



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC PETITION NO. 250 OF 2015

**IN THE MATTER OF : ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 40, 43 (1) 50 AND 28 CONSTITUTION OF
KENYA 2010**

JOHN OMOLO ORACHA

GEORIGE MWANYAMA MCHOI

MARTINE OTIENO

VALANTINE SAMBA MWALUGA.....PETITIONERS

AND

KENYA PETROLEUM REFINERIES LTD

NATIONAL LAND COMMISSION

COUNTY POLICE COMMANDER

THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. The issue for determination is the preliminary objection dated 6th October 2015 raised by the 1st Respondent. The 1st Respondent pleads that this petition is *res judicata* because the land the subject matter of this petition is the same as what was determined in Mombasa HCCC No 544 of 2000. The second issue raised is that this Court is *functus officio* and lacks jurisdiction to hear this matter.

2. In arguing this preliminary objection, parties filed detailed written submissions which I have considered while writing this decision. In brief, the 1st Respondent submitted that the judgement rendered in HCCC No 544 of 2000 between Kenya Petroleum Refineries Limited and Hassan Ngoa and 53 others was made in *rem* and not in *personum*. That from the prayers contained in the petition and the petition as instituted wholly relates to matters that were determined and duly finalized in Mombasa HCCC No 544 of 2000. Therefore the principle of *functus officio* which aims to block parties from re – opening a suit after a final decision has been rendered applies. He cited the case of **Telkom (K) Ltd vs John Ochanda (2014)eKLR** to support this submission.

3. The 1st Respondent defended the issue raised by the Petitioners that *res judicata* is not a pure point of law. He quoted **Omondi vs NBK Ltd & Others (2001) IKLR 579**. The 1st Respondent submits that this petition is *Res Judicata* because the five mandatory conditions enumerated in **Lotta vs Tanaki & Others (2003) 2 EA 556** exist concurrently or at once in this petition and proceeded to demonstrate how.

4. The Petitioners on their part submitted that the doctrine of *functus officio* should not be confused with the doctrine of *res judicata*. It is the Petitioners' case that the *functus officio* doctrine would only apply to the proceedings brought in HCCC No 544 of 2000. The Petitioners also submitted on the limb of requirement of want of notice as provided for under order 1 rule 8 (2) of the Civil Procedure Rules but which was abandoned by 1st Respondent and asked the Court to dismiss the objection.

5. The Petitioners submit that this preliminary objection is not proper in relation to what was set out as a point of law in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors LTD (1969) EA 696**. That what are raised here are mere facts to be ascertained by evidence; e.g whether or not the defendants in **HCCC 544 of 2000** are proxies to the petitioners herein; whether there was collusion between those defendants and the present petitioners or whether the previous suit was litigated on behalf of all others.

6. The Petitioners contend that the 1st Respondent has failed to demonstrate the principles of *res judicata* as set out in section 7 of the Civil Procedure Act. Further that the petition raises questions of fact and law that were not the subject of **HCCC 544 of 2000** e.g whether one can be evicted pursuant to a decree where he/she was never a party. Secondly that the parties in the former suit are different from the current Petitioners. Lastly that the former suit has not been heard and finally decided. They urged the Court to dismiss the objections raised.

7. To begin with, the 1st Respondent has cited the case of Telkom Kenya supra which defines the doctrine of *functus officio* as a doctrine to prevent the re – opening of a matter before a Court that rendered the final decision. The decision went further to state that the power to re – hear a matter was transferred by the Judicature Act to the Appellate division. I have read that case and I form an opinion that the circumstances of that case are not the similar to the present case. I am in agreement with Petitioners that 1st Respondent has confused the *functus officio* doctrine with that of *res judicata*. I do not see how this doctrine would be applied to this petition.

8. The second issue is whether the objection raised by the 1st Respondent meets the test laid for a point of law as enumerated in the **Mukisa Biscuits** case supra. To answer the petitioner, section 7 of the Act gives six explanations to be considered whether a suit is *res judicata* or not. These explanations are to be derived from the facts set out in the pleadings and need not necessarily be ascertained by adduction of evidence. This Court's duty is to establish whether the 1st Respondent has proved any of those explanations. Both parties made reference to the provisions of section 7 in proving *res judicata* i.e

- a) **The subject matter must be directly and substantially in issue in the subsequent suit as in the former suit.**
- b) **The former suit must be between same parties or parties claiming under them.**
- c) **The Court which decided the former must have been competent to try it.**
- d) **The matter in issue must have been heard and finally decided in the former suit.**
- e) **The parties must have litigated under the same title in the former suit.**

9. It is not disputed by both parties herein that the subject parcels of land in this petition is similar to the parcels adjudicated in **HCCC 544 of 2000**. It is also not disputed that the Court which heard and determined HCCC 544 of 2000 was competent to try it. The two issues in dispute is whether the parties here were proxies/proxies of parties in the former suit. The second issue is whether the former suit has

been finalised.

10. Tackling the second issue, the former suit was concluded and a judgement pronounced. A copy of that judgement is part of this record. The petitioners view of questioning its finalization is on the basis that an appeal was lodged. My view in this and relating it to section 7 is that the matter was heard and determined for purposes of section 2 and explanation 1 of section 7. The petitioners have raised in their submissions whether they can be evicted on a decree where they were not parties. It is admitted that the former suit is indeed decided. The appeal is indeed challenging that decision that was made by the Court that heard and determined the matter. As regards to the inference of;

“finally decided”, this Court has concurrent jurisdiction with the court who determined the former suit. Therefore the matter was decided as envisaged under section 7 of the Act.

11. The remaining question is whether the petitioners herein are privies or proxies of the defendants in the former suit. The defendants in the former suit were sued by the 1st Respondent because they lived on the suit parcels of land. The 1st Respondent were granted orders to evict them. This petition is brought by the 4 petitioners “*petitioning on their own behalf and on behalf of the residents of Port Reitz residing on Land Reference numbers 2586, 2587, 2504, 255/1, 1194/R, 244/1, 1211/1 Section IV Mainland North Mombasa*”.

12. If the defendants who were 54 in the former suit were residents in the same subject matter (land) how then can these petitioners deny they are not proxies or privies to parties in the former suit when now in their petition, they are claiming on their own behalf and on behalf of the residents of Port Reitz which includes the defendants in the former suit? This is a fact deductable from the face of the pleadings and need no ascertainment.

13. Once the parties are found to be the same or capable of litigating through them, the issues raised in the petition which are submitted to be new ought to have been raised by the defendants in the former suit. I am satisfied that the 1st Respondent has proved the doctrine of *res judicata* in regard to this petition. In the result, I find merit on the objection that this petition is *res judicata*. Consequently I strike out the petition with an order that each party to bear their respective costs of the preliminary objection and the petition.

Ruling dated and delivered at Mombasa this 30th day of June 2016.

A. OMOLLO

JUDGE