



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 403 OF 2012

BETWEEN

MUUNGANO WA WANAVIJIJI.....1ST PETITIONER

ERIC MAINGI.....2ND PETITIONER

KEVIN MUSOMBA.....3RD PETITIONER

CHRISTIAN SADA.....4TH PETITIONER

JANET NYAMATA.....5TH PETITIONER

MUKURU HEALTH AD.....6TH PETITIONER

ELIJAH.....7TH PETITIONER

ROSELINE.....8TH PETITIONER

EVANS KIDALA.....9TH PETITIONER

JACKY NYABOS.....10TH PETITIONER

JAMES ARISA.....11TH PETITIONER

ISAAC MOSE.....12TH PETITIONER

RUBEN AFYA.....13TH PETITIONER

BRIDGE RURWEBU.....14TH PETITIONER

BERNARD MUTISO.....15TH PETITIONER

STELLAMARIES NKONGE.....16TH PETITIONER

HENRY ONGERI.....17TH PETITIONER

JUDITH.....	18 TH PETITIONER
GIDEON MBINDA.....	19 TH PETITIONER
RICHARD MUSETU.....	20 TH PETITIONER
JOB OMBASA.....	21 ST PETITIONER
HENRY NYABUTO.....	22 ND PETITIONER
KILONZO WILSON.....	23 RD PETITIONER
ELIUD NGARE.....	24 TH PETITIONER
MILLICENT AKINYI.....	25 TH PETITIONER
WALTER KHOVA.....	26 TH PETITIONER
JOMO OANGA.....	27 TH PETITIONER
CLIFF OBONYO.....	28 TH PETITIONER
JANE ASIKO.....	29 TH PETITIONER
JUDITH MUSIMBI.....	30 TH PETITIONER
JOSPHAT MUTISO.....	31 ST PETITIONER
KENNEDY OTOTO.....	32 ND PETITIONER
SAMUEL KAUNDE.....	33 RD PETITIONER
WILLIAM ADOYO.....	34 TH PETITIONER
PATERE ECARIGO.....	35 TH PETITIONER
JONATHAN WACHIRA.....	36 TH PETITIONER
CAROL MUENI.....	37 TH PETITIONER
ALEX VUGUSO.....	38 TH PETITIONER
DANCAN MWARO.....	39 TH PETITIONER
WILSON MUTUA.....	40 TH PETITIONER
SAMUEL.....	41 ST PETITIONER

AND

THE HON. ATTORNEY GENERAL.....	1 ST RESPONDENT
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THE MINISTER FOR LANDS.....	2 ND RESPONDENT
THE MINISTER OF STATE OFFICE OF THE PRESIDENT IN CHARGE OF PROVINCIAL ADMINISTRATION.....	3 TH RESPONDENT
COMMISSIONER OF LANDS.....	4 TH RESPONDENT
RETIRED PRESIDENT HIS EXCELLENCY DANIEL ARAP MOI.....	5 TH RESPONDENT
WILSON GACHANJA.....	6 TH RESPONDENT
SAMMY MWAITA.....	7 TH RESPONDENT
JAMES RAYMOND NJENGA.....	8 TH RESPONDENT
JOHN JOSEPH KAMOTHO.....	9 TH RESPONDENT
KUZA FARMS AND ALLIED LIMITED.....	10 TH RESPONDENT
EMBAKASI DEVELOPERS LIMITED.....	11 TH RESPONDENT
NASH MOTORS LIMITED.....	12 TH RESPONDENT
MIDWAY VENTURES LIMITED.....	13 TH RESPONDENT
ORBIT CHEMICALS LIMITED.....	14 TH RESPONDENT
BETA ENGINEERING LTD & AMSCO CHEMICALS LTD.....	15 TH RESPONDENT
WOODCRAFT INDUSTRIES LIMITED.....	16 TH RESPONDENT
JANDU INVESTMENT (K) LIMITED.....	17 TH RESPONDENT/APPLICANT
OCEANFREIGHT TRANSPORT CO. LIMITED.....	18 TH RESPONDENT

RULING

1. The Application before me is dated 24th March 2014 and is filed by the 17th Respondent, Jandu Investment (K) Limited and is supported by an Affidavit sworn by Nilesh Devani on 18th February 2014. The Application has sought for an order that the Petition as against the 17th Respondent should be struck out and/or dismissed. It has also sought an order of costs of the Application and the entire Petition as against the 17th Respondent.
2. The Application is based on the following grounds i.e. that;
 - i. The matter as against the 17th Respondent has been fully dealt with in **ELC Petition 869 of 2012.**

- ii. A preliminary decree was obtained by consent of all parties in the above cited matter where the 17th Respondent is the 4th Respondent.
- iii. The Petition as against the 17th Respondent amounts to *res judicata* as similar issues were addressed in **ELC Petition 869 of 2012** and a final consent order recorded amongst the Parties on 29th August 2013 and adopted as an order of the Court.
- iv. Pursuing the Petition as against the 17th Respondent will be an abuse of the Court process.

The Applicant's Case

3. The Applicant contends that **ELC Petition No.869 of 2012** was initially filed as a Constitutional Petition and dealt specifically with the land in dispute in the present Petition and was subsequently settled by consent of the Parties therein. It thus contends that the matters in issue in this Petition as against the 17th Respondent have been fully settled and that continuing with the Petition as against it would be an abuse of the Court process. It also claims therefore that the Petition as filed is *res judicata* and should be struck out. Mr. Kanjama for the Applicant further relies on the case of **Job Kipkemei Kilach vs Director of Public Prosecutions & 2 Others 2014 eKLR**, and **Charo Kazungu Matseve & 273 Otura vs Kenent Holdings Ltd & Anor (2012) eKLR** in support of that proposition.
4. It was Mr. Kanjama's other submission that the Petitioners' claim as against the other Respondents should proceed for determination as filed under **Article 22(2) (b)** of the **Constitution**.

Petitioners'/Respondents' Submissions

5. The Petitioners/Respondents oppose the Application through the Affidavit of Joseph Muturi, a National Executive Member of Muungano wa Wanavijiji sworn on 11th July 2014 and submissions by Mr. Lempaa, Learned Counsel.
6. They state that the Petition as filed against the 17th Respondent is not an abuse of the Court process and does not raise issues that are *res judicata*.
7. Further, that the Petitioners herein, all members of Muungano wa Wanavijiji, were not party to **ELC No.869 of 2012** and are therefore not bound in any way by any orders arising out of that suit because orders given in *personam* cannot operate as against the whole world. In any event, that this Petition and **ELC No.896 of 2012** do not in raise identical issues for determination and cannot therefore be treated as if they are the same.
8. It is also the Respondents' position that the Applicant is guilty of non-disclosure of material facts as the Pleadings in **ELC No.869 of 2012** are not before the Court and this Court is being asked to speculate on them and their import. That in that regard, a party coming to Court must come with clean hands and without providing pleadings in **ELC No.869 of 2012**, the Court cannot determine whether the matter is *res judicata* or not.
9. Mr. Lempaa for the Petitioner thus submits that the Application is an abuse of the Court process and is meant to delay the hearing of the Petition filed by Parties that were never in any litigation with the Applicant. He thus urges the Court to dismiss the Petition, stating that access to justice is a constitutional right that cannot be fettered in any way.
10. The 1st to 16th Respondents and the 18th Respondent did not reply to the Application neither did they make any submissions in regard thereof.

Determination

11. The only issue arising for determination from the Parties' submission as summarized above is whether the suit is *res judicata* and thus an abuse of the Court process.
12. In that regard, the principle of *res judicata* in civil law in Kenya is provided for under **Section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya)** which 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.”

In addition, the doctrine of *res judicata* has also been upheld by various Courts in various jurisdictions as seen below;

- i. In the case of **Gordon vs Gordon 59 So. 2d 40 (Fla. 1952)**, the Supreme Court of Florida stated that;

“We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when res judicata is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as was the first. If the second suit is bottomed upon a different cause of action than that alleged in the prior case estoppel by judgment comes into play and only those matters actually litigated and determined in the initial action are foreclosed —no other matters which "might have been, but were not, litigated or decided...”

The Court went on and stated that;

“...res judicata is founded upon the sound proposition that there should be an end to litigation and that in the interest of the State, every justiciable controversy should be settled in one action in order that the courts and the parties will not be bothered for the same cause by interminable litigation.”

- ii. In the case of **International Harvester Company vs Occupational Safety and Health Review Commission and the Secretary of Labour 628 F. 2d 982, 1980** the United States Court of Appeals rendered itself in the following words;

“[12]...we note that even where the technical requirements of res judicata have been established, a court may nonetheless refuse to apply the doctrine. This court does not adhere to a rigid view of the doctrine in the administrative context:

[13] The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor...”

- (iii) In **Ramchandra Dagdu Sonavane (Dead) by L.Rs. vs Vithu Hira Mahar (Dcsd) by L.Rs. & Ors., AIR 2010 SC 818**, the Supreme Court of India pointed out that;

“...It is well known that the doctrine of res-judicata is codified in Section 11 of the Code of Civil Procedure. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res-judicata or the principle of the res-judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res-judicata is

engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also Principles not only of direct res-judicata but of constructive res-judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res-judicata and bars the trial of an identical issue in subsequent proceedings between the same parties. The Principle of res judicata comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications and even then the Principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided.”

iv. In **Swamy Atmandanda vs Sri Ramakrishna, Tapovanam [(2005) 10 SCC 51]**, the Court opined as follows;

“[26] The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment. [27] The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.”

v. In the **East African Court of Justice EACJ Reference No.1 of 2007, James Katabazi and 21 Others vs The Attorney General of the Republic Of Uganda**, the Court stated that for the doctrine of res judicata to apply;

“...the matter must be ‘directly and substantially’ in issue in the two suits and the parties must be the same or parties under whom any of them claim, litigating under the same title...”

vi. In Kenya, the approach of the Courts has not been different from the above, as can be seen from the decisions in **Job Kipkemei Kilach vs Director of Public Prosecutions and 2 Others (2014) eKLR, Charo Kazungu Matsere and 273 Others vs Kencent Holdings Limited and Another (2012) eKLR, Karia and Another vs the Attorney General and Others (2005) 1EA 83** and also in **Samuel Njau Wainaina vs Commissioner of Lands and 6 Others Petition No. 46 of 2012** where in the latter case, the Court held that;

“In this respect, I would do no better than quote the case of Edwin Thuo vs Attorney General & Another Nairobi Petition No. 212 of 2012 (Unreported) where the court stated;

“[57] The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he

stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata'."

13. I am in agreement with the above propositions of the law and applying them to the Application before me wish I opine as follows;
14. In the Petition before me, the parties are Muungano wa Wanavijiji, an alleged federation of slum dwellers with presence in various informal settlements in the Republic of Kenya and the individual Petitioners are members of the larger Mukuru Informal Settlement Community in Nairobi. They have filed this Petition against several other Respondents including the 17th Respondent, Jandu Investment (K) Ltd. In **ELC No.869 of 2012**, the parties were Councillor Peter Maina Kangara as Petitioner and Jandu Investment (K) Ltd among others as Respondents and the 17th Respondent had been sued as the 4th Respondent in that suit.
15. As can be seen, on the face of it, the parties are therefore not the same. I have also perused **ELC No.869 of 2012** and it is unclear what personal interest the Petitioner therein (Councillor Peter Maina Kangara) sought to represent. However, it is clear from the record that he was also acting on behalf of, and to pursue the interests of the residents of Lunga Lunga slums who were in occupation of **LR. No.209/9633** registered in the name of the 17th Respondent/Applicant. In that case, the residents of Lunga Lunga slums were threatened with demolition of their structures on **LR. No.209/9633** and *prima facie*, Councillor Peter Kingara was seeking to protect their interests over that parcel of land.
16. The question I must therefore answer is whether Councillor Peter Maina Kangara had also filed that suit on behalf of the Petitioners herein, either as individuals or as members of Muungano wa Wanavijiji.
17. Mr. Kanjama for the Applicant, in his Submissions, claimed that **ELC No.869/2012** was filed by Kingara aforesaid, in the interests of all the residents of that area generally and land parcel number L.R.209/9633 in particular. That the Petitioners' claims and interests were therefore necessarily included in that suit and once the suit was compromised by consent, then the claims by the Petitioners were also compromised and are consequently barred by the principle of *res judicata*. In that regard, a perusal of the pleadings in **ELC No.869/2012** would reveal that the dispute in **ELC No.869/2012** was with regard to **LR. No.209/9633** which is registered in the name of Jandu Investments (K) Ltd, the Applicant, and the Consent Orders recorded in that suit were against the said Jandu Investments (K) Ltd. in favour of the residents of Lunga Lunga slums represented by Councillor Peter Kingara.

What then is the nexus between the individual Petitioners, Muungano wa Wanavijiji and the residents of Lunga Lunga slums? I have said that having perused the Pleadings in the two files, i.e. the instant Petition and **ELC No.869 of 2012**, I still cannot see and do not know the nexus between the two parties. Mr. Kanjama failed to address me on that aspect of the Application and, therefore *prima facie* my finding is that the two parties are not the same neither are their interests nor claims although they obviously all claim a portion of or the whole of **LR. No.209/9633**. I make that finding based on the evidence and the material before me at this stage of the proceedings.

18. I now turn to consider the other corollary issue, i.e. whether this Petition raises same the issues as those in **ELC No.869 of 2012**.
19. In this Petition, the Petitioners are *inter alia* claiming that they have been in occupation of **LR. No.209/9633** which was also the subject matter of **ELC No.869 of 2012** and they have thus sought orders directed at the 9th to 18th Respondents to forfeit the said parcel of land, for the Commissioner of Lands to revoke the grant of title and for the National Land Commission to grant the said land to the Petitioners as residents of Mukuru kwa Reuben Informal Settlement in

Nairobi.

20.The issue in contest in the Application must therefore be viewed from the fact that the Petitioners are claiming the suit land as members of Muungano wa Wanavijiji residing in Mukuru kwa Reuben Slums while in **ELC No.869 of 2012** the Petitioners had sued on behalf of the residents Lunga Lunga Slum in Nairobi. Even if therefore the subject matter of both cases is the same as in **ELC No.869 of 2012**, the parties claiming thereof are not the same and the Petition has not been determined as regards that specific claim. It is therefore difficult to state that the issues in the Petition before me are the same as the issues in **ELC No.869 of 2012**.

21.Having expressed myself as above, it is my finding that the Petition before me is not *res judicata* with regard to the case against the 17th Respondent and I decline to strike out the Petition as against it. The law as set out elsewhere above and the facts before me would lead me to that conclusion only and to no other.

22.The Application dated 24th March 2014 is therefore dismissed and as to costs, let the same abide the outcome of the Petition.

23.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 30TH DAY OF OCTOBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Lempaa holding brief for Mr. Imanyara for Petitioners

Mr. Sekwe for 1st, 2nd and 3rd Respondents

Order

Ruling duly delivered.

Mention on 9/12/2014 for directions

Notice to issue.

ISAAC LENAOLA

JUDGE