



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 19 OF 2021

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF ARTICLES 22 AND 23 AND 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 26A, 27, 28 AND 29 OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 AND 284 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 24, 25 AND 26 OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF SECTION 7 OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF ENVIRONMENT AND LAND COURT ACT 2011

BETWEEN

MAGDALENE MWOMBUI FRANCIS (Petitioning as a legal representative of

M'THIRINJA M'IMATHIU THARANE (Deceased)..... PETITIONER

VERSUS

LAND ADJUDICATION & SETTLEMENT OFFICER, KARAMA..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

FIRDINARD KAIYERA RITHUTY..... INTERESTED PARTY

RULING

1. By a preliminary objection dated 5.11.2021, the interested party takes the view that the petition herein is resjudicata since this is a land dispute where the petitioner was aggrieved by objection proceedings after which he filed **Meru ELC Judicial Review No. 17 of 2019** which was determined on 3.11.2020 and the proceedings dismissed for want of prosecution.
2. After the dismissal, the petitioner did not apply for the reinstatement of the judicial review matter but filed the instant petition.
3. Mr. Ouma counsel for the interested party submitted that the petition raised the same issues over the subject matter between the same parties which was contrary to **Section 7 of the Civil Procedure Act, Order 12 Rule 7 Civil Procedure Rules**, allowed for reinstatement of the judicial review instead of a different suit which in his view amounted to abuse of the court process. Counsel relied on **Stephen Njihia Ndumia T/A Sunlight Bar & another –vs- Baringo County Government & another [2020] eKLR**.
4. Mr. Orimbo advocate for the petitioner opposed the preliminary objection. He relied on the answer to the preliminary objection dated 16.11.2021 on the basis that the order of 3.11.2020 was not a determination of the matter on merits.
5. Counsel submitted a matter dismissed for want of prosecution was not a determination on merits and did not fall under **Section 7 of the Civil Procedure Act**. Counsel relied on **Michael Bett Siror –vs- Jackson Koech [2019] eKLR** on the proposition that where a suit was technically knocked out, the matter was not determined on merits.
6. Counsel also relied on **Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others [2017] eKLR** where the Court of Appeal held that all elements must be satisfied conjunctively for the doctrine of res judicata to be invoked.
7. In a rejoinder, Mr. Ouma advocate submitted the remedy to the petitioner after the judicial review was dismissed for want of prosecution was to apply for reinstatement but not to file a fresh matter which amounted to trying to go around the knock out which should not be permitted since the cure was **Order 12 Rules 3 and 7 of the Civil procedure Rules**.
8. A preliminary objection was defined under **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd [1069] E.A 696** as a pure point of law taken on the basis that the facts as pleaded by one party are admitted by the other. Courts have held a point of law is not disclosed if facts have to be ascertained and or what was sought was with regard to the exercise of a court's discretion. See **Independent Electoral & Boundaries Commission –vs- Jane Cheperenger & 2 Others [2015] eKLR**.
9. In this matter, the petitioner's claim is based on the petition dated 15.6.2021. The petitioner has described herself as the sister to the late M'Thirinja M'Imathiu Tharane who died without heirs and whose undisclosed mother owned **Parcel No's 1685, 1638 and 2841 Karama adjudication section** recorded in the name of the deceased which the 1st respondent allegedly in 2017, colluded and or conspired with a third party and the 1st interested party to transfer.
10. The petitioner avers he filed objections which were heard without committee members and whose dismissal the land adjudication recorded in favour of the interested party.
11. He disclosed the existence of a **Judicial Review No. 17 of 2019** and seeks for invalidation of the decision, he be declared the owner of the parcels and mandamus for the 1st respondent to cancel the register in favour of the interested party.
12. The issue commending itself for the court's determination is whether the preliminary objection herein meets the threshold and secondly, if the petition offends **Section 7 of the Civil Procedure Act**.
13. Other than the preliminary objection, the interested parties and the respondents have not responded to the petition. **Annexure MMF "1"** to the petition was the proceedings to the **Meru ELC Judicial Review 17 of 2019**. The pleadings in that judicial review have not been attached to the preliminary objection for this court to establish if the parties' subject matter and the issues in the two suits are similar and or offend **Section 7 of the Civil Procedure Act**.
14. In **Oraro –vs- Mbaja [2005] eKLR**, the court held where the court has to establish the facts, a party raising a preliminary objection on such a matter falls below the threshold of what amounts to a preliminary objection.
15. In my view, the court would have to look for the facts herein and find out what was before the previous court and if the same was similar with the instant case. Similarly, both parties herein agree the previous suit was not determined on merits and to finality.
16. Be that as it may, the interested party has shifted his argument to say the failure to apply for the setting aside of the order dismissing the suit for non-prosecution and the reinstatement of the judicial review and coming to file a fresh matter a petition, amounts to an abuse of the court process.
17. In my view, the preliminary objection as filed did not include that 2nd ground of objection. That notwithstanding, there has been no demonstration of the nature of abuse. In order to establish an abuse of the court process, such an endeavor would be a matter of the exercise of discretion.
18. The petition herein is grounded under **Articles 23 and 165 of the Constitution. Order 12 Rules 3 and 7 of the Civil Procedure Rules** cannot be used to stifle a party's access to justice under **Article 48 and 50 of the Constitution**.
19. The interested party has not demonstrated any prejudice occasioned by the non-revival of the judicial review proceedings. It was the Attorney General who sought for the dismissal of the judicial review for non-compliance in the absence of the interested party and the

petitioner herein with costs only to the respondent.

20. In sum, I find the preliminary objection lacking merits. The same is dismissed with costs.

21. Parties to file responses within **45 days** and take a date for directions.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 23RD DAY OF MARCH, 2022

In presence of:

Orimbo for petitioner

Ouma for interested party

Kieti for 1st, 2nd and 3rd respondents

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE