



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KILGORIS

CONSTITUTIONAL PETITION NUMBER E001 OF 2021

IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION

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**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES, 27,28,40
AND 47 OF THE CONSTITUTION OF KENYA,2010**

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IN THE MATTER OF CONTRAVENTION OF RIGHTS TO PROTECTION TO AN INDIVIDUAL'S RIGHT TO PROPERTY

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FREEDOM FROM DISCRIMINATION, HUMAN DIGNITY AND RIGHTS TO FAIR ADMINISTRATION ACTION

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IN THE MATTER OF TRANSMARA/MEGUARA/44

BETWEEN

CHRISTOPHER LEKODI KIMURATA.....PETITIONER

AND

WILLIAM LESHON NKEIYA1ST RESPONDENT

SOLOMON LEMAIYAN NKEIYWA.....2ND RESPONDENT

SENIOR PRINCIPAL MAGISTRATE, KILGORIS LAW COURTS...3RD RESPONDENT

CHIEF LAND REGISTRAR KILGORIS..... 4TH RESPONDENT

INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

REGISTRAR OF SURVEY.....6TH RESPONDENT

RULING

The issue for determination before this Honourable Court is the Preliminary Objection by the 1st and 2nd Respondent/Applicants (hereinafter referred to as "the Applicants") dated 4th October 2021 and filed on the 6th of October 2021 (hereinafter referred to as "the Preliminary Objection")

The Preliminary Objection raises Four (4) grounds for determination which are mainly;-

a. THAT the Petition dated 22nd September 2021 seeking among other Orders, an Order of Certiorari to quash the decision and proceedings in Kilgoris ELC No.14 of 2018 is time barred by virtue of the Provisions of Section 9 (3) of the Law Reform Act Cap 26 and Order 53 Rule 2 of the Civil Procedure Rules 2010.

b. THAT the Prayer seeking for an Order of Certiorari to quash all documents and records held by the 4th and 6th Respondents regarding land parcels TRANSMARA/MEGUARA/44 AND TRANSMARA/MEGUARA/150 is Res Judicata as it was the subject of the proceedings and judgement in KILGORIS ELC PMCC NO.14 OF 2018 where the Petitioner's sons were the Defendants while the 1st and 2nd Respondents were the 1st Plaintiff and husband to the 2nd Plaintiff therein respectively.

c. THAT the Petitioner is guilty of Constitutional avoidance as the Petition herein discloses no constitutional violation against the Petitioner as alleged and is just but a short cut from appealing against the decision of the trial magistrate in Kilgoris ELC PMCC No.14 of 2018.

d. THAT the instant Petition is therefore bad in law, frivolous, vexatious, scandalous, and designed to be a waste of this Honourable Court's time, thus outrightly an abuse of the Court process.

e. THAT the Application and Petition dated 22nd September 2021 are devoid of merit deserving to be dismissed with costs to the 1st and 2nd Respondents.

The Preliminary Objection was served on the Petitioner/Respondent as well as The Attorney General who is on record for the 3rd, 4th, 5th and 6th Respondents pursuant to a Memorandum of Appearance filed on the 19th October 2021.

The Applicants filed their Submissions in support of the Preliminary Objection on the 19th October 2021 together with the necessary authorities and effected proper service on the other parties.

The Petitioner/Respondent filed his Written Submissions in opposition to the Preliminary Objection on the 15th November 2021 together with the authorities in Support thereof.

The Attorney General on behalf of the 3rd, 4th, 5th and 6th Respondents has not filed any submissions either in support or opposition to the Preliminary Objection.

ISSUES FOR DETERMINATION.

A) Is the Prayer of Certiorari prayed in the Petition dated 22nd September 2021 seeking to quash the decision and proceedings in KILGORIS ELC PMCC No.14 of 2018 time barred by virtue of Section 9(3) of the Law Reform Act, Cap 26 and Order 53 Rule 2 of the Civil Procedure Rules 2010?

Section 9 (3) of the Law Reform Act states as follows:-

“ In the Case of an Application for an Order of Certiorari to remove any judgment, order, decree, conviction or other proceedings for the purposes of its being quashed, leave shall not be granted unless the application for leave is made not later than Six (6) months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgement, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appeal has expired.”

On the Other hand, Order 53 Rule 2 of the Civil Procedure Rules, 2010 states as follow;-

“Leave shall not be granted to apply for an Order of Certiorari to remove any judgment, order, decree, conviction or other proceedings for the purposes of its being quashed, unless the application for leave is made not later than Six months after the date of the proceedings or such shorter period as may be prescribed by the Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

The Applicants submit in their written submissions that any Application for an Order of Certiorari to quash a judgement and proceedings can only be entertained if it is brought within Six months from the time such judgement was issued.

According to the Applicants, the judgement in Kilgoris ELC PMCC No.14 of 2021 which the Petitioner/Respondent seeks to Quash by way of Certiorari was delivered on the 24/09/2020.

The Applicants state that the Petition before Court was filed on 22/9/2021 after the prescribed period of Six Months as provided in Section 9 (3) of the Law Reform Act, Cap 26 and Order 53 Rule 2 of the Civil Procedure Rules.

The Applicants have relied on the Authority of ***KENYA ASSOCIATION OF AIR OPERATORS-VERSUS- KENYA AIRPORTS AUTHORITY & ANOTHER, CIVIL APPEAL No. 285 OF 2013 (2018) eKLR.***

In addition to the above grounds, Applicants submit that even if the Court would be inclined to hear the Petition, the Courts hands are tied because there is no application for enlargement of time beyond the Six Months period and this effectively contravenes a substantive provision of the law governing applications of Certiorari as appertains jurisdiction of the Court which is not a mere procedural technicality to be cured by Article 159 (2) of the Constitution.

The Petitioner/Respondent opposes the Applicants in the Preliminary Objection by raising the following arguments.

First and foremost, the Petitioner/Respondent states that the Petition before Court is brought under Articles 2,3,4,22,23,40 and 258 of the Constitution of Kenya, 2010.

Consequently, a distinction needs to be made when dealing with proceedings under Articles 22 and 258 of the Constitution seeking the enforcement of human rights and fundamental freedoms by way of a judicial review order of Certiorari on one hand and proceedings in the nature of judicial review seeking an order of Certiorari, but which proceedings do not seek the enforcement of human rights or fundamental freedoms on the other hand.

In other words, can a Petitioner seeking to enforce his/her rights through a Constitutional Petition under Articles 22 and 258 of the Constitution be denied that right by the provisions Sections 9 (3) of the Law Reform Act, Cap 26 and Order 53 Rule 2 of the Civil Procedure Rules, 2010?

This Court has noted with appreciation the authority of **METAL BOX CO LIMITED -VERSUS- CURRY'S LIMITED, (1988) 1 ALL ER 341 and then Kenyan Authority KARIUKI KIBOI -VERSUS- ATTORNEY GENERAL eKLR, NAIROBI CIVIL APPEAL NO.90 OF 2015**, where the Court of Appeal heard and determined a claim which arose in the mid- 1980s and but a Petition was filed in 2010.

The Court of Appeal held as follows:-

“Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The Law concerning limitations of actions cannot be used to shield the state or any person from claims of enforcement of fundamental rights and freedoms protected under the Bills of Rights.”

In the Case of **ENVIRONMENT & LAND PETITION NUMBER 28 OF 2017 BETWEEN SAMUEL KIMONDO THEURI-VERSUS-MOHAMMED SWAZURI & 2 OTHERS (2018) eKLR**, again cited by the Petitioner/Respondent, the Learned Judge held as follows:-

“On the first issue, the Respondents and the Interested Party are contending that the judicial review proceedings were not brought within 6 months. It is important to note that this application was brought as an interlocutory application under a constitutional petition. These are not proceedings which were commenced by way of judicial review. If the proceedings had been brought under judicial review, then the issue of 6 months would have come in. This Court is empowered to grant reliefs of judicial review when hearing a matter commenced as a Constitutional petition. I therefore find that the application which seeks judicial review is not barred by the 6 months period.”

A perusal of the Petitioner/Respondent's Petition dated 22nd September 2021 invokes Articles 3,20,22,23,27,28,40,47 & 159 of the Constitution of Kenya in its heading.

The Petitioner/Respondent has outlined the Rights provided under the above Articles and decried of their breach in the proceedings and judgement delivered on the 24th of September 2020 through Kilgoris ELC PMCC No.14 of 2018.

Indeed, The Petitioner/Respondent alleges that the proceedings and judgment delivered 24th of September 2020 affect the proprietary rights of the Petitioner as regards the property known as TRANSMARA/MEGUARA/44.

Consequently therefore, the Court is satisfied that indeed the Petitioner herein is seeking remedy of a Constitutional nature and not of a Judicial Review nature as provided for under the Law Reform Act, Cap 26.

Section 9(3) of the Law Reform Act and Section 53 Rule 2 of the Civil Procedure Rules, 2010 apply in proceedings instituted under the Law Reform Act by a party seeking to cancel, compel and/or rectify decisions made by a Public Body/Person in exercise of their constitutional or statutory powers delegated to them.

In conclusion therefore, the Applicants ground as regards to the Provisions of Section 9(3) of the Law Reform Act and Section 53 Rule 2 of the Civil Procedure Rules 2010 is hereby dismissed.

B) IS THE ORDER OF CERTIORARI QUASHING ALL THE DOCUMENTS AND RECORDS HELD BY THE 4TH AND 6TH RESPONDENTS REGARDING LAND PARCELS TRANSMARA/MEGUARA/44 AND TRANSMARA/MEGUARA/150 RES JUDICATA?

In deciding this issue, the Court shall be guided by Section 7 of the Civil Procedure Act which states as follows:-

“ No court shall try any suit or issue in which the matter directly and substantively in issue has been directly and

substantively in issue in a former suit between the same parties, or between parties under whom they or any of the them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has been heard and finally decided by such a court.”

In the matter of **JOHN FLORENCE MARITIME SERVICES LIMITED & ANOTHER -VERSUS- CABINET SECRETARY, TRANSPORT & INFRASTRUCTURE & 3 OTHERS (2021) eKLR**, the Supreme Court of Kenya held as follows:-

“Hence, whenever the question of Res Judicata is raised, a Court will look at the decision claimed to have settled the issues in question, the entire pleadings and record of the previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same issues in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.”

In the Case of **BERNARD MUGO NDEGWA -VERSUS- JAMES NDERITU GITHAE & 2 OTHERS (2010) eKLR**, when evaluating Res Judicata, the following five distinct headings should be of guidance:-

i)The matter in issue is identical in both suits.

ii)The Parties are in the suit are the same.

iii)sameness of the title/claim.

iv)concurrence of jurisdiction

v)Finality of the previous decision.

In the case of **OKIYA OMTATAH OKOITI & ANOTHER -VERSUS- THE ATTORNEY GENERAL & ANOTHER PETITION NO.593 OF 2013 (2014) eKLR**, the Learned Judge stated as follows:-

“Whereas these principles have generally been applied liberally in civil matters, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the constitutional court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, it must be sparingly invoked in rights-based litigation and the reason are obvious.”

The Court having established the parameters applicable in making a determination on the issue of Res Judicata, it now looks at the facts and evidence before it.

The Applicants state in their submissions that the issue canvassed in the proceedings and judgment of **KILGORIS ELC PMCC NO.14 OF 2018** is trespass on the property known as **TRANSMARA/MEGUARA/150** owned by the **WILLIAM LESHON KKEYUA & SALOME LEMAYIAN NKEIYUA**.

The persons alleged to have trespassed on the property known as **TRANSMARA/MEGUARA/150** were namely **PAUL SANINGO CHRISTOPHER, EMAULE KORIKO and TIREN SERERE** who were the Defendants.

Upon hearing all the parties in the proceedings namely **KILGORIS ELC PMCC NO.14 OF 2018**, the Court made a finding that the Defendants namely **PAUL SANINGO CHRISTOPHER, EMAULE KORIKO and TIREN SERERE** vacate the Plaintiffs property within Ninety (90) Days failure to which eviction should be done.

The Applicants therefore believe that the ownership and/or legitimacy of the property known as **TRANSMARA/MEGUARA/150** was duly determined in the proceedings known as **KILGORIS ELC PMCC NO.14 OF 2018** and cannot be canvassed again in this Petition.

The Petitioner/Respondent on the other hand opposes the Applicants allegations and state that the both the parties and property in litigation in the proceedings known as **KILGORIS ELC PMCC NO.14 OF 2018** are not the same as in the present Petition.

The Court has evaluated the submissions of both parties and make the following conclusions; -

i. According to the Applicants written submissions, the issue before **KILGORIS ELC PMCC NO.14 OF 2018** was trespass on the property known as **TRANSMARA/MEGUARA/150**.

The conclusion of that litigation was the order to vacate issued against the Defendants namely **PAUL SANINGO CHRISTOPHER, EMAULEKORIKO and TIREN SERERE**.

In this present Petition, the issue is the infringement of the Petitioner’s Right to own property under Article 40 of the Constitution of Kenya, 2010

The Petitioner in this present Petition also seeks a fair hearing as provided for under Article 47 of the Constitution, 2010 before any Rights to his property known as TRANSMARA/MEGUARA/44 are infringed and/or tempered with.

Clearly, the issues for determination in the proceedings known as KILGORIS ELC PMCC NO.14 OF 2018 and the present Petition cannot be similar by any standard.

ii. Looking at the parties in the proceedings known as KILGORIS ELC PMCC NO.14 OF 2018, the Plaintiffs were WILLIAM LESHON KKEYUA & SALOME LEMAYIAN NKEYIUA while the Defendants were VERSUS PAUL SANINGO CHRISTOPHER, EMAULE KORIKO & TIREN SERERE.

In the present Petition, the Petitioner is CHRISTOPHER LEKODI KIMURATA and Respondents are WILLIAM LESHON NKEYYA, SOLOMON LEMAYIAN NKEYIWA, SENIOR PRINCIPAL MAGISTARE, KILGORIS LAW COURT, CHIEF LAND REGISTRAR,

KILGORIS, INSPECTOR GENERAL OF POLICE AND REGISTRAR OF SURVEY.

Looking at the two matters, it is only the Applicants that appear in both proceedings.

However, the inclusion of the Applicants in the present Petition does not automatically render the Petition Res Judicata.

The Applicants inclusion in this present Petition is to give them an opportunity to participate in the constitutional issues that have emanated from the proceedings and/or judgment obtained in KILGORIS ELC PMCC NO.14 OF 2018 delivered on the 24th of September 2020 in their favour.

iii. On the issue of whether the parties are litigating under the same title, the Court finds in the negative.

In the proceedings undertaken in KILGORIS ELC PMCC NO.14 OF 2018, the Title in issue was TRANSMARA/MEGUARA/150 while in this Petition the property in issue is TRANSMARA/MEGUARA/44.

iv. Lastly, in the proceedings known as KILGORIS ELC PMCC NO.14 OF 2018, the issue which was heard and determined appertained to trespass by the Defendants namely PAUL SANINGO CHRISTOPHER, EMAULE KORIKO & TIREN SERERE.

In the present matter, the issue for determination is the Petitioner's rights over his property known as TRANSMARA/MEUARA/44 as appertains to Article 40 and Article 47 of the Constitution affected by the Judgment of KILGORIS ELC PMCC NO.14 OF 2018.

This issue in the present Petition was never discussed and/or adjudicated by the judgment delivered on the 24th September 2020.

In conclusion therefore, this Court dismisses the second ground regarding Res Judicata.

C) DOES THIS PRESENT PETITION DEMONSTRATE CONSTITUTIONAL AVOIDANCE?

On the third ground, the Applicants submit that the Petitioner's prayers in the present Petition canvassed can be urged through other lawful avenues and not necessarily through a Constitutional Petition as filed herein.

The Applicants have placed reliance on the case of **MARTIN MUTHIKE NDAMBUKI -VERSUS- DIRECTLINE ASSUARANCE CO.LIMITED & 2 OTHERS (2021) eKLR**.

In this judgment, the Learned Judge was of the view that litigants should not be in a rush to institute constitutional petitions even when there is a statute that can effectively resolve the issue in dispute.

The Learned Judge in that matter clearly pointed out that the prayer being sought was akin to a stay of execution order of the lower court decree which would be done under Order 42 Rule 6 of the Civil Procedure Rules.

In this Petition, it is important to clearly state that the Petitioner herein was never a party in the proceedings known as KILGORIS ELC PMCC NO.14 OF 2018.

Upon delivering its judgment on the 24th of September 2020, the Court became functus as regards the issues in those proceedings contained in KILGORIS ELC PMCC NO.14 OF 2018.

However, the judgement delivered on the 24th September 2020 created another problem in its implementation through the Decree issued on the 24th September 2020 and the eviction Order of 31st August 2021.

The problem at hand is that the Applicants are allegedly interfering with the proprietary rights and/or occupation of the Petitioner's property known as TRANSMARA/MEGUARA/44 thereby infringing on the Petitioner's rights as guaranteed under Article 40 of the Constitution.

The Petitioner further alleges that the judgment delivered and being implemented by the Applicants emanating from the proceedings of

KILGORIS ELC PMCC NO.14 OF 2018 violated his Constitutional Rights in contravention of Article 40 and 47 of the Constitution, 2010.

At least these two allegations of Constitutional infringements amongst others if any raised by the Petitioner in this Petition cannot be adjudicated through an Appeal or Judicial Review as alleged by the Applicants.

These are issues of personal rights of the Petitioner as guaranteed in the Constitution and this Court has jurisdiction to adjudicate on the same.

In a nutshell, the Applicants ground that this Petition demonstrates constitutional avoidance is hereby dismissed.

Similarly, based on the above three findings by the Court, the Applicants grounds number 4 and 5 in the preliminary objection are also dismissed.

In conclusion, the Court hereby makes the following Orders as appertains the Preliminary Objection dated 4th October 2021.

1. The entire Preliminary Objection is hereby dismissed with costs to the Respondents.
2. The 1st and 2nd Respondents are directed to file their Responses to the Petition within Fourteen (14) days from the date of delivering this Ruling.
3. The Petitioner is hereby directed to fix the main Petition for directions within the next THIRTY (30) DAYS from the delivery of this Ruling.
4. Failure to Comply with direction 3 hereinabove by the petitioner, the Conservatory Orders issued by the Court on 23rd September 2021 shall automatically be discharged.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 17TH DAY OF JANUARY, 2022

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court assistance – Mr. Matiko

Counsel for applicant – Maroko

Counsel

for

Respondent:

Anyoka