



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTION PETITION NO. E009 OF 2021

BENJAMIN GITONGA ANDREW

(Suing as the legal representative of the estate

of STEPHEN M’MUTUA M’IKOMBO) - DCD.....PETITIONER

VERSUS

AGGREY MURAGA ETHANGATHA.....1ST RESPONDENT

FRANCIS MICHUKI.....2ND RESPONDENT

EARNEST KIREMA.....3RD RESPONDENT

JASON K. MBERIA.....4TH RESPONDENT

HENRY ETHAIBA.....5TH RESPONDENT

SILAS MUTHEE MBERIA.....6TH RESPONDENT

JOHNSON KIBARA MBAABU.....7TH RESPONDENT

SAMUEL MUKIRI.....8TH RESPONDENT

ERIC KINOTI.....9TH RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT

OFFICER, URINGU II ADJUDICATION SECTION

TIGANIA WEST DISTRICT.....10TH RESPONDENT

ATTORNEY GENERAL.....11TH RESPONDENT

AND

MARY PAOLA MUTIGA.....INTENDED INTERESTED PARTY

RULING

1. The 1st, 4th, 6th and 7th respondent by a notice of preliminary objection dated 19.6.2021 prays the court to strike out the petition on the basis that: the subject matters have previously been litigated during the process of litigation and finalized in favour of the respondents; the court has handled the same dispute in **High Court Miscellaneous Application No. 99 of 2010** in their favour; afterwards the petitioner filed a notice of appeal dated 13.11.1998. The subject matter, the parties and issues are the same; the petition is res judicata and res subjudice to the said Court of Appeal matter: it offends **Sections 6, 7 and 8 of the Civil Procedure Act** though disguised as a constitutional petition when it is a claim for land and lastly it is filed against a deceased person without any legal representative who include the 2nd, 5th and 8th

respondents.

2. The petition dated 25.2.2021 is premised on **Articles 10, 19, 20, 22, 23, 35, 40 and 47 of the Constitution** over a dispute started in 1960 on land belonging to M'Mutua M'Ikombo now deceased and Samuel M'Mukiri (deceased) which has been subject to various court cases including **African Court No. 10 of 1960** awarding the two 2/3 and 1/3 of the land respectively, **District Magistrate Case No. 10 of 1969**; Njuri Ncheke elders' decision; **Nairobi Misc. Appl. No. 1296 of 1995 and Nairobi Civil Appeal No. 161 of 1996** filed by 1st, 4th and 5th respondents respectively and **Meru High Court Misc. Appl. No. 58 of 1997 and Nairobi High Court Misc. No. 230 of 1993** filed by 1st, 4th and 5th respondents and which was dismissed.

3. In efforts to implement the aforesaid court decisions on the map and record by the 10th respondent, the petitioner avers only 121.54 acres was found to be available, 66.23 acres of which was given Parcel No. 293 later split into two portions namely 293 measuring 41.28 acres and No. 3420 measuring 24.95 acres, and which were registered under the petitioner's name after the death of Stephen M'Mutua M'Ikombo in 1994.

4. The petitioner has averred in 2008, during the sixty days period for the filing of A/R objection, the 10th respondent allowed the 1st – 9th respondents to file objection proceedings over **Parcel No's 293 and 3420**. The petitioner filed objection cases **No's 401 – 405** where he sought to compel the 10th respondent to implement the 2/3 of the land on the ground since it had only been plotted on map and not on the ground.

5. The petitioner sates that the 10th respondent only heard and allowed the objections brought by the respondents but dismissed the ones he had filed contrary to order from High Court Misc. Application No. 230 of 1993.

6. It is further averred in 2010, the petitioner filed **Meru High Court Misc. Appl. No. 99 of 2010** seeking to quash the 10th respondent's decision of 30.7.2010. The application was however dismissed for failure to exhaust the internal mechanisms under the law before moving to court. He states the aforesaid decision does not affect the proceedings herein.

7. The petitioner maintain the conduct of the 10th respondent in carrying out his duties regarding the issues was contrary to **Cap 284** and deprived him his right to own land.

8. Further, it is averred in dismissing the objections, the 10th respondent was malicious, acted unlawfully and wrongfully, was discriminative and breached the petitioner's constitutional right to own land, invaded and infringed his legal rights which unless upheld by this court would make him impoverished, suffer great prejudice, irreparable loss and damage.

9. The petitioner prays for declaration that the actions by 10th respondent over **L. No's Tigania West/Uringu II/2983 and 3420** illegal, unconstitutional; declaration that he is the sole owner of the two parcels of land; an order for the 10th respondent to amend the record to reflect his names and mark the boundaries on the ground; eviction orders against the 1st – 9th respondents from the two parcels parcel and an for general damages for violation of his constitutional rights to property and loss of user.

10. The petition is supported by has attached a list of documents including the aforementioned court decisions.

11. The petition was duly served upon the respondents vide an affidavit of service filed on 20.9.2021.

12. The 1st respondent has opposed the petition through a replying affidavit sworn on 19.6.2021 on behalf of the 1st, 4th 6th and 7th respondents stating there have been civil suits between the parties over the subject matter on similar issues as in the petition which have all been determined in their favour (the latest being **Meru High Court Misc. Appl. No. 99 of 2010** ruling delivered on 18.10.2010 whereof the petitioners lodged a notice of appeal and that the matter was pending at the Court of Appeal. They claim the petition is both res judicata and res subjudice.

13. Secondly, the 4th, 6th and 7th respondents aver the adjudication process was complete with all the objections determined in their favour and that there were no further challenges over their parcels of land by the petitioner or any other person: and that the parcels of land are clearly marked on the map; they are in occupation with developments on their land parcels no interruptions from the petitioner.

14. Thirdly, it is averred by the respondents the petitioners did not prefer an appeal to the Minister after they lost the objection and the court should not usurp such powers; that the petition was an abuse of the court process; that the **Nairobi High Court Misc. No. 230 of 1993** did not include all of them as parties and could bar the 10th respondent from undertaking its statutory mandate.

15. Parties were directed to file and serve written submissions by 30.1.2022. None filed and served within the stipulated time.

16. The issues commending themselves for determination are:-

a) If the 1st, 4th, 6th and 7th respondents preliminary objection is merited.

b) If the petition herein is both res-judicata and res subjudice.

17. A preliminary objection is a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. See ***Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] E.A. 696.***

18. **Ojwang J.** as he then was in ***Oraro –vs- Mbaja [2005] eKLR*** held a point of law must not be blurred with factual details liable to be contested which in any event are to be proved through the process of evidence. Further he held that an assertion in the name of preliminary objection but bearing factual aspects calling for proof or adduction of evidence for its authentication was not a true preliminary objection.
19. The 1st, 4th, 6th and 7th respondents take the view that the petition is disguised as a constitutional petition but in real sense it was touching on the same subject matter between the same parties seeking the court to determine issues already litigated before courts of competent jurisdiction and in which there is a pending appeal at the Court of Appeal. To that extent they maintain this petition offends **Sections 6, 7 and 8 of the Civil Procedure Act**.
20. At paragraph 13, 17, 18, 20 21, 23, 24, 29 and 30 of the petition the petitioner has admitted the existence and determination of the previous suits. However he has averred the 2010 suit did not affect the instant proceedings.
21. The petitioner has not admitted there is a pending appeal at the Court of Appeal. The existence of the previous suits and decisions are not contested. Both sides in this petition have attached the aforesaid decisions.
22. The preliminary objection is premised on res judicata and res subjudice. The two in my view are pure points of law given the facts in this petition are not contested by the parties.
23. Therefore the preliminary objection as regards res judicata and res-subjudice has to my mind met the test laid down in both ***Mukisa Biscuits Manufacturing Co. Ltd Supra*** and ***Oraro*** case **Supra**.
24. Moving on the next issue is whether the previous decisions especially by courts of parallel jurisdiction affect the proceedings herein.
25. Whereas the petitioner admits the court has over the years rendered decisions relating to the two parcels of land, he pleads the 10th respondent while determining the objections on 30th July 2010, infringed and or breached his constitutional rights by acting contrary to previous court orders, discriminating against him, carrying out his duties contrary to **Cap 284** and causing him loss and damage.
26. Looking at the decision rendered in **Meru High Court Misc. Appl. No. 99 of 2010**, the parties are almost the same as in the instant case. The petitioner was seeking for the orders of certiorari, prohibition and mandamus over **Parcel No's 2983 and 3420** over the 1st respondent decision rendered on 30.7.2020 now the 10th respondent in this petition.
27. In that case, the petitioner prayed for an order of mandamus directed at the 1st respondent to demarcate the two parcels on the ground and fix the boundaries.
28. In my view the said prayers were almost similar to the prayers sought in this petition. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents herein were the interested parties in **Meru High Court Misc. No. 99 of 2010** and had raised almost similar defence as in the replying affidavit herein.
29. At page 9 of the judgment, the court framed the issues of determination among them being whether the 10th respondent had acted ultra vires **Cap 284** in handling the objections and by extension in disregard of **High Court Misc. No. 230 of 1993 (Nairobi)** issued on 23.7.1994.
30. The court made a finding the 1994 court decision had been made before the area was declared an adjudication section and that the decision was offensive to **Section 4 (4) of the Limitation of Actions Act** since it could not be enforced after 12 years.
31. The petitioner at paragraph 30 of the petition admits that there was a decision in 2018 by this court. However, he interpretes the decision to mean that cannot be a bar to this petition and therefore it does not affect the proceedings herein.
32. This petition invokes the right to fair administrative actions act under **Article 47 of the Constitution**.
33. In **High Court Misc. No. 99 of 2010**, the petitioner was seeking for judicial review orders. The jurisdiction to issue prerogative orders after 2010 has been anchored in our **Constitution at Article 23 (1)**.
34. This court determined and held that the decision of the 10th respondent was not offensive to **Article 47**. The petitioner has appealed against that decision to the Court of Appeal. At the same time he has invoked **Article 47, 19, 20, 23, 24, 21, 40, 47 and 50 of the Constitution** and now urges this court to find the 10th respondent acted against **Cap 284** as well as the Constitution.
35. The petitioner is without doubt seeking to re-open issues and matters already determined in the guise of a constitutional petition so as to have a second bite of the cherry.
36. In my view, a court of competent and parallel jurisdiction has pronounced itself on these issues herein. No matter the clothes the petitioners comes back wearing, he remain the same person albeit in different clothing of a constitutional petition.
37. This court would be hesitant ant to encourage parties to re-litigate matters and issues already determined to finality but who come in a different capacity in the name of seeking to have an already determined matter heard in the name of it raising a constitutional controversy. A party whose matters has been heard and determined on merits by the High Court has no right to reframe his suit afresh as a constitutional petition. Such an action by itself is an abuse of the court process.

38. In the premises, this court has reached a finding that the petition offends **Sections 6, 7 and 8 of the Civil Procedure Act** and proceeds to strike it out with costs to the respondents and the interested party.

39. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 9TH DAY OF FEBRUARY, 2022

In presence of:

Miss Mureithi for petitioner

Mutisya for Gikunda Anampiu interested party

Kieti for 10th and 11th respondents

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE