



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 286 of 2012

SAMUEL NJAU WAINAINA PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

JOHN RIMUI NJAU 2ND RESPONDENT

BONIFACE NDURA KOIMBURI 3RD RESPONDENT

RULING

1. When this matter came up before me on 25th July 2012, I directed the petitioner to show cause why this petition should not be struck out because the petitioner had filed a previous petition namely; ***Nairobi Petition No. 46 of 2012, Samuel Njau Wainaina v Commissioner of Lands, the Chief Lands Registrar, the Kiambu District Land Registrar, the Attorney General, Commissioner of Police, John Rimui Njau and Boniface Ndura Koimburi*** which I struck out on 19th March 2012.
2. The petitioner, 2nd and 3rd respondents have been involved in long standing litigation concerning Muguga/Jetscheme Block/218. In ***Nakuru HCCC No. 208 of 2003***, John Rimui Njau filed suit against Samuel Wainaina seeking eviction from the property. Samuel Njau lodged a counterclaim claiming that the property was fraudulently registered in name of John Rimui and should revert to the name of Njau Rimui (Deceased). Hon. Justice Kimaru by a ruling delivered on 3rd October 2005 struck out the petitioner's counterclaim and ordered the eviction of the petitioner.
3. After the suit was struck out, the petitioner then filed ***Nairobi Petition No. 46 of 2012*** seeking to set aside the orders in ***Nakuru HCCC No. 208 of 2003*** on the ground that the orders were issued in violation of his fundamental rights and freedoms. On 19th March 2012, I struck out the suit as an abuse of the court process as I found that the matter was *res-judicata* and that I had no jurisdiction to interfere with the order of a judge of concurrent jurisdiction.
4. The petitioner has now brought this case in order to stop the prosecution of ***Kikuyu Criminal Case No. 739 of 2011*** on the ground that it will violate his fundamental rights and freedoms. Mr Kihara, counsel for the petitioner, points out that apart from prosecution of the Criminal Case in Kikuyu, the new fact is that the petitioner has applied to the court in Nakuru to review the judgment of Hon. Justice Kimaru. Upon filing the application for review, a temporary stay against the execution or further execution of the decree was issued pending hearing of the application by Hon. Justice Ouko on 28th March 2012.

5. In the petition, the petitioner seeks the following reliefs;

- (a) *A declaration that the petitioner's Constitutional rights and fundamental freedoms will be breached in case the criminal case No. 739 of 2011 at Kikuyu is not stayed.*
- (b) *A prohibitory order against the further prosecution of the Criminal case No. 739 of 2011 at Kikuyu.*
- (c) *A declaration that in the totality of the circumstances the petitioner's constitutional rights and fundamental freedoms will be infringed if the case at Kikuyu proceeds.*
- (d) *An order for enforcement of the Orders of the Honorable Justice Ouko requiring any further proceedings of the Civil Case No. 208 of 2009 pending hearing to apply.*
- (e) *An order that any further proceedings in Principal Magistrate's Court Criminal Case No. 739 of 2011 at Kikuyu be stayed until the finalization of Civil Case No. 203 of 2008 at High Court, Nakuru.*
- (f) *The cost of this suit.*

6. A clear reading of these reliefs shows that the intention of the petitioner is to stay the criminal proceedings pending hearing of the application before the Nakuru High Court. In determining the petition, it will be necessary to appraise myself of the proceedings in the Nakuru High Court and make a finding thereon. A consideration of this petition will put me in direct conflict with the Nakuru High Court case and it is therefore proper that all matters relating to the suit property including the application whether other proceedings should be stayed pending the hearing of that suit must be dealt with in one suit.

7. I think that these proceedings are a collateral challenge to the orders issued by the High Court Judge in Nakuru and it is that judge in Nakuru, who is possessed of all facts, to ensure that his orders are not undermined by parallel proceeding in another court. The High Court has unlimited jurisdiction and it does not matter that the criminal case is lodged in Kikuyu.

8. In my ruling in *Nairobi Petition No. 46 of 2012*, I stated that, ***“For the avoidance of doubt, this Court cannot interfere with or declare the judgment and decree in Nakuru HCCC No. 208 of 2003 as prayed in the petition.”*** I cannot do so likewise in this matter.

9. The net result of my finding is that this petition is struck out with costs to the 2nd and 3rd respondents.

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

D.S. MAJANJA

JUDGE

Mr C. N. instructed by C N Kihara and Company Advocates for the petitioner.

Ms Makori, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Mr Kirimi instructed by Kinyanjui Kirimi & Company Advocates for the 2nd respondent.

Mr Njuguna instructed by Kiarie Njuguna & Company Advocates for the 3rd respondent.