



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PETITION NO. 5 OF 2015

IN THE MATTER OF SECTION 84(1) (2) OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70(A), 71(1) (2) 72(1) 73(1), 74(1) 75(1) 76(1) 77(4), (9), 78(1) 79(1) 80(1) 82(1), 107, 114 & 123(8) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LEGAL NOTICE NO. 6 OF 2006 ARTICLE 11, 12, 20 & 21

AND

IN THE MATTER OF HIGH WAY AND PUBLIC ROADS AUTHORITY ACT (CAP) LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT, (CAP) 300 LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT (CAP 22) LAWS OF KENYA

AND

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT (CAP 22) LAWS OF KENYA

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT (CAP 265) LAWS OF KENYA

AND

IN THE MATTER OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT (CAP 21) LAWS OF KENYA

BETWEEN

WILLIAM NJUGUNA MAGONDUPETITIONER

VERSUS

THE DISTRICT LAND REGISTRAR KIRINYAGA DISTRICT1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA2ND RESPONDENT

THE DISTRICT COMMISSIONER KIRINYAGA DISTRICT.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

AND

JAMES MUNENE NDUMBI1ST INTERESTED PARTY

NJUGUNA MIANO2ND INTERESTED PARTY

JUDGMENT

By his petition dated 27th April 2010 and filed herein on 28th April 2010, the Petitioner sought the following orders against the Respondents:-

- a. *A declaration that the rights of the Petitioner have been, are being and are likely to be violated by the alienation of the said land Plot No. 2 (77) KAGUMO-KERUGOYA AT KAGUMO MARKET*
- b. *A declaration that the alienation of the Plot No. 2 (77) KAGUMO-KERUGOYA AT KAGUMO MARKET by the Interested parties is illegal, null and void*
- c. *A declaration that the right to protection of the law under Section 70(a) 71, 72, 77 (1) (2) and 84(1) of the Constitution is so deep and cannot be undermined by the Respondents in illegal conduct*
- d. *A declaration that the Petitioner is entitled to the right to own property Plot No. 2 (77) KAGUMO-KERUGOYA AT KAGUMO MARKET which is protected by Section 75(1) of the Constitution*
- e. *A declaration that the Petitioner's rights as contemplated under Section 70-83 (inclusive) are not just paper aspirations but a reality in the daily lives which can be enforced by the Courts*
- f. *A declaration that the Petitioner is entitled to damages for the loss suffered and restitution thereof*
- g. *A declaration that the action of the 2nd Respondent and Interested parties in declaring Plot No. 2 (77) KAGUMO-KERUGOYA AT KAGUMO MARKET a road reserve was arbitrary, illegal, null and void and should be quashed*
- h. *An order restraining the Respondents and Interested parties, their agents, servants or howsoever (sic) from transferring, developing, alienating and/or interfering in any way whatsoever with the said property Plot No. 2 (77) KAGUMO-KERUGOYA AT KAGUMO MARKET*
- i. *Any such other orders as this Honourable Court shall deem just and convenient in the circumstances of this case*
- j. *Costs.*

The said petition is supported by the petitioner's twenty four (24) paragraphs affidavit the salient issues raised therein being:-

- *That he has been in occupation of the Plot No. 2 (77) KAGUMO-KERUGOYA AT KAGUMO MARKET for 49 years and has been paying rates to the KERUGOYA COUNTY COUNCIL and that the said plot (hereinafter the suit plot) has never been registered in the names of the*

Interested parties

- ***That the said suit plot was later declared a road reserve and in 1986, he applied to convert his plot to commercial use which approval was given and the plot was assigned number 77 KAGUMO and he is waiting for titles from the Ministry of Land since he is legally entitled to be registered as the owner of the suit plot yet the Respondents have intruded on it and started to construct structures and when he made enquiries from the Chief Engineer Roads, he was informed that his plot had never been acquired nor is it part of a road reserve.***
- ***That he is entitled to orders on adverse possession having occupied the suit plot for 49 years and his property rights have been violated and he has been treated in an inhuman and degrading manner and therefore deserves the protection of the Court because the provisions of Sections 70(a) (b) and (c), 71(1) (2) 72(1), 73(1), 74(1) 75(1), 76(1) 78(1) 79(1) 80(1) 81(1) 82(1) (3) of the Constitution have been violated.***

The petition is opposed and J. KARITHI the clerk to the 2nd Respondent has filed a replying affidavit in which he depones, inter alia, that the petition is bad in law, incompetent, misconceived and an abuse of the Court process because the Petitioner was a party in **KERUGOYA PMCC NO. 34 of 1990 JAMES MUNENE NDUBI & OTHERS VS NJUGUNA MAGONDU & 5 OTHERS** where the suit plot was the subject matter and all the parties therein were offered alternative land for settlement by the 2nd Respondents and therefore this petition is Res-judicata. Further, it is deponed that there is no such plot as No. 77.

The 1st Interested party has also filed a replying affidavit on behalf of the 2nd Interested party in which they similarly oppose the petition as misconceived and incompetent and also raise the issue of similar proceedings in **KERUGOYA PMCC NO. 34 of 1990** and also **KERUGOYA PMCC NO. 44 of 2010** and the petitioners withdrew and accuse him of being on a fishing expedition from one Court to another.

The 1st, 3rd and 4th Respondent filed grounds of opposition dated 23rd April 2012.

When the parties appeared before me on 19th February 2013 following the transfer of this petition from Embu High Court to this Court, it was agreed that the petition be canvassed by way of written submissions which all counsels have now filed.

I have considered the petition, the supporting affidavit and annexures thereto as well as the replying affidavits of Mr. J. Kariithi clerk to the 2nd Respondent and those of the 1st and 2nd Interested parties and annexures thereto.

I have also considered the submissions by the counsel for Petitioner, the 1st 2nd 3rd and 4th Respondents and the Interested parties.

The issue of res-judicata has been raised by the 2nd Respondent and Interested parties who argue that the Petitioner was a party in **KERUGOYA PMCC No. 36 of 1990 JAMES MUNENE NDUMBI & TWO OTHERS VS NJUGUNA MAGONDU & 7 OTHERS** where a consent judgment was entered in a case involving the same subject matter herein. Counsel for the Petitioner has however submitted that res-judicata does not arise because that case was not heard on its merits but a consent was recorded.

The doctrine of res-judicata is provided for in **Section 7 of the Civil Procedure Act** in the following terms:-

“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”

It is clear from the above that the prohibition against hearing a dispute which has been the subject of

previous litigation between the same parties or those acting under them is absolute hence the use of the words “**No Court shall try**”. I have looked at the pleadings in KERUGOYA PMCC NO. 34 of 1990 filed in Court on 1st November 1994. The Petitioner herein was the 5th defendant while the 2nd Respondent was the 8th defendant. The 1st and 2nd Interested parties herein were the 2nd and 3rd plaintiffs. That case was terminated by a consent judgment dated 5th December 1996 adopting an arbitrator’s award in favour of the plaintiffs and notices were even issued to Providence Auctioneers to evict the Petitioner from the suit plot. Indeed in his petition herein, Petitioner concedes as much and states as follows in paragraph 4 thereof:-

“That in 1990 the Interested parties went to Court with others against the Petitioner and others in Civil Case No. 34 of 1990. The Petitioner was made to believe by the Interested parties herein that his plot was part and parcel of the road reserve and on the strength of those false presentations, the Petitioner entered consent to settle the case”

By his own admission therefore, the Petitioner concedes that the subject of this dispute (the suit plot) was the subject of another case but adds that he was misled into agreeing to a consent. In light of that admission this petition is really res-judicata. There is nothing on record indicating that the Petitioner appealed or attempted to set aside that consent when he found out that he had been misled. That judgment is therefore binding on him and his counsel’s submission that the previous suit was not determined on its merits is of no avail because the Court of Appeal in **BENJOH AMALGAMATED LTD & ANOTHER VS KENYA COMMERCIAL BANK LTD C.A CIVIL APPEAL NO. 239 of 2004 (NBI)** held that it does not mean that a trial has to be conducted before res-judicata can apply. The Court of Appeal while addressing a situation similar to this where a consent judgment had earlier been recorded stated as follows in that case:-

“It does not mean that a matter can only be treated as res-judicata if a trial is held. As is clear from explanation (3), a matter can be admitted, expressly or impliedly and when that happens, res-judicata becomes immediately applicable. It would be an exercise in futility to hold a trial in respect of an issue which has been admitted”.

As stated earlier, the Petitioner has admitted that the suit plot was also the subject matter in KERUGOYA PMCC NO. 34 of 1990 in which he was misled into signing a consent. His option was to have the said consent set aside on grounds that it was obtained fraudulently. He did not do that and has instead moved the Court vide a Constitutional Petition alleging a violation of his rights. That, in my view, is a clear abuse of the Court process and is sufficient ground upon which this Court should strike out the petition.

Even if this Court were to examine the merits of this petition, it is clear that the same cannot be sustained. The Petitioner herein alleges a violation of his rights protected under Sections 70(a) (b) and (c), 71 (1) (2), 72(1), 73(1) 74(1) 75(1) 76(1), 77, 78(1), 79(1), 80(1) 81(1) and 82(1) and 3 of the repealed Constitution - see paragraph 31 of the petition. In the case of **RASHID ODHIAMBO ALLOGGOH AND 245 OTHERS VS HACO INDUSTRIES C.A CIVIL APPEAL NO. 110 of 2001 (NBI)**, the Court of Appeal stated that it is the duty of the Court to consider the allegations set out in the petition and depositions and decide whether they constitute a breach of fundamental rights and freedoms. Therefore, the issue that this Court needs to determine is whether, having considered the parties’ respective pleadings, there is any violation of the Petitioner’s right under the said Constitutional provisions. It must always be remembered that no right or fundamental freedom is absolute. It may be limited by law or other reasonable and justifiable considerations. Looking at the Constitution provisions cited by the Petitioner, it is clear that only **Section 75(1) of the Constitution** is relevant in the circumstances of this case. The other provisions cited in the petition do not really aid him because they deal with issues regarding right to life and liberty, freedom from slavery and forced labour, freedom from torture, cruel and inhuman treatment, freedom of expression, assembly, association and movement and also prohibits against discrimination. Those provisions do not really come into play in this petition.

In my view the only provision that this Court can consider is **Section 75(1) of the repealed Constitution** which provided as follows:-

75(1) “No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:-

The section then lays down the conditions that may justify such acquisition.

In the case of **JOSEPH IHUGO MWAURA & OTHERS VS ATTORNEY GENERAL PETITION NO. 498 of 2009 (NBI)**, the Court while referring to the above provision observed that it contemplates a situation where the person whose property has been acquired compulsorily has a proprietary interest in the land as defined in law. From the pleadings herein, what the Petitioner is alleging is that there was a violation of his right with regard to the suit plot which was alienated by the Respondents and Interested parties. He therefore seeks an award of damages. But what evidence has he adduced in support of his claim over the suit plot? In paragraph 10 of his supporting affidavit, the Petitioner claims to be entitled to the suit plot by virtue of adverse possession having occupied it for 49 years. However, only the High Court can declare a person to have become entitled to land by virtue of having occupied it for over 12 years. The Petitioner does not have any orders declaring him to have become entitled to the suit land by virtue of the provisions of **Section 38 of the Limitations of Actions Act** which grants the High Court powers to make such a declaration. The Petitioner attempted to do so by filing an Originating Summons in KERUGOYA PMCC NO. 44 of 2010 against the Interested parties herein but this was withdrawn on 30th March 2010 no doubt after the Petitioner realized that the Court had no jurisdiction over the matter. There is no evidence tendered by the Petitioner that the suit property is registered in his names under any of the legal regimes that confer interests in land. The Petitioner has annexed to his petition two receipts each for Ksh. 1,110 (annexture **WNM 1(a)** and **(b)**) dated January 2009 and 2010 as evidence that he has been a rate payer. Those receipts do not confer any interest in land. In the case of **JOSEPH arap NGOK VS JUSTICE MOIJO OLE KEIWUA C.A CIVIL APPLICATION NO. 60 of 1997 (NBI)**, the Court of Appeal had this to say on how one acquires title to land:-

“It is trite law that such title to landed property can only come into existence after issuance of letters of allotment, meeting the conditions stated in such letters and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held”

The Petitioner herein therefore, having not provided any document as proof of ownership of the suit plot, cannot validly allege any violation of a right that does not infact exist. The dispute between him and the other parties over the suit plot having been settled following a consent judgment that he signed on 5th December 1996 when the same was recorded before F.F. Wanjiku SRM. It is not clear why the Petitioner would then proceed again to pay rates to the 2nd Respondent in 2009 and 2010 on account of the same suit plot long after the dispute over the same had been concluded vide a consent judgment that he signed and has not sought to have set aside on grounds of misrepresentation or fraud.

It is therefore clear from the above that even if this Court was wrong on the issue of res-judicata and were to determine this petition on its merit, the Petitioner has not satisfied me that any of his rights were violated with respect to the suit plot. In the circumstances, this petition is devoid of merit.

However, this Court has made a finding that this petition is res-judicata as the subject herein was canvassed in a previous forum and is therefore caught up by the provisions of **Section 7 of the Civil Procedure Act**.

Ultimately therefore, this petition is ordered struck out with costs to the Respondents and Interested parties.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Ondiek for Petitioner – absent

Mr. Kiarie for 2nd Respondent – absent

Ms Kiragu for Mr. Kahiga for 2nd Interested party – present

1st Interested party - present

Attorney General for 3rd & 4th Respondents – absent

COURT: Judgment delivered this 18th day of September 2015 in open Court.

Mr. Ondiek for Petitioner – absent

Mr. Kiarie for 2nd Respondent – absent

Ms Kiragu for Mr. Kahiga for 2nd Interested party - present

1st Interested party – present

Attorney General for 3rd & 4th Respondents – absent

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

Explanatory note on delay

This judgment was due on 14th May 2015 but I was on urgent leave attending to my sick mother and thereafter I was bereaved and travelled out of the country until 7th July when I resumed duties. The High Court proceeded on vacation soon after until 16th September 2015. That occasioned the delay which is highly regretted.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015