



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC PETITION NO. 16 OF 2019**

**IN THE MATTER OF PETITION UNDER ARTICLES 22**

**AND 23 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL FREEDOMS**

**AND RIGHTS OF THE PETITIONER UNDER ARTICLE 19, 20, 22, 23,**

**24, 28, 31, 42, 69 AND 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 18 OF THE ENVIRONMENT AND LAND COURT ACT 2011**

**IN THE MATTER OF THE ACTIONS OF VICTOR KARITHI MUTUMA**

**WARD REPRESENTATIVE FOR ATHWANA WARD AND THE COUNTY**

**GOVERNMENT OF MERU IN ARBITRARILY CONSTRUCTING A MARKET**

**ON A THIN STRIP OF LAND IN KARAMENE AREA WITHIN ATHWANA WARD**

**ON A RESIDENTIAL AREA AND NEAR WASO MARA RIVER PROVIDING DRINKING**

**AND FARMING WATER TO THE INHABITANTS AND THOSE LIVING DOWNSTREAM**

**BETWEEN**

**MICHAEL GATUMA.....1<sup>ST</sup> PETITIONER**

**JOSEPH MAILUTHA.....2<sup>ND</sup> PETITIONER**

**DOMISIANO MWILARIA.....3<sup>RD</sup> PETITIONER**

**MWITI NICHOLAS.....4<sup>TH</sup> PETITIONER**

**KAMAAI THIKANYI.....5<sup>TH</sup> PETITIONER**

**SEBASTIANO IKIAO.....6<sup>TH</sup> PETITIONER**

**PRISCILLA MUKPKINYA.....7<sup>TH</sup> PETITIONER**

PATRICK MBURUKI.....8<sup>TH</sup> PETITIONER  
CYPRIANO LIMBITU.....9<sup>TH</sup> PETITIONER  
THARAMBA KALAINA.....10<sup>TH</sup> PETITIONER  
SEBERA KAREI.....11<sup>TH</sup> PETITIONER  
AGNES KARAMBU.....12<sup>TH</sup> PETITIONER  
JAMES MURIUKI.....13<sup>TH</sup> PETITIONER  
MARTIN MURITHI.....14<sup>TH</sup> PETITIONER  
FLORA KITHUKU.....15<sup>TH</sup> PETITIONER  
SERA KATHONI.....16<sup>TH</sup> PETITIONER  
GRACE MWARI.....17<sup>TH</sup> PETITIONER  
SARAFINA NKIRINA.....18<sup>TH</sup> PETITIONER  
CHARITY MWARI.....19<sup>TH</sup> PETITIONER  
JACOB KIMATHI.....20<sup>TH</sup> PETITIONER

**VERSUS**

VICTOR KARITHI MUTUMA.....1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The petitioners by an application dated 5.8.2021 seeks under **Rule 21 and 22 of the Constitution of Kenya, Protection of Rights and Freedoms Rules 2003** for temporary orders of injunction barring and restraining the respondents from carrying out construction works of **Parcel No. 215 Athwana/Akithi Section Karamene area Athwana ward** pending hearing and determination of this petition.
2. The other prayer sought is a permanent injunction restraining the respondents from allocating to individuals the suit parcel of land pending determination of this petition.
3. The application is based on the grounds on the face of it and a supporting affidavit jointly sworn by Domisiano Mwilaria, Rose Mwakiuna, Mwiti Nicholas and Sebastiano Ikiao on 10.8.2021.
4. The grounds are that the suit land is public land but has now been allocated to some individuals who have allegedly started fencing it with a view of starting some development thereon instead of the proposed Karamene market.
5. The petitioners averred there has been no public participation, or requisite approvals and licences to commence the allocations or construction and that if the construction occurs, the health of the residential suburb residents would be compromised.
6. Further, the applicants aver that they have established the suit land which was reserved for the construction of Karamene market had been allegedly subdivided into 14 plots and was illegally allocated to individuals who had invaded it, started fencing activities and had deposited building materials as shown in the attached photographs marked **DM "1"**.
7. It was averred that the alleged subdivision(s) and allocations went against public policy and were in breach of the residents' constitutional and fundamental rights as to privacy, dignity; health environment and the principles of public participation, transparency and accountability.
8. The 1<sup>st</sup> respondent opposed the application through a replying affidavit sworn on 20.12.2021 as speculative, full of falsehoods, as political and not based on cogent evidence, resjudicata and an abuse of the court process.
9. It was the 1<sup>st</sup> respondent's view that as an elected leader, his mandate was to represent his constituents' rights and interests at the County Assembly including ensuring the 2<sup>nd</sup> respondent uphold public land in trust of the people and manages the land in the best interest of the public hence was unaware of the alleged subdivisions, allocation and authorization of developments to third parties.

10. Further, the 1<sup>st</sup> respondent averred the suit property was earmarked by the defunct Nyambene County Council, his ward lacked a market, residents had lobbied for a modern market which would immensely benefit them by promoting trade and their economy and hence the allegations in the application were without merits, vexatious, frivolous and ought to be dismissed.

11. The 2<sup>nd</sup> respondent opposed the application through a replying affidavit of Catherine Kithinji sworn on 20.12.2021 largely associating her averments with those of the 1<sup>st</sup> respondent save to reiterate that there had been no subdivisions, allocation, approved developments and or fencing as alleged or at all in line with the clear laid down procedures to be followed by the 2<sup>nd</sup> respondent in allocating and leasing public land to interested members of the public.

12. Further, the 2<sup>nd</sup> respondent averred if any structures existed in the suit land as alleged, the same were illegal, unlawful and not authorized by the 2<sup>nd</sup> respondent.

13. With leave, parties put in written submissions dated 4.12.2021 and 18.1.2022.

14. The petitioners submitted that they had met the threshold for the grant of injunction as set out in *Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358* on prima facie case since the supporting affidavit had indicated there had been illegal allocation to individuals who had fenced it and had started erecting illegal structures on the suit land hence the subject land was in danger of wastage, damage and alienation as per **Order 40 Rule 1 (a) Civil procedure Rules**. Reliance was placed on *Naftali Ruthi Kinyua Gachure –vs- Patrick Thuita & Another [2015] eKLR* on the proposition that based on the documentation and the doctrine of **lis pendens**, there was need to preserve the suit land.

15. About irreparable injury, the petitioners submitted any continuation of allocation and authorization of developments of the suit land to individuals will cause profound harm, loss and damage which could not be cured as held in *Tritex Industries Ltd & 3 Others –vs- National Housing Corporation & Another [2014] eKLR*.

16. Regarding the balance of convenience, the petitioners submitted that the supporting affidavit and its annexures thereto indicated the balance of convenience favoured the grant of the orders sought as held in *Thomas Mungiria & 9 Others –vs- Joseph Mutuma & 4 Others [2012] eKLR Meru HCC No. 12 of 2010*.

17. On the other hand, the respondents submitted the issues for determination were whether the injunction should be granted, if the application was res judicata and lastly what would be the orders as to costs.

18. On the 1<sup>st</sup> issue, the respondents submitted the application fell short of the parameters set out in *Giella –vs- Cassman Brown (supra), Nyayo Embakasi Resident Association (George Ochola & 3 Others –vs- National Social Security Fund & Another [2015] eKLR and Mrao Ltd –vs- First American bank Ltd & 2 Others [2003] KLR 125* in that there had been no evidence of subdivisions, allocation and approvals of developments linking the respondents with any alleged ongoing works on the suit land, documentary or otherwise from the lands Ministry, or anything close to that, save for the photographs which had no evidentially value.

19. The respondents submitted there had been no demonstration of any irreparable damage or injury which the petitioners were likely to suffer given that for the alleged subdivisions, allocation and approval of developments to occur, there were elaborate legal procedures to follow and as stated in the replying affidavit of Catherine Kithinji, there were no plans in place to do so given the views and needs of Athwana ward residents for a modern market and lastly that the balance of convenience did not favour the applicants.

20. In fact, it was submitted if such orders were given, it would stifle development plans by the 2<sup>nd</sup> respondent for it may require the public land for a different project which if orders were in place it would estop if from effecting, should the need arise.

21. On the res judicata, the respondents submitted a similar application dated 18.6.2019 was determined on 29.1.2020 over the same issues between the same parcels and seeking the same remedies yet the current one was a replica hence bad in law, vexatious and an abuse of court. Reliance was placed on *San Electricals Ltd –vs- Sitima Enterprises Ltd & 4 Others [2015] eKLR and Uhuru Highway Development Ltd –vs- Central Bank of Kenya [1996] eKLR* since there was no review or appeal of the previous orders.

22. This court commends the lawyers for the parties for very elucidate and up to point submissions on their respective parties rival claims.

23. Having said that, the issue commending themselves for determination is whether a party may apply in a petition for injunctive orders without falling under the traps of **Section 7 of the Civil Procedure Act** after the denial of similar orders petitioners are entitled to the orders sought.

24. Looking at the first issue, the respondents have attacked the instant application for being res judicata. By an application dated 18.6.2019, the petitioners were seeking temporary orders of injunction stopping the respondents from carrying on the suit land of the proposed Athwana market in Karamene residential area on the ground it was offensive to planning laws, there had been no public participation or approvals from **National Environment Management Authority**, that it was injurious to the rights and freedoms of the petitioners given the **Environmental Impact Assessment Report** had raised serious concerns and lastly there was fear 14 plots had allegedly been subdivided and allocated to non-residents.

25. In reply to the application, the respondents indicated the proposed Karamene market was not one of the projects then earmarked for that financial year and that the Environmental Impact Assessment had been erroneously done.

26. Secondly, the respondents denied the purported allocation and subdivisions of 14 plots in favour of third parties.

27. The court has considered the issue(s) before it then, and now as over the proposed Karamene market and the allegations of illegal allocation. In essence therefore, prayers 3 and 5 of the instant application was essentially heard and determined by the court to finality. The photographs attached have not been authenticated and so are the allegations over the subdivisions, allocation and or developments on the alleged public land.

28. The petitioners have not attached any minutes, transfer(s) or searches from the lands Ministry to substantiate their claim that after the ruling of 29.7.2020, the substratum to the petition was now under attack for this court to preserve the property. Alienation of public land is a long process involving the National Land Commission.

29. The applicants have not demonstrated before this court that a petition or a complaint had been lodged at the National Land Commission to investigate any sub-divisions or allegations. Similarly, it is common knowledge the 2<sup>nd</sup> respondent has in place a committee governing public land.

30. As regards the prayer No's 2 and 4 for injunction, this court is asked to issue a temporary injunction restraining the respondents and or their servants or agents or anyone claiming through them from carrying out any construction works on **Parcel No. 215 Athwana/Akithi section**.

31. In the previous application, the prayer was seeking for the stoppage of construction of the proposed Athwana market.

32. In the instant application, the grounds are that the respondents have allowed some individuals now purportedly allocated the land to fence and or begin construction on the public land without public participation and the requisite approvals and or licences.

33. To substantiate this, the petitioners have attached photograph(s). The date, place and particulars of the individuals allegedly allocated the land have not been given. The petitioners have not attached any official searches from the Ministry of lands, minutes or request from the National Construction Authority, Public Health department, National Environment Management Authority and or the Ministry of public Works so as to lead credence to their assertion that there has been allocation, change of user, non-approvals of permits or licenses regarding the allottees and or the proposed developers of the plots in issue.

34. The petitioners have not disclosed if they have lodged a complaint to the County Planning Liaison Committee under the Physical Planning laws which is the first port of all before escalating the matter to court.

35. The court in ***Kanorero River Farm & 3 Others –vs- National Bank of Kenya Ltd [1986] KLA*** held the doctrine of res judicata applies equally to decisions on applications as it does to final decisions on matters. This was confirmed by the Supreme Court of Kenya in ***George Kihara Mbiyu –vs- Margaret Njeri Mbiyu & 15 others [2018] eKLR***.

36. The doctrine serves the statutory aim of bringing finality to litigation and affords parties closure and the respite from the spectre of being flexed, haunted and hounded by issues already determined by a competent court such that without it, there will be no ends to litigation and the judicial process would be rendered a nonsense, nuisance and held in disrepute since there would be no sure and certain justice. See ***Uhuru Highway Development (supra)***. ***Peter Njogu –vs- Joyce Wambui Njugu & Another [2005] eKLR***, ***Joseph Kathuthi & 11 Others – vs- Permanent Secretary, Ministry of Interior & Coordination of Government & Another [2021] eKLR***.

37. In ***Uhuru Highway Development (supra)***, the court held interlocutory applications were covered by **Section 89 Civil Procedure Act** citing with approval ***Mburu Kinyua –vs- Gachini Tuti [1978] KLR 69***. It went on to say a party coming to court must come with all facts in support of his case and not keep some facts in reserve.

38. Further, the court in considering whether if there were new set of facts or evidence a party could circumvent res judicata, it held parties must bring before court exercising reasonable diligence, all facts/issues that they could take and that points not taken then could not be taken again as the same would amount to an abuse of the court process.

39. The court took the view that once an application was heard and determined under the ***Giella*** (principles), a similar application could not be brought unless there were new facts not before the court earlier on after the exercise of due diligence which merits a rehearing and possible departure from the previous ruling.

40. In the instant case, I have demonstrated that petitioners have not brought new set of facts or issues. The petition remains as it was on 29.1.2020. No amendment was made to it.

41. I therefore come to the conclusion that the application herein is res judicata. The same is dismissed with costs.

42. Parties to set down the petition for hearing within 90 days failure of which it shall stand dismissed for non-prosecution.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23<sup>RD</sup> DAY OF MARCH, 2022**

**In presence of:**

Kamindo holding brief for Ayieko for respondents

Mutuma for applicants

Court Assistant – Kananu

**HON. C.K. NZILI**

**ELC JUDGE**