



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)

PETITION 218 OF 2012

BETWEEN

HAITHAR HAJI ABDI.....1ST PETITIONER

ABDI BAHIM HAITHAR HAJI.....2ND PETITIONER

AND

SOUTHDOWNS DEVELOPERS LTD.....1ST RESPONDENT

**OFFICER COMMANDING POLICE DIVISION
(OCPD)**

LANGATA POLICE DIVISION.....2ND RESPONDENT

PROVINCIAL POLICE OFFICER (PPO).....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

AND

KENYA NATIONAL

CAPITAL CORPORATION.....1ST INTERESTED PARTY

PAUL OMONDI MBAGO.....2ND INTERESTED PARTY

RULING

Introduction

1. By the petition dated 23rd May 2012 the petitioners seek the following relief;

(1) *A declaration that the respondents said action and inaction complained of offend, violate, transgress upon and or threaten to offend, violate and transgress upon petitioners' rights to privacy, property, fair administrative action, fair hearing as laid out under Articles 31(a) and (b), 40(1) and (2), 47(1) and (2)*

and Article 50(1) of the Constitution of the Republic of Kenya.

(2) A declaration that the respondents said actions and inaction is so far as they purport to demolish, alienate and or disposes the petitioners' property is unlawful, illegal and unconstitutional.

(3) A declaration that the 2nd and 3rd respondent through the said actions and inactions are ultra vires the relevant law and the constitution, thus null and void ab-initio.

(4) An order of prohibition directed at the 2nd and 3rd Respondent authorities prohibiting any of them from any way setting for entering upon, remaining thereon, fence(s) abuttal or anything standing on the petitioners landed property situate on LR No. 13154 (Original Number Part of 6861/4 Langata and or from anyway undertaking and or transgressing upon the petitioners constitutional rights out under the Constitution.

(5) Costs of the petition.

2. The petition is supported by the affidavit of Haithar Haji Abdi sworn on 23rd May 2012 which sets out the facts of the case. There is also a Chamber Summons dated 23rd May 2012 that seeks conservatory orders in the nature of an injunction. The application is also supported the affidavit of 1st petitioner sworn on the same date.

Facts

3. The petitioners' case is that they charged their residential property LR No. 13154 (Original No. Part of 6861/4) situated along Bogani Road Langata ("the suit property") in favour of Kenya National Capital Corporation ("Kenyac") to secure credit facilities to finance their transport business.

4. Due to default, Kenyac exercised its statutory power of sale and the suit property was sold by public auction to the 1st respondent ("Southdowns").

5. The property and the validity of the sale were challenged by the petitioners in **Nairobi HCCC NO. 6054 of 1991** and **Nairobi HCCC No. 1181 of 1992**. The two suits were consolidated and heard by the Hon. Justice Waki who delivered a judgment on 18th December 2003. The court ruled that the auction was properly conducted and that the 1st respondent was bona fide purchaser for value without notice. An order of specific performance of the auction sale agreement was duly ordered. It is not in dispute that the 1st respondent has since become the registered proprietor.

6. Kenyac subsequently filed **Nairobi HCCC No. 2310 of 1993** against the 1st petitioner claiming the balance of the outstanding loan amount after sale of the suit property. Summary judgment for the sum of Ksh.9,053,105/25 together with interest was entered against the 1st petitioner.

7. From the petitioners' depositions, it is evident that there was another suit namely **Milimani HCCC No. 447 of 2004** where the petitioners sued Kenyac party over the suit property. The suit was dismissed for want of prosecution on 7th December 2005 by Lady Justice Kasango.

8. There is also another suit between the Southdown and petitioners namely **HCCC No. 1389 of 2004** in which it seeks a decree for vacant possession of the suit premises.

9. The 1st petitioner filed a constitutional reference against Kenyacto wit; Nairobi **HC Misc No. 546 of 2006**. The reference was intended to challenge the mode of execution of the decree in **Nairobi HCCC No. 2310 of 1993**. The constitutional reference was dismissed for want of prosecution on 1st March 2012.

Submissions

10. When this matter came up for hearing of the petitioners' application for conservatory orders, I directed Mr A. Khaminwa to show cause why this matter should not be struck out as an abuse of the court process on the basis of the suits between the same parties in respect of the same subject that had been determined by the High Court and that this matter was *res-judicata*.

11. Mr Khaminwa argued that though this subject of this suit has been the subject of previous proceedings, the petition raises grave constitutional issues regarding the conduct of the sale of the suit property. He contended that there were issues of breach of the petitioners' fundamental rights and freedoms in issue.

12. Mr Khaminwa conceded that ***Nairobi HCCC No. 1389 of 2004*** is still pending in Court and there is a pending application for review of Justice Muchelule's order of 2nd December 2010 wherein the learned judge dismissed an application for consolidation of several suits regarding the subject matter.

13. Mr Khaminwa urged me not to drive the petitioners from the judgment seat as they have now invoked the Constitution to protect them from arbitrary and unconstitutional conduct of the respondents and interested parties.

Determination

14. The subject of this petition is the suit property whose auction and sale was the subject of the full hearing and judgment by Hon. Justice Waki in ***HCCC No. 6054 of 1991*** and ***HCCC No. 1181 of 1992***.

15. I find and hold that all matters concerning the parties in respect of the suit property are now *res judicata*. The substance of the case as between the petitioner and Southdown is whether the sale by the Kenyac was valid or not. The Court has already made determination as to propriety of the sale. The petitioners had a full opportunity to make all allegations regarding that sale including allegations regarding the position of one of the directors of Southdown and it would be improper to re-open a matter that has been determined by a Court of competent jurisdiction. This view is fortified by a similar finding by Justice Muchelule in the ruling dated 2nd December 2010 in ***Nairobi HCCC No. 1389 of 2004***.

16. The fact that this matter comes before this Court as one to enforce fundamental rights and freedoms does not change the nature of the matter. In ***Samuel Njau Wainaina v Commissioner of Lands and Others Nairobi Petition No. 46 of 2012 (Unreported)***,

[22] 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 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.*' In that case the court quoted Kuloba J., in the case of ***Njangu v 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*'"

17. The addition of the Attorney General, the Officer Commanding Lang'ata Police Division, Commissioner of Police and the Provincial Police Officer as parties to the petition are merely cosmetic changes. The common thread running through this and the previous suits is whether the suit property was properly sold to Southdown. These matters that 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*.

Conclusion

18. My conclusion is that the matters raised in this case are *res judicata*. This petition is an abuse of the court process and it ought to be struck out and it hereby struck out with no order as to costs.

DATED and **DELIVERED** in **NAIROBI** this 30th day of May 2012

D.S. MAJANJA

JUDGE

Mr A. Khaminwa instructed by Khaminwa and Khaminwa Advocates for the Petitioners.