of res judicata. That the petition lacks merit and should be dismissed in entirety with costs to the petitioners.
11. On that account, the issues for determination are as identified by the petitioner and the interested parties in their respective submissions hence, the same boil down to whether;
 - a. This petition is res judicata, and
 - b. Subject to the outcome regarding issue (a) hereinabove, is the instant petition tenable?
12. It is noteworthy that the interested parties raised a preliminary objection to the petition on ground that the same is res judicata as stated in paragraph 5 hereinabove. In [Mukisa Biscuit Manufacturing Company Ltd-vs-West End Distributors](#) (1969) EA 696, the Court of Appeal remarked;

“.....preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection will dispose of the suit.....”
13. The doctrine of res judicata is housed under section 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya. All the ingredients thereof are taken into consideration in relation to this petition.
14. In [Black's Law Dictionary](#) 10th Edition at page 1504, the term “res judicata” means an issue that has been definitively settled by judicial decision. The three essential elements of the term set out therein are;
 - a. An earlier decision on the issue,
 - b. A final judgment on the merits, and
 - c. The involvement of the same parties or parties in privity with the original parties.
15. Similarly, [Concise Oxford English Dictionary](#) 12th Edition at page 1224, defines the term ‘res judicata’ as infra;

“A matter that has been adjudicated by a competent court and may not be pursued further by the same parties.”
16. It must be borne in mind that in Kisii HCC No. 102 of 2003 (OS), Civil Appeal NO. 277 of 2012 at the Court of Appeal and Homa Bay ELCC No. 31 of 2021 involved the same parties or parties under whom they claimed and the same land. The issues therein were finally determined by courts of competent jurisdiction. The same parties or parties under whom they claim as well as the same land are involved in this matter as confirmed at paragraph 12 of the petition and paragraph 7 of the interested parties’ submissions.
17. Plainly, the present petition is a suit. In section 2 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya, the term “Suit” means;

“all civil proceedings commenced in any manner prescribed.”
18. In the obtaining circumstances, this petition is res judicata. So, the petitioner is not entitled to the orders sought therein.



19. The cardinal principle is that litigation must come to end; see *Halsbury's Laws of England* 4th Edition Volume 22 page 273.
20. In the case of *Kirugi and another-vs-Kabiya and 3 others* (1987) KLR 347, the Court of Appeal noted that the burden is always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof. In this petition, the proof is short of the said standards.
21. In conclusion, I find the instant petition unmeritorious. The same is hereby dismissed.
22. By virtue of the proviso to section 27 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya and *Rai-vs-Rai* (2014) eKLR, costs of this petition shall be borne by the petitioner.
23. It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF JULY 2023

G. M. A ONG'ONDO

JUDGE

