



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 164 OF 2012

JOHN KAVOSA ILIONA

JAMES SINGU OGUTU

PETER ANDAI LINGALINGA

ONESMUS PHANUEL AMAKHALE

ERUSTUS ANDAI AMBUNDO

PETER MUKABI MATAKWA

ALFRED OUMKHOBERO AKWANYI

MIKE POUS ANDAYI

HOSBORN AMBIYA OGUTU

WILLIAM MUHURA GITAU

AMBROSE NICHOLAS AWIDH

GILBERT NJUKI GAUMU

HARUN KIMEU MWAU

SAMUEL NG'ANG'A GITAU

ANCENT KITUVA KITETU

BARACK MICHAIAH OYWAYA

PETER MUTUKI NTHUKU

NZENGYA MUTHOKA

JULIUS NGALA OPATI

CHARLES PERTER MAINA

ROBERT OBED ATSULU

WILLIAM OTIENO OLUOCH

JOSEPH OTIU WACHARA

RICHARD MWANZIA MUSIKALI

DAVID OTWOMA MBATI

HESBORN KHABALA LWANGU

MUTHUKI KARIMI

ERICK ODIGA

SAMSON OKETCH WMARI

BEATRICE NGARIZU INGIMBA

JOHN ALFRED ODUOR

FRANCIS WANJAU GITHAIGA

FRANCIS ADISA AGUTA

CONSOLATA ADHIAMBO JUMA

FRANCIS OMOMU NYANGURE

SARAH AYEKHA IMBUYE

LUKA OKANDI AMULI

ALEX OUMA NYASITA

LEONARD MAINA MWANGI

SELINA WANJIRU NJENGE

NICHOLAS MUTUGU NGURE

RUTH MIDEVA MUHADI

BEATRICE OMBINA OLUOCH

APPOLO ADRIANS DIANGA

TABITHA ANDESO

ALICE ENEYIA KHARUNDA

SEPHIRAN KIBIDI

DANIEL VITONYE ILLIONA

EDMUND MUOKI MWANGANGI

JAMES MURIITHI NGUNG'U

MARY ATIENO ANDAI

MARTIN MURIU GITONGA

PETER OMONDI CHWERO

RUTH MUTSAMI

JAMES MEJA MWANGI

MARY ANDIKA

KEFA O. ONYURO

ATENAS TETE ONDORI

ESTHER WAMBUI

BENSON MUTEMI KATHOKA

IBRAHIM, AURA ATITI

ANDREW KHAYO OGUTU

LORNA ONZELE

MARIAMU NDAKA;A

LILIAN AMBIYO

SIMON KIHUMBA KAMOR

CHARITY MBUCU NYAGA

ARTHUR M O OBAKHA

ALICE MMBONE

WILSON CHRISTOPHER NG'AMBWA

ALICE NJERI MAINA

JOSEPH MUCHINA CHEGE

JUDITH ASSSENDI AKALICHE

TERESA NYAMBURA NJAMB

DAVID MUTURI MWANGI

ZACCHAEUS KAMBERE

NANCY WANJIKU NJENGA

BEATRICE OYIELE AMBUKA

JERIDAH AMBOKA

CLEOPHAS WAEMA MWANANGI

ENOCK ANDALE

TOM OBULIFWA ETEJELA

AGGREY LUKWENDE OCHIENG

EBRAHIM NGAIRA MUCHERA

DANIEL KATHURIMA KATHOKA

MIRIAM IMIRI TETE

STEPHEN MWAURA KARITA

FRANCIS LAVUNA AMBUZI

ANJELINE AKOTH OCHIENG

GLADYS MUHONJA

DANIEL KIPRONO ARITEI

JOSHUA KEGODE SHIKOTE

EMILY AMOLO WASWA

RICHARD EDWARD TOSTSI

LINET B ACHAYO

ELIZABETH HOKA

RICHARD ODHIAMBO OBONDI

STEPHEN AUCHI

JOHN MUZIOMBO

PETER MBONE ODERA

SOLOMON MWANGI

MOSES OKONDA TETE

PHANUEL OTIENO OTIENDE

PENINA NAOMI ODIYO

JAMES AYOTI WABONDA

JOSEPHINE AYIEKO ANDAYI

ERIC OTIENO ADUDA

ELIZABETH WANJIRU MWANGI

PETER MUTURI GACUGU

GIDEON MUTIEMULI

PHILIP ASIKOYE MUKHOBI

FLORAH ACHANDO

CATHERINE WANJIRU NJERI

ANTHONY KUNGU KARANJA

ZEPHANIAH MWANGI GITAHI

PETER KANYAGIA KARIUKI

ZEDEKIAH MELCHZEDEK ANUNA

COSMAS NDINYA ATSULO

COSMOS GABRIEL ANYANGO

MOSES NDINYA ATSULO

DINAH AYAKO COSMOAS

LONIC JABUYA

MILTON SHIKOLIKI NGOMARA

DORCAS ANDAYI

AGNES WAMBUI MUGO

ELISHAMO OKENO OMUHEL

SAMSON OSAMBO

JOHN KITUZI MAKAU

MARGARET A HORE

JAMES NJOROGE GICHUKI

MARGARET W KARUNGU

MUTOFUNDI KATHENYA

JOHN NJOROGE KARANJA

GEOFFREY AMANYA

PETER MBURU MWANGI PETITIONERS

AND

COMMISSIONER OF LANDS 1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

AVITON ENTERPRISES LTD 1ST INTERESTED PARTY

THE TOWN CLERK,

CITY COUNCIL OF NAIROBI 2ND INTERESTED PARTY

RULING

Petitioners' Case

1. By way of Petition dated 18th April, 2012, the petitioners moved this court seeking the following reliefs:

- a) *A declaration that the Respondents' conduct and action amount to denial, violation, infringement and/or threat to the fundamental rights and freedoms of the Petitioner as provided under Articles 19, 20, 21, 22, 23, 27, 28, 29, 31, 39, 40, 43, 47, 48, 50 of the Constitution of Kenya, 2010;*
- b) *An award of Kshs 3 billion being damages;*
- c) *A declaration that the Petitioners have a constitutional right to be allocated L.R Number NAIROBI BLOCK 83/530*
- d) *Costs of the Petition;*
- e) *Any other or further orders, writs and directions the Honourable court considers appropriate and just to grant for the purpose of the enforcement of the Petitioner's fundamental rights and freedoms.*

2. The petitioners are aggrieved by the action of the City Council, the 2nd interested party of allegedly demolishing their houses on L.R Number NAIROBI/BLOCK 83/530("the suit property") and the 1st interested party's action in taking possession of the suit property.

3. The petitioners complain that they had established themselves in the suit property for over 20 years wherein they constructed their houses and settled with their families, all this with full knowledge of the Interested Parties.

4. It is the petitioners' contention that their rights under the Constitution have been infringed and they seek a declaration that they have a constitutional right to be allocated the property. They further contend that the interested parties' actions of violently evicting them from the suit premises thereby rendering them destitute subjected them to inhuman and degrading treatment. They further contend that due to the respondents' actions, their right to housing has been infringed and that the allocation to the 1st interested party was done in an illegal and discriminatory manner.

5. In their affidavit in support of the petition sworn by John Kavosa Iliona, the 1st petitioner, the petitioners' case is that their possession of the land has been uninterrupted since they occupied the same. That their *mabati* houses were demolished under the guise of failure to comply with the **Physical Planning Act**.

6. They further allege that the suit property was list in the *Ndung'u Report* as one of the properties that were unlawfully and wrongfully acquired by the interested party and that there was no justification by the respondents to dispose of the same illegally. As a result they claim that the interested party has no valid title to the premises and since it did not acquire the property for value and that they will not suffer any prejudice should this court issue an order of injunction.

Interested Party's Case

7. The 1st interested party has opposed the petition through the replying affidavit sworn by Habib Omar Kongo, its Chief Executive Officer, on 27th July, 2012, on the basis that it is the registered proprietor of the suit property. It also avers that this suit is not only *res judicata* but also an abuse of the court process in view of other suit filed over the suit property in other courts.

The Application

8. The plea of *res judicata* is also raised in the 1st interested party's Notice of Motion dated 27th July, 2012. Its position is that the applicants have been filed against various suits against the respondents and interested parties as follows;

(1) ***Nairobi HCCC No. 48 of 2006, John Kavoya Illiona v. Aviton Enterprises Limited.*** The plaintiffs sought, "A declaration that the applicants are entitled to LR No. NAIROBI/BLOCK 83/530 by way of adverse possession." The case was heard by Hon. Justice K H Rawal and on 9th October 2007, the suit was struck out.

(2) ***Nairobi HC Misc. No. 621 of 2008(OS), John Kavosa Iliona and 135 others v City Council of Nairobi and Others.*** In this case the applicants invoked the provisions of **sections 74, 75, 77, 82 and 84** of the former Constitution claiming proprietary rights and adverse possession. The suit was heard by Hon. Justice D. K. Maraga and dismissed on 30th November 2010.

(3) Apart from the aforesaid suits, the petitioners have also filed other suits against the 1st interested party in respect of the property. These are;

(a) ***Nairobi CMCC No. 7420 of 2002, Umoja Unjuzi Self Help Group v Habib Omar Kongo.*** The suit was withdrawn.

(b) ***Nairobi HCCC No. 326 of 2005, Umoja II Ujuzi Youth Self Help Group v Nairobi Children's Care and Rehabilitation Centre and Habib Omar Kongo.*** The suit was withdrawn.

(c) ***Nairobi CMCC No. 2388 of 2011, John Kavosa Iliona and Others v Amiton Enterprises Limited and Habib Omar Kongo.***

9. The applicants' case is that the present suit being a suit against the same parties and in respect of the same property is *res judicata*. Mr Thuita, counsel for the applicant, urged the court to strike out the petition.

10. In their replying affidavit to the application, sworn by **John Kavosa Iliona** on 9th October, 2012, the petitioners position is that matters of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** should not be imported into matters of enforcement of fundamental rights and. Mr Kiplagat, counsel for the petitioners, argued that the matter is one for enforcement of fundamental rights and freedoms and the court should exercise great circumspection in striking out the suit.

Determination

11. It is not disputed that the present case involves the same parties and in respect of the same property. The fact that it involves enforcement of fundamental rights and freedoms does not negate the application for the doctrine of *res-judicata*. Whether the doctrine of *res-judicata* applies to matter of enforcement of fundamental rights has been settled in several cases. (See ***Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2011 (Unreported)***, ***Richard Nduati Kariuki v Leonard Nduati Kariuki & Another Nairobi Misc Civil Appl. No. 7 of 2006 (Unreported)***, ***Booth Irrigation v Mombasa Water Products Ltd (Booth Irrigation No. 1), Nairobi HC Misc. Appl. No. 1052 of 2004 (Unreported)***).

12. In any event, the judgment of Hon. Justice Maraga dated the 30th November, 2010 in ***Nairobi HCCC No. 621 of 2008*** dealt conclusively with the petitioners' claim including the issue of adverse possession and in that case the provisions of the former Constitution were invoked.

13. I find that this suit is *res-judicata* and an abuse of the court process and it is hereby dismissed. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 18th day of October 2012.

D.S. MAJANJA

JUDGE

Mr Kiplagat instructed by Kwengu & Company Advocates for the petitioner.

Mr Thuita instructed by Mwangi & Guandaru Advocates for the interested party/applicant.