



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)**

**ENVIRONMENTAL & LAND CASE 923 OF 2012**

**SIMON MUSILI MUSYOKA.....  
..... 1<sup>ST</sup> PETITIONER**

**PETER KITAVI MWEI.....  
.....2<sup>ND</sup> PETITIONER**

**MICHAEL NZIOKA  
MULIU.....3<sup>RD</sup>  
PETITIONER**

**(on their own behalf and on behalf of 1,500 owners of plots in Mwingeny Settlement Scheme,  
Embakasi Area, Nairobi.**

**Versus**

**THE COMMISSIONER OF  
LANDS.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LANDS REGISTRAR.....  
.....2<sup>ND</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....  
.....3<sup>RD</sup> RESPONDENT**

**MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL**

SECURITY.....4<sup>TH</sup> RESPONDENT

THE HONOURABLE THE ATTORNEY GENERAL.....  
.....5<sup>TH</sup> RESPONDENT

JAMES GAMAU WAINAINA.....  
.....6<sup>TH</sup> RESPONDENT

SIMON MUTURI WANGUO.....  
.....7<sup>TH</sup> RESPONDENT

RAPHAEL MUIGAI  
MWANGI.....8<sup>TH</sup>  
RESPONDENT

PAUL KAHUTHI  
KONDIA.....9<sup>TH</sup>  
RESPONDENT

### RULING ON PRELIMINARY OBJECTION

1. The Petitioners, who are residents of the Mwingenye Settlement Scheme, filed a Petition claiming ownership rights over L.R. Nos. 209/11543, 209/11544, 209/11545, 209/11546, 209/18270 and 209/18278 (the “Suit Lands”) on their own behalf and on behalf of 1,500 residents of Mwingenye Settlement Scheme in Embakasi, Nairobi Area. The Petitioners claim that they have lived on the Suit Lands for decades, have had the Suit Lands surveyed and subdivided into 1,500 portions each measuring 60 feet by 30 feet in area. The Petitioners disclose that the Suit Lands were demarcated and titles issued in favour of other persons including Kimwake Enterprises while the residents were awaiting the registration of the Suit Lands in their favour. They further disclose that the residents of Mwingenye filed two suits in High Court Civil Suit Nos. 298 of 2003 and 394 of 2004 which were later consolidated and dismissed by Hon. H. M. Okwengu. They further disclose that the said Judgment included an order of eviction from the Suit Lands against them which prompted them to file the present Petition as they are apprehensive of being rendered homeless and destitute as Mwingenye is the only place they have called home for decades. In their Petition, the Petitioners state that the impending eviction will be a violation of their fundamental right to accessible and adequate housing as enshrined in Article 43(1)(b) of the Constitution of Kenya and will render the Petitioners vulnerable to other human rights violations.

2. The Petition is supported by the Affidavit of Simon Musili Musyoka dated 19<sup>th</sup> November 2012 which sets out the facts of the case. There is also a Chamber Summons dated 19<sup>th</sup> November 2012 that seeks conservatory orders staying the eviction of the Petitioners from the Suit Lands. The application is also supported by the Affidavit of the 1st Petitioner sworn on the same date.

3. The 8<sup>th</sup> and 9<sup>th</sup> Defendants filed a Notice of Preliminary Objection to the Petition dated 6<sup>th</sup> December 2012 on the ground that the matter is **RES JUDICATA** as the matters raised therein have already been determined in Nairobi HCCC No. 298 of 2003 consolidated with HCCC No. 394 of 2004

and they requested that the Petition herein be dismissed with costs.

4. Submissions were made by counsel for the parties herein which I have taken into consideration. On their part, counsel for the Objector stated that this new case touches on the same subject matter as the decided case namely the Suit Lands and that the parties in this new case are the same ones who were covered in the representative suit of the decided case. They emphasized that this court cannot make another ruling against a judgment which had been made in the decided case. He argued that a person should not run to the constitutional court seeking relief after it had been defeated in a civil case. He also stated that counsel for the Petitioners is abusing the court process by filing this Petition and a Notice of Appeal against the decided case at the same time. He also pointed out that there is a specific procedure for requesting for the review of a judgment under Article 23 and wondered why the Petitioners failed to use that procedure.

5. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents submitted that by filing the Petition, the Petitioners were asking this court to supervise a court of concurrent jurisdiction and mentioned that there are authorities to support the notion that this cannot be done. He also mentioned that the Petitioners had filed the Petition and an Appeal at the same time, amounting to abuse of the court process. He also cited decided Petition No. 144 of 2012 in which Majanja J found that the change of parties does not change the cause of action. He urged the court to determine whether the judgment entered touches the same cause of action as in the present Petition. He noted that the cause of action in both cases is the ownership of the Suit Lands. He also urged the court to determine whether the change of parties amounts to giving a new cause of action.

6. On his part, counsel for the Petitioners submitted that the matters raised in the Petition are constitutional issues and that the same should be determined after going into the merits of the Petition. He pointed out that the parties in this present Petition are different from the ones in the decided case. He further submitted that certain tenets of the Bill of Rights had been dishonoured and that such fundamental rights cannot be waived by concepts of *res judicata*. He also submitted that land is a sensitive issue and it is fair that all parties are heard before decisions are made.

7. Let us turn attention to the doctrine of *Res Judicata*, specifically the circumstances under which *res judicata* arises. Section 7 of the Civil Procedure Act 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 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.”**

This is to say that for the operation of the doctrine of *res judicata*, the following broad minimum conditions have to be satisfied:

- a. There has to be a former suit or issue decided by a competent Court;
- b. The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar;
- c. The parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.

8. Let us now turn attention to this present suit and draw up a comparison between this present Petition and the HCCC No. 298 of 2003 consolidated with HCCC No. 394 of 2004 to ascertain whether the 3 listed conditions above are satisfied.

- a. Was there a former suit or issue decided by a competent Court? I find that the answer to this question is in the affirmative. There is admission by all parties to this Petition that judgment was entered

in HCCC No. 298 of 2003 consolidated with HCCC No. 394 of 2004 by the Honourable Lady Justice H.M. Okwengu.

b. Was the matter in dispute in the former suit between the parties directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar? In HCCC No. 298 of 2003 consolidated with HCCC No. 394 of 2004, the Plaintiffs' claim which was identical in the two suits are that they are descendants of Malei Mwengenyne and Kyania Mwengenyne, that they have been living on a piece of land in Embakasi since the year 1923 and that the family had grown to 1500 people, that the land upon which they settled belonged to them and their ancestors until the year 1994 when they were informed by the Area Chief that the land belonged to the government, that the Plaintiffs applied for allocation of the land, that the government authorized the Plaintiffs to survey, demarcate and settle on the land, that in disregard of this the Commissioner for Lands fraudulently demarcated the land upon which the Plaintiffs were settled and subdivided it into various land parcels which he allocated to third parties, that the Plaintiffs deserved to be allocated the land upon which they had settled as they have lived on the land for a long time and have no other place to call home. In these two cases, the Plaintiffs claim ownership of their land which was demarcated as L.R. Nos. 209/11543, 209/11544, 209/11545, 209/11546, 209/18276 and 209/11270. It emerges quite clearly that the matter in dispute in these two consolidated suits which is the Suit Land is substantially the same as the matter in dispute in the present case.

c. Are the parties in the former suit the same parties, or parties under whom they or any of them claim, litigating under the same title? The former suit was a representative suit covering 300 residents of Mwengenyne Settlement Scheme. The present suit is also a representative suit covering 1,500 residents of Mwengenyne Settlement Suit. This shows that though the Petitioners in the present suit are different, the current suit which is also a representative suit is litigating under the same title of residents of the same Mwengenyne Settlement Suit.

In short, the 3 conditions set out above have all been met and therefore this matter is indeed *res judicata*.

9. The fact that this case involves enforcement of fundamental rights and freedoms does not negate the application of the doctrine of *res judicata*. See **Samuel Njau Wainaina v. Commissioner of Lands and others, Nairobi Petition No. 46 of 2012 (unreported)**.

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

“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 v 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.”

11. The substitution of the plaintiffs in the former suit with the petitioners in the present Petition is merely cosmetic changes. The common thread running through this and the previous suit is the claim of ownership over the Suit Lands. These matters have been settled by the judgment and cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action under Article 22 of the Constitution in order to evade the general principle of *res judicata*.

12. My conclusion is that the matters raised in this case are *res judicata*. This Petition is an abuse of the court process and it is hereby struck out with costs to the Respondents.

**SIGNED AND DELIVERED AT NAIROBI THE 19<sup>TH</sup> DAY OF APRIL 2013**

**MARY M. GITUMBI  
JUDGE**