



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 144 of 2012**

**DAVID MWATHI KIBE, JOHN KIBARU MWAI AND SALOME MWIHAKI NJENGA** suing as  
the treasurer, secretary

and chairlady and on behalf of the

**TWIGA ESTATE SQUATTERS SOCIETY) ..... PETITIONER**

**AND**

**MUNICIPAL COUNCIL OF RUIRU ..... RESPONDENT**

**JUDGMENT**

1. This is a dispute surrounding the ownership and occupation of LR No. 9312 (original 4728/1), LR No. 9313 (Original 4728/2) and LR No. 3760 which are collectively known as Twiga Estate. The land has been subject of several disputes and this is another suit in the line of litigation.

2. This petition was triggered by a Notice issued by the Municipal Council of Ruiru dated 29<sup>th</sup> March 2012 published in the *Daily Nation* newspaper as a public notice (“the notice”). The notice stated as follows;

*Notice is hereby given to all developers who have erected illegal structures/buildings at LR No. 9312, LR 9313 and LR No. 3760 known as Twiga Farm that you are hereby given fourteen (14) days Notice to remove the structures, failure to which the council shall remove them at your own cost.*

3. The petitioners, who call themselves Twiga Estate Squatters Society, moved this court by petition on 18<sup>th</sup> April 2012 seeking the following orders;

(a) *A declaration be made that the Applicants’ fundamental rights and freedoms under Articles 28, 29c, d, and f, 31b, 40, 43, 47, 48 of the Constitution have been contravened and or likely to be contravened and violated by the respondents herein.*

(b) *A declaration be made that the applicants have a right to peaceful and quiet enjoyment of the properties subject hereto.*

(c) *An order of Certiorari does issue removing to the High Court for purposes of being quashed the Demolition Notice against the Applicants.*

(d) *An order of prohibition issue against the respondent and the Commissioner of Police*

prohibiting the intended eviction and demolition of the applicants vis a vis the properties.

(e) Conservatory and interim orders of stay of all demolitions and evictions, proceedings, intended, recommended and instituted by the respondents or any other party and or intended for the eviction of the petitioners herein.

(f) Any further order, direction or writ as the Honourable court deems fit just and appropriate to grant.

(g) Cost of this suit.

4. During the submissions, Mr Kenyatta, counsel for the petitioners, conceded that the petitioners are not asserting any proprietary rights to the property, rather they contest the notice issued by the Ruiru Municipal Council. Their contention is that the notice violates the petitioner's rights.

5. It is also not in dispute that the properties comprising Twiga Estate are owned by the famous Mbo-I-Kamiti Farmers Company Ltd. Mbo-i-Kamiti Farmers Company Ltd has been involved in litigation concerning the property and persons it claims are illegally residing on the property. These suits are as follows;

a) **ELC NO. 170 of 2010, Mbo-I-Kamiti Co. Ltd v Simon Charagu & Others (Suing as Twiga Men and Women Group)**. A consent order was recorded that the defendants vacate the suit premises.

b) **ELC No. 487 of 210, William Chege, Joseph Woru Nganga, George Mwangi Irungu (Suing as Twiga Estate Squatters) v Mbo-I-Kamiti Farmers Company Ltd**. This suit was dismissed on the ground that the matter was res-judicata.

6. The respondent also filed a suit against Mbo-I-Kamiti Company Ltd, being **ELC No. 57 of 2012 Municipal Council of Ruiru v Mbo-I-Kamiti Farmers Company Limited, William Chege, Joseph Woru Nganga, George Mwangi Irungu, Simon Charagu Kimani, Joseph Muthigani Kariuki, Jackson Wilfred Maingi and John Kinge**. A consent order was recorded on 13<sup>th</sup> February 2012 to the effect that the defendants, who were in occupation of the suit property, would be barred from constructing buildings on land parcels and that the illegal structures would be removed within 21 days. The order also directed the OCS Ruiru be mandated to offer security as the execution of the orders was being carried out. The consent allowed the Municipal Council to demolish all buildings erected on Twiga Estate by the occupants in breach of the provisions of **section 29** of the **Physical Planning Act (Cap 286)**.

7. It is instructive to note that the consent recorded in **ELC No. 57 of 2012** was between the Municipal Council and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who described themselves as the officials of Twiga Estate Squatters Society. It is the self-same persons who filed **ELC No. 487 of 2010** which the court held was *res-judicata*. In light of all these cases, Mr Sang, counsel for the respondent, argued that the petition is *res-judicata*.

8. Whether present suit is *res-judicata* depends on the status of the Twiga Estate Squatters Society whose suit has been dismissed as *res-judicata* and whose officials entered into a consent order with the Municipal Council to remove the structures built contrary to the **Physical Planning Act**.

9. The petitioners contend that the persons who purported to record the consent were not officials of the society. In view of the decision in **ELC No. 487 of 2010**, the issue whether William Chege, Joseph Chege and Joseph Weru Ng'ang'a were officials of the society cannot be re-opened. The issue of the demolition and removal of the illegal structures was covered or determined by the consent orders recorded. The logical consequence is that the present matter is now *res-judicata*.

10. This consent order recorded in **ELC No. 57 of 2012** was adopted as an order of the court. As a result it cannot be set aside through the filing of a petition for the enforcement of fundamental rights and freedoms. Allowing the petition would amount to a collateral attack on an order of a court of competent

jurisdiction.

11. The fact that this case 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. It is not without sympathy that I am constrained to dismiss the petitioners' claim. If indeed, relief is to be sought, then that relief must be sought in ***ELC No. 57 of 2012*** (See ***Methodist Church in Kenya Trustees v Reverend Jeremiah Muku and Another Nyeri CA Civil Appeal No. 233 of 2008 (Unreported)***).

13. The High Court exercising jurisdiction is entitled to enforce fundamental rights and freedom, what I am not permitted to do is to give orders which would amount to setting aside an order issued by another High Court judge (See ***John Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012 (Unreported)***).

14. The petition is dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 3<sup>rd</sup> day of December 2012.

**D.S. MAJANJA**  
**JUDGE**

Mr Odiwuor instructed by Kenyatta Odiwuor and Company Advocates for the petitioners.

Mr Sang instructed by Muriuki Njagagua and Associates for the respondent.