



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 357 OF 2012

SAYIALEI OLE KOILEIPETITIONER

VERSUS

LAND REGISTRAR, KAJIADO 1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE, KAJIADO.....2ND RESPONDENT

CHAIRMAN LAND DISPUTE TRIBUNAL, KAJIADO.....3RD RESPONDENT

ATTORNEY GENERAL4TH RESPONDENT

AND

DANIEL MONIREIINTERESTED PARTY

RULING

1. On the **24th September 2013**, the Petitioner/Applicant filed a Chamber Summons under certificate of urgency seeking issuance of conservatory orders restraining the Respondents and Interested Parties, their agents, employees, servants and any person claiming and/or deriving title from the Interested parties and Respondent from selling, transferring, alienating, charging, developing and or dealing with **L.R. Number L.R. Number Kajiado/Kipeto/3454** pending hearing and determination of the reference. Interim orders were granted pending hearing of the application *interpartes* by **Dulu J**, on the **25th day of September 2012**.

2. On the **9th June 2014**, the interested party filed a notice of Preliminary Objection to the Petition and the Chamber Summons on grounds that;

- i. This court lacks jurisdiction to consider the Petition and the application due to the principle of *res judicata*. The basis being that **Makhandia J (as he then was)** heard **H.C. Misc. Civil Case No. 142 of 2011** on the same subject matter **Title No. Kajiado/Kipeto/2454** between the same parties herein.
- ii. The Petition and chamber application is an abuse of the process of the court.

3. In his submissions counsel for the interested party **Mr. Ocharo** submitted that the land in issue belongs to the interested party having purchased it from the Petitioner. When his rights were disputed by the Petitioner the issue was adjudicated upon by the **Land Disputes Tribunal**. Its decision was confirmed by the court.

4. Having failed to appeal to **Appeals Tribunal Board**, the Petitioner moved the court to review its order. The prayer having been rejected, they sought prerogative orders challenging the decision of the subordinate court. The application was dismissed. Seeking the same orders in a constitutional petition is *res judicata* as there is no constitutional issue. Terming it an abuse of court, he prayed for dismissal of the same.

5. **Ms. Otieno** learned counsel of the Petitioner submitted that the petition raised a quasi-constitutional issue. She stated that the miscellaneous application was for leave to file judicial review proceedings that were declined. Rights of fair hearing could therefore not be addressed in a Judicial Review Application. She argued that the issue raised in the petition was between private individuals. She called upon the court to dismiss the Preliminary Objection.

6. The issue for determination is whether the petition herein is *res judicata*.

Section 7 of the Civil Procedure Act provides:

“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 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. In the instant constitutional petition, the Petitioner/Applicant seeks declaratory orders to the effect that he has a constitutional right to exercise proprietary interest over **L.R. Number Kajiado/Kipeto/3454**. This is tantamount to being declared the owner of the aforementioned parcel of land.

8. Looking at the supporting affidavit to the petition, it is deponed that the Petitioner sold the land to the interested party who did not pay him the total purchase price. However, following a dispute that arose over the portion of land, he was summoned to appear before the **Kajiado District Land Disputes Tribunal**. The complainant was Interested Party. Thereafter he learnt that the Interested Party had obtained a title to land subsequent to issuance of a decree by Senior Resident Magistrate, Kajiado. Terming what transpired as illegal acts, he called upon the court to determine whether he was deprived of his property.

9. The interested party however argues that the Applicant herein filed a **Miscellaneous Application No. 142/2011** seeking leave to institute Judicial Review Orders to quash the decree of the Senior Resident Magistrate’s Court, Kajiado in **Land Disputes Tribunal Case No. 14 of 2010**.

Further, he also sought to have the District Land Registrar directed to cancel the title deed issued to the Interested Party and reinstate the applicant’s title deed.

10. The grounds relied upon were inter alia that the judgment entered and subsequent decree of the court enabled the Interested Party to deprive the Applicant his right to ownership of the land.

11. In his ruling **Makhandia J** (*as he then was*) held that the remedy of the Applicant lay in an appeal either to the Provincial Land Disputes Appeals Committee or to the High Court. On that ground leave sought was denied.

12. Looking at the verifying affidavit relied upon in **Misc. Civil Application No. 142 of 2011** and the supporting affidavit to the petition herein, the content is similar.

13. As stated in the case of **Abok James Odera versus John Patrick Machira, Civil Application No. Nai 49 of 2001**, to rely on the doctrine of *res judicata* it must be established that there was;

i. A previous suit in which the matter was in issue;

- ii. The parties were the same litigating under the same title;
- iii. A competent court heard and determined the matter in issue and
- iv. The issue had been raised once again in a fresh suit.

14. The issue herein though clothed as constitutional rights issue, is ownership of land parcel number **Kajiado/Kipeto/3454** in the name of **Daniel Nkirimpa Monirei** the interested party. This was the subject matter of the case before the Land Dispute Tribunal, Kajiado. The court did adopt the award and issued a decree thereto. Prior to the learned Judge coming up with the decision in **HC Misc. Application No. 142 of 2011**, he considered the grounds, upon which the application was based, the statement of facts and verifying affidavit. The order was dated **31st January 2012**.

The parties herein were the same ones litigating under the same title aforesaid. The issue was determined by a court of competent jurisdiction.

15. The same issue has now been raised in the instant suit. Although issues of constitutional rights have been brought in, the bone of contention is ownership of land which was determined by **Makhandia J.** The applicant having chosen not to appeal against the order, bringing up the same issue which is res judicata is tantamount to abuse of due process of the court.

16. In the result, the Preliminary Objection is allowed. The Petition filed herein is struck out with costs.

17. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 23RD day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE