



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.330 OF 2013

BETWEEN

STEPHEN KAMUNGE WAINAINA1ST PETITIONER

JOSEPH KIMANI NJOROGE.....2ND PETITIONER

PAULINE MWEMBA.....3RD PETITIONER

AND

THE COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

RULING ON A PRELIMINARY OBJECTION

1. Before me is a Preliminary Objection filed by the Respondent, the County Government of Nairobi, against the Petitioners' Petition dated 20th June 2013. The Preliminary Objection is premised on the grounds that the Petition is *res judicata* in view of the decision of the Honourable Court in **Stephen Kamunge Wainaina and 2 Others v City Council of Nairobi ELC No. 1632 of 2007** formerly **Stephen Kamunge Wainaina & 2 Others v City Council of Nairobi & Rapido Construction Company Ltd HCCC No.1133 of 2005** and that the Petition offends the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) High Court Practice and Procedure Rules, 2013 and is an abuse of the process of the Court and ought to be struck out with costs to the Respondent.
2. To put the matters into perspective, the Petitioners are the registered proprietors of all that property known as **L.R 209/14882 (I.R No. 94183)** (*hereinafter the "suit property"*) situated within Embakasi area in the County of Nairobi. They claimed that sometimes in 2005, the Respondent's predecessor, the City Council of Nairobi, awarded a tender to a company known as Rapido Construction Company Ltd for the construction of a health facility within the suit property. Subsequently, construction begun on the suit property and when a dispute arose, the Petitioners filed a civil suit, **Stephen Kamunge Wainaina & 2 Others v City Council of Nairobi & Rapido Construction Company Ltd HCCC No. 1133 of 2005**. Allegedly, Mwilu J (*as she then was*) dismissed that suit on 20th January 2012. In their Petition dated 20th June 2013 and supported by the affidavit of Joseph Njoroge Kimani, 2nd Petitioner herein, the Petitioners seek the following orders;

"1) That a declaration be issued that the Petitioners are the lawful owners of all that property known as L.R. No.209/14882 (I.R. No.94183) situated within Embakasi area in the County of Nairobi.

- 2) *That a declaration be issued that the acquisition of the Petitioners' property by the Respondent was not only arbitrary but was also illegal, unlawful and unprocedural.*
- 3) *That the Honourable Court do issue an order against the Respondent for payment of full and just compensation at market rates to be paid to the Petitioners for compulsory acquisition of the property known as LR. No.209/14882 (I.R. No.94183) situated within Embakasi area in the County of Nairobi.*
- 4) *That this Honourable Court do issue an order compelling the Respondent to pay mesne profits to the Petitioners to be assessed by it.*
- 5) *That this Honourable Court do issue such orders or give such directions as it may deem just and appropriate in all the circumstances of this matter.*
- 6) *That the costs of this Petition be awarded to the Petitioners.”*

3. The Preliminary Objection was argued before me on 10th December 2013. Mr Otieno for the Respondents urged me to strike out the Petition on grounds of *res judicata* and also that it is therefore an abuse of the Court process.
4. The Petitioners neither filed any response to the Preliminary Objection nor made oral arguments before me.
5. I have perused *ELC No.1632 of 2007*. I note that the matter came up before Ougo, J (*she was then Chief Magistrate*) on 29th September 2009. She granted leave to the Defendants to amend their defence and counter-claim. A perusal of the file shows that the next action on the file was on 20th January 2012 when the matter came up for Notice to Show Cause why the suit should not be dismissed under **Order 17 Rule 2(1) & (4)** of the **Civil Procedure Rules**. The records shows that the Defendants were represented by Mr. Kingi and there was no appearance for the Plaintiffs. Mwilu J (*as she then was*) dismissed the suits with costs to the Defendants. That order was extracted and is what the Respondent herein is using to claim that the Petition before me is *res judicata*.
6. The law on *res judicata* as I understand it is found in **Section 7** of the **Civil Procedure Act**. This Section provides as follows;

“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 can 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.”

7. To my mind, for *res judicata* to be therefore invoked in a matter, the issue in the present suit must have been decided by a competent Court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title - See the case of *Karia and Another v the Attorney General and Others (2005) 1EA 83*. The essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. That was the holding in *Omondi v National Bank of Kenya Ltd and Others (2001) EA 177*.
8. Looking at the Petition before me, the facts in its support and also the position as espoused above in regard to *ELC No. 1632 of 2007* the issues raised in the two suits were one and the same.

Those issues were never concluded on merit and what the record bears out is that **ELC No. 1632 of 2007** was dismissed on a technicality rather than on merit. Having said so, it is clear to my mind that the matter before me is therefore not barred by the doctrine of *res judicata* as the issues in the instant Petition have not been determined by a court of competent jurisdiction.

9. Having addressed my mind as above, that would have been enough to dispose of the Preliminary objection before me as that is all there was to determine.
10. However, looking at the prayers sought by the Petitioners in the Petition as reproduced elsewhere above, I do not see anything constitutional in them to warrant hearing by this Division of the High Court. A casual look at the prayers reveals that the Petitioners are seeking *inter alia* orders that they are the lawful owners of LR NO. 209/14882 (I.R No. 94183) and orders for compensation for compulsory acquisition of the suit premises. As can be seen, the Petitioners have not in any way set out the constitutional provisions that have been violated and the manner in which they have been violated. I am aware that this Court has consistently held that where a violation of the Constitution has been alleged, an aggrieved party must set out with some degree of precision the manner in which the provisions of the Constitution have been violated - See **Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272.**
11. It is also clear to my mind that the issues raised by the instant Petition are within the purview of the Environment and Land Court as established under **Article 162(2)** of the **Constitution** which establishes the Environment and Land Court with jurisdiction to hear and determine disputes relating to the environment and use and occupation of, and title to land. The courts contemplated under **Article 162(3)** have now been established through the Environment and Land Court **Act No. 19 of 2011** which came into effect on 30th August 2011. The object of the Act is as follows;

“An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes”

12. The above is the law and it is obvious that the Petition before me is in the wrong court. I say so because **Article 165(5)** is in certain terms that the High Court shall not have jurisdiction for matters reserved for the exclusive jurisdiction of the Courts established under **Article 162(2)**, including the Environment and Land Court. In the circumstances there is nothing else to say. The final orders that attract my mind are as follows;

(a) *The Preliminary Objection dated 23rd September 2013 is overruled.*

(b) *The instant Petition be and is hereby transferred to the Environment and Land Court for determination and disposal.*

(c) *Costs in the cause.*

13. Orders Accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 22ND DAY OF

JANUARY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Shah holding brief for Mr. Kamau for Petitioner

Mr. Mutua holding brief for Mr. Kithi for Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

By Court

Mention before the Environment and Land Division on 30/1/2014 for directions.

ISAAC LENAOLA

JUDGE