



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CONSTITUTIONAL PETITION NO 2 OF 2013
IN THE MATTER OF LR NO LOC 2/GATHARAGE/3556

AND

**IN THE MATTER OF CHAPTER FOUR ARTICLES 22, 48, AND 50 OF THE CONSTITUTION
OF KENYA**

AND

IN THE MATTER OF NYERI HIGH COURT CIVIL CASE NO. 68 OF 1978

BETWEEN

MUNDIA KARUMU1ST PETITIONER

THUMBI WERU.....2ND PETITIONER

KIANA GIKUHI3RD PETITIONER

GEOFFREY NGUNYI NDUNDU

ALIAS NGUNYI.....4TH PETITIONER

KIONGO KAMAU.....5TH PETITIONER

AND

KARATINA TOWN COUNCIL

NOW MUNICIPAL COUNCIL OF KARATINA.....RESPONDENT

RULING

1. The Petitioners filed this petition arising from Nyeri High Civil Case No 68 of 1978 whose judgment was entered in favour of the respondents on 22nd January, 2007. The Petitioners (plaintiffs in that case), were claiming ownership of various plots in Sofia area within the Respondent's (defendant in that case) Municipality, but their suit was dismissed for non attendance and their application for review and setting aside was later dismissed. The Respondents counterclaim proceeded for hearing and the prayers sought were granted.

The Petitioners now seek that the court makes the following declarations;

a) **THAT the honourable court be pleased to declare the petitioners fundamental rights were violated and/ or contravened.**

b) **THAT the honourable court be pleased to declare the proceedings in the Nyeri High Court Civil Case No 68 of 1978 a nullity and illegal.**

c) **THAT the honourable court be pleased to order a fresh hearing in Nyeri High Court Civil Case No 68 of 1978**

d) **THAT the honourable court be pleased to make such other orders as it may deem just and fit.**

2. The Petition is supported by a supporting affidavit of **Geoffrey Ndundu** sworn on his own behalf and on behalf of the 2nd to 5th Petitioners on **19th April, 2013**. He depones that in the previous case, he was one of the plaintiff's and an allottee of a plot in Sofia area of Karatina Municipality which plots were allocated in 1964. He further depones that their suit was dismissed and an order for review also dismissed by a judge who had been declared unfit to serve by the Judges and Magistrates Vetting Board, hence their right to be heard was denied unjustly; that the defendant's counter claim was allowed to proceed and judgment entered, whose effect was to have the petitioners evicted from the suit plots which they had developed. He avers by denial of the review orders, the judge denied the Petitioners a right to fair hearing.

3. In reply, the respondent filed a replying affidavit sworn on **28th November, 2013**. They depose that the Petitioners never filed an appeal to the judgment in NYR. H.C.C.C No. 68 of 1978; that this court cannot sit in appeal of its own judgment and that the judgment of the court in the NYR. H.C.C.C No. 68 of 1978 was fair and just in accordance with the law. The respondent urges the court to dismiss the petition with costs.

4. I have perused the proceedings in NYR. H.C.C.C 68 of 1978 and noted the following; when the matter came for hearing on the **13th July, 1993** the Petitioners having been served with the hearing notice but failed to appear in court (their advocate was present), the court dismissed their claim and entered judgment in favour of the respondent's counterclaim and gave a date for formal proof. The formal proof was heard and the orders sought in the counterclaim were granted.

5. The Petitioners later applied for review and setting aside of the order dismissing their suit for non attendance. On **16th September, 1993**, their application for setting aside was found to be unmerited and it was dismissed on the grounds that the Petitioners had not substituted the parties who had died as ordered by the court. Further when the matter was referred to arbitration, the time given and later extended in favour of the petitioners had expired without the petitioners doing anything.

6. The court also finds that the Petitioners had earlier taken dates for hearing of the matter by consent but failed to appear severally. The petitioners had given an indication that they would appeal against the dismissal but there is nothing on record to show that an appeal was ever filed.

7. The Respondent proceeded with his counterclaim and the Petitioners participated in that counterclaim as witnesses. In the end, judgment was entered in favour of the Respondent as the owner of the suit property, having only allowed the Petitioners temporary occupation.

8. when this matter came for directions on the **12th March 2014**, counsel for the Respondent urged the court to first hear the preliminary objection (P.O) raised in paragraphs 8 to 12 of the respondent's replying affidavit, sworn by **Wambui Kimathi**. The court accepted and directed that that P.O be disposed by way of written submissions and gave timelines within which submissions were to be filed. The respondent filed his written submissions on **5th May, 2014** and the Petitioners did likewise on **21st May, 2014**.

9. Counsel for the Respondent submitted that the petitioners had been given a fair hearing, that none of their constitutional rights had been breached or violated as alleged, no appeal was preferred against the

judgment of the court in NYR. H.C.C.C 68 of 1978 and the ruling for review of the order for dismissal of suit for non attendance; that this court cannot sit on appeal over another court's decision which is of concurrent jurisdiction and that the suit is res judicata.

10. The Petitioners submitted that the issues raised in their Petition cannot be dealt with by a P.O as it would amount to denying them a chance to be heard again as had happened in NYR. H.C.C.C 68 of 1978; that the P.O was merely a counter attack on the issue of jurisdiction to hear the petition; that it was necessary that they be heard on the circumstances under which a temporary licence could be revoked.

11. I have considered the pleadings and submissions of each party. The issues for determination are as set out in paragraph 8 of this ruling.

12. A Preliminary objection was defined in case of **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd [1969] 1 EA 696** where the court held that: ***“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”***

13. I am at this point called to determine whether the issues raised by the respondent in his P.O are purely points of law which are likely to dispose of the suit. My answer is in the affirmative I will proceed to determine each separately.

14. On the ground raised that there was no of Violation of the fundamental rights of the Petitioners to own property and fair hearing, I find that the ground succeeds. The petitioners argue that they were the first persons to be allotted the suit property by the defendant but the defendant treated them unfairly by allocating the same plots it to other persons and is now in the process of evicting them. They fault the court for not giving them a fair hearing in dismissing their suit for non attendance thus closing the avenue for them to ventilate their entitlement to the suit property.

15. The reasons for dismissal of their suit are based on the fact that due to laxity on the part of the Petitioners in prosecuting NYR. H.C.C.C 68 of 1978 , the respondent was forced to take a hearing date and serve it upon the petitioners. Despite service the Petitioners advocate turned up in court without any of his clients and the case was dismissed. When the application for review was filed, the petitioners reason for being absent in court was that the arbitration had not been concluded and adopted and that they were waiting to be signaled to adopt the award of the arbitration.

16. This ground was rejected by the court because both the time given for the arbitration and the extended time had expired without the petitioners taking any action until the respondent fixed the matter for hearing before the court.

17. On the last and final ground that this court cannot sit on appeal over a decision made by a court of concurrent jurisdiction, I wholly agree and will not belabour this point.

18. On the ground that the petitioners never filed any appeal against the judgment of the court in NYR. H.C.C.C 68 of 1978 and the ruling for review of the order for dismissal of suit for non attendance, I find that this right of appeal was available to the petitioners but they did not exploit it. Their failure to exercise this right does not amount to violation of the right to fair hearing or any violation of a fundamental right.

19. On the ground that the suit is *res judicata*, I find that this ground succeeds. I say this because in NYR. H.C.C.C 68 of 1978 after the petitioners suit was dismissed for non attendance, *the petitioners still defended the counterclaim. The issue they have raised in this petition of revocation of the temporary occupation licenses was raised by the witnesses in their defence of the counterclaim and the same was determined.*

Section 7 of the Civil Procedure is clear that, "No court shall try any suit or issue in which the matter

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

See also the case of *PIL Kenya Ltd Vs Opong (2009) KLR 442*.

20. In the light of the foregoing, I find that the petition is an abuse of the court process and uphold the preliminary objection. I hereby dismiss the petition with costs to the respondent.

Dated, signed and delivered at Nyeri this 24th day of February, 2015

L. N. WAITHAKA

JUDGE

In the presence of:

Mr. Muthoni holding brief for Mr. Mugo Ndata for petitioner

No appearance for the defendant

Lydiah – Court Assistant