



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 25 of 2009

JOSEPH KIMARI 1ST PETITIONER

REUBEN GICHUNGU..... 2ND PETITIONER

TERESIA NYAMBURA 3RD PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

JOHANNA MBOGO 2ND RESPONDENT

MTUMISHI CHURCH OF GOD 3RD RESPONDENT

JUDGMENT

1. By the petition dated 10th February 2011, the petitioners have moved the court seeking several orders as follows;

(a) A declaration be issued that pitch plots Nos A186, A185, A187, are owned by the 1st, 2nd and 3rd petitioners respectively.

(b) A declaration that any purported taking possession of their said pitch plots aforementioned whether in execution of the decree dated 13th March, 2002 in High Court Civil Case No. 446 of 2000 or otherwise will amount to a violation of the petitioners' fundamental rights and freedoms under Articles 22, 40, 48, 50 of the Constitution.

(c) A declaration be issued to declare that the Decree dated 13th March 2002 Nairobi High Court Civil Case No. 446 of 2000 Johanna Mbogo & Another vs Reuben Kimari & 2 Others in respect of land parcel No. 33716 Dandora Area, Phase III is constitutionally null and void under Articles 27, 47, 50 and 159 of the Constitution to the extent that its execution is sought against the petitioner's parcels of land known as Pitch Plots No. A186, A185 and A187.

(d) A permanent injunction to restrain the second and third respondents, wither of themselves, their agents and or their representatives from interfering with the quiet possession of the Pitch Plots numbers A186, A185, A187 owned by the petitioners.

(e) A permanent injunction to restrain the respondents either of themselves, their agents and or their representative from evicting the petitioners from Pitch Plots numbers A186, A185, A187.

(f) Any further or other relief which this Honourable Court may deem fit to grant.

(g) The respondents be ordered to bear the costs of this petition.

2. The gravamen of the petitioner's claim is that they are the rightful owners of pitch plots situated at Dandora Market Terminus being **Plot Numbers A186, A185 and A187** and that the execution of the decree in **HCCC No. 446 of 2000 Johanna Mbogo & Another v Reuben Kimari & 2 Others** will result in a breach of their rights to the properties protected by the Constitution.

3. It is not disputed that the petitioners were involved in litigation regarding some property. In **HCCC No. 446 of 2000 Johanna Mbogo & Another v Reuben Kimari & 2 Others**, the respondents herein sued the petitioner herein seeking the removal of the petitioners and all their structures on **Plot No. 33716**, Dandora Area III. In the defence in that suit, the petitioners denied that they trespassed into the plaintiff's plot. They averred that it is actually the plaintiff who trespassed into the defendants' plots. They also stated that, "[T]he defendants reside in their own plots which they were dully allocated by the City Council and it is the plaintiff who are trespassing into the defendants' plots." They prayed that the suit be dismissed.

4. The matter was duly heard and considered by a judgment delivered on 13th March 2002, Justice Rimita ordered the removal of the defendants and their structures from **Plot No. 33716**, Dandora Area 111 and granted a permanent injunction restraining them from trespassing on the said property.

5. While the decree was being executed the petitioner moved the High Court seeking orders *inter alia* that, **"There be an order restraining the respondents from trespassing constructing, in any other manner interfering with suit premises being plot No. 33716, Dandora and/or the purported Pitch No. A186, A185 and A187 pending the hearing of the application."**

6. The application was heard by Justice Lenaola and on 18th December 2003, he dismissed the application as he felt that the pitch plots had nothing to do with the judgment and that the respondents ought to proceed with execution of the decree.

7. The appeal by the petitioner namely; **Nairobi CA No. 254 of 2002, Joseph Kimaru, Reuben Gichungu, Teresia Nyambura v Johanna Mbogo and Mtumishi Church of God** was finally heard by the Court of Appeal and in a judgment delivered on 20th December 2007, the Court of Appeal affirmed the findings and decision of the High Court.

8. Undeterred by the findings of the Court of Appeal, the petitioners once again moved the High Court in **HCCC No. 446 of 2000** for orders *inter alia* that;

(4) *THAT a declaration be and is hereby issued declaring that the decree dated 13th March 2002 does not apply to the applicants pitch Plots Nos A185,, A186, A187.*

(5) *THAT a declaration be issued declaring that the suit property herein known as plot No. 33716 Dandora Area III does not exist.*

9. Justice Sitati duly considered the issues raised and in the ruling delivered on 31st March 2009 she concluded that, **"I have found that the existence of otherwise of the suit property was a subject matter of the suit. In the circumstances, I do find and hold that this matter is res judicata. I am satisfied that the court has already exercised its judicial mind on the matter now in dispute both during the trial and at appeal and made a decision on it. To allow the Defendants application at the moment would unnecessarily open a can of worms As far as the law is concerned, this matter is dead and buried. I shall not disturb its bones."**

10. This petition is now a further attempt to resurrect the issue of the Dandora pitch plots. The issue of who is the owner of the property on which the respondents occupy had been determined by a court of

competent jurisdiction. It is instructive to note that in their defence, the petitioners in fact asserted that they occupied the premises and that is why an order of eviction was issued. The Court of Appeal affirmed the High Court judgment and the High Court, once again, has declined to re-open the issue.

11. I am afraid that the decisions made by the High Court and the Court of Appeal cannot be circumvented by dressing up a matter which has been the subject of these decisions as a petition for relief for the violation of fundamental rights and freedoms under **Article 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, “[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.*”

12. The case of ***Daniel Migichi Njoroge v The Attorney General Nairobi Petition No. 290 of 2009 (Unreported)*** cited by the petitioner is to be distinguished. The facts in that case related to the jurisdiction of the Land Disputes Tribunal which is subject to the supervisory jurisdiction of the High Court under **Article 165(6)** and **(7)**. In this case the High Court acted within its jurisdiction and the High Court is prohibited from exercising supervisory jurisdiction over a superior court.

13. Finally, what the petitioner seeks in substance is a review of the judgment of the High Court on the basis of a likelihood of breach of fundamental rights and freedoms by execution of a High Court decree. I must emphasise that this court has no jurisdiction to proceed in the manner suggested by the petitioner. If any authority were required it is the case of ***Peter Ng’ang’a Muiruri v Credit Bank Limited and Others Nairobi Civil Appeal No. 203 of 2006 (Unreported)***. (See also ***John Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012 (Unreported)***)

14. This matter must now remain buried. The petition is *res-judicata* and an abuse of process and it is dismissed with costs to the respondents.

DATED and DELIVERED at NAIROBI this 30th day of October 2012.

D.S. MAJANJA
JUDGE

Mr Wanyaga instructed by Kinoti and Kibe Advocates for the petitioner

Mr Matwere instructed by Rumba Kinuthia and Company Advocates for the 2nd and 3rd respondent.