



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 508 of 2012

JOMUNJO EDUCATION FOUNDATION LIMITED .....PETITIONER  
AND

DANIEL KIPURKET LEPATEI ..... 1<sup>ST</sup> RESPONDENT

PETER SANE LEPATEI ..... 2<sup>ND</sup> RESPONDENT

THE REGISTRAR OF TITLES ..... 3<sup>RD</sup> RESPONDENT

THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT

RULING

Introduction and background

1. The petitioner claims that it is the lawful and legal owner of a parcel of land known as **KAJIADO/KAPUTIEI NORTH 807** having been issued with a title in 2004. It claims that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acquired the land fraudulently through the Kajiado Land Disputes Tribunal which awarded them ownership of the said land in *Case No. TC 465/7/2008*. The Tribunal award was adopted in *Kajiado Resident Magistrates Court Mis. Appl. No. 30 of 2008*.

2. In order to forestall the loss of the land, the petitioner then filed *Machakos HCCC No. 204 of 2008, Jomunjo Education Foundation Limited v Daniel Kipurket Lepatei, Peter Sane Lepatei and Registrar of Titles* in which it sought redress in respect of Tribunal Award. In the said suit, the petitioner sought orders to restrain the respondents from interfering or dealing with the land and indeed obtained an interim injunction restraining the respondents from interfering and dealing with the land.

3. In the course of the proceedings, the respondents applied to strike out the plaint while the petitioner also filed an application to amend the plaint. The application to strike out the plaint was duly heard by Hon Justice Makhandia and by a ruling dated 31<sup>st</sup> October 2012, the suit was struck out. In his ruling the learned judge observed as follows, *“The 2defendants have demonstrated by affidavit evidence and the annexures thereto that they are the registered proprietors of the suit premises. They have exhibited a title deed issued on 24<sup>th</sup> October 2008 with regard to the suit premises which is in their*

**names. Accompanying the title deed is a certificate of official search dated 31<sup>st</sup> October 2009 showing again that the 2defendants are the registered proprietors of the suit premises. The 2 defendants too have demonstrated how they acquired the suit premises. This was pursuant to a court decree. The transfer and registration followed court proceedings which terminated in favour of the 2defendants as against the plaintiff. The court decree has yet to be reviewed and or set aside. Accordingly the defendants have demonstrated that they obtained the title to the suit premises lawfully. In the light of the foregoing this suit can be vexatious, frivolous and abuse of process of the court and I so hold. The plaintiff has not demonstrated to my satisfaction its entitlement to the suit premises if at all. The aftermath of so holding is that the suit is incontestably or hopelessly bad such that it must be struck out. It is struck out and all consequential orders vacated with costs to the 2defendants. The 2defendants shall also have costs of this application.”**

4. The petitioner being aggrieved has now moved this court by petition dated 5<sup>th</sup> November 2012 where it seeks the following reliefs;

a) A declaration that the petitioner’s right as provided under Article 40 of the Constitution is likely to be contravened at the instance of the respondents upon reliance on the fraudulent award by the Kajiado District Lands Board.

b) A declaration that the petitioner is the lawful and legal owner of the suit property known as Land reference number KJD/KAPUTIEI NORTH/807.

c) An order of mandamus directed at the registrar of titles the 3<sup>rd</sup> respondent herein to forthwith cancel the title issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents in relation to the suit property.

d) An order of mandamus directed at the registrar of titles the 3<sup>rd</sup> respondent herein to forthwith issue title to the petitioner with regard to the suit property.

e) An order of compensation to be paid by the respondents to the petitioner in such a sum and in such proportion as shall be determined by this honourable court.

f) Damages

g) Costs be provided for.

### **Issue for determination**

5. When the matter came up for directions on 20<sup>th</sup> December 2012, I directed the petitioner to show cause why this matter should not be struck out as it seeks redress in respect of a decision that has already been rendered in ***Machakos HCCC No. 204 of 2008***.

### **Submissions**

6. Mr Ongoto submitted that the petitioner’s grievance is that the ruling delivered by Justice Makhandia striking out the petitioner’s claim was made even though the petitioner had an application on record to amend the plaint. The petitioner contends that a perusal of the ruling shows that the plaintiff’s pleadings were missing from the file and the decision was probably made without any due consideration of the petitioner’s case. Mr Ongoto stated that as a result of the ruling the petitioner stood to lose substantial property as a result of glaring denial of justice. Counsel contended that the petitioner’s case was a proper case for the court to intervene and protect the petitioner’s fundamental rights and freedoms under the Bill of Rights.

7. The respondents took the position that the suit was an abuse of the process of the court. In written submissions dated 22<sup>nd</sup> January 2012, Mr Mutua, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, submitted that this matter was *res judicata* in view of the ruling delivered by Justice Makhandia where the

ownership of land was dealt with conclusively. Further the attempt to litigate issues that were subject of previous proceedings rendered the case an abuse of the court process.

8. Mr Wamotsa, counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents, noted that the issues raised by the petitioner ought to have been raised on review or appeal from Justice Makhandia's decision in ***Machakos HCCC No. 204 of 2008***. Counsel submitted that this court being one of coordinate jurisdiction cannot entertain these proceedings.

### **Determination**

9. I think this petition is an attempt to resurrect the issues that have been determined in ***Machakos HCCC No. 204 of 2008***. The issue of who is the owner of the property has now been determined by a court of competent jurisdiction. I am afraid that the decisions made by the High Court cannot be circumvented by dressing up a matter which has been the subject of a judgment as a petition for relief for the violation of fundamental rights and freedoms under **Article 22**. The issue is now *res-judicata* and in this respect, I would do no better than quote the case of ***Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2012 (Unreported)*** where I 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 is 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.*” I agree with the respondents submissions and I am satisfied that this petition is such an attempt to re-litigate the issue of the suit property.

10. The petitioner also attacks the decision of Justice Makhandia and in respect of the arguments made I would reiterate what I stated in ***John Githongo and Another v Harun Mwau and Others Nairobi Petition No. 44 of 2012 (Unreported)*** “[51] *The law governing civil procedure is replete with provisions that entitle a party to set aside an order made ex-parte, review orders where there is an error of law apparent on the face of the record or for sufficient reason. This jurisdiction is not exercised by commencing parallel proceedings but by making an application in the same case. To insist that the issues raised in this petition be dealt with in the civil suit will not impair the petitioners' rights and the petitioners will be heard by a court competent to enforce their fundamental rights and freedoms.*”

11. Finally, proceeding with this petition in the manner suggested by the petitioner would amount to reviewing the decision made by another High Court Judge. This course is not permitted and the issue has now been settled in several cases; ***Peter Ng'ang'a Muiruri v Credit Bank Limited & Others Nairobi Civil Appeal No. 203 of 2006 (Unreported)***, ***John Githongo and Another v Harun Mwau and Others (Supra)*** and ***Robert Mwangi v Shepherd Catering and Another Nairobi Petition No. 89 of 2012 (Unreported)***.

### **Disposition**

12. It must now be abundantly clear that the petitioner's case is an abuse of the court process. It must be dismissed and it hereby dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 24<sup>th</sup> day of January 2013

**D.S. MAJANJA**

**JUDGE**

Mr Ongoto instructed by C. M. Ongoto and Company Advocates for the petitioner.

Mr Mutua instructed by Nyandieka and Associates Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Mr Wamotsa, Litigation Counsel, instructed by the State Law Officer for the 3<sup>rd</sup> and 4<sup>th</sup> respondents.