



Muthoka & another (Suing as the administrators of the Estate of Mwangangi Muthoka) v Musyimi (Suing as the administrator of the Estate of Musyimi Kilonzo) & 3 others (Environment and Land Constitutional Petition 15 of 2020) [2022] KEELC 3862 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 15 OF 2020**

CA OCHIENG, J

JULY 26, 2022

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 27, 28,
29(D), 40, 47, 48, 50(1), 52, 64, 162(2) (B) AND 159 OF THE**

CONSTITUTION

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES
AND 159 OF THE CONSTITUTION AND OTHER FUNDAMENTAL FREEDOMS**

AND

**IN THE MATTER OF CONTRAVENTION OF RIGHT
TO ACQUIRE/OWN AND ACCESS PROPERTY**

AND

IN THE MATTER OF LAND ACT AND LAND REGISTRATION ACT

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

ANDREW MUTHAISU MUTHOKA 1ST PETITIONER

NDOLO MWANGANGI 2ND PETITIONER

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF MWANGANGI
MUTHOKA**

AND

**GODFREY KISWII MUSYIMI (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF MUSYIMI KILONZO) 1ST RESPONDENT**



CABINET SECRETARY, MINISTRY OF LANDS AND HOUSING	2 ND RESPONDENT
REGISTRAR OF LANDS, MINISTRY OF LANDS AND HOUSING	3 RD RESPONDENT
ATTORNEY GENERAL	4 TH RESPONDENT

RULING

1. What is before court for determination are two notices of preliminary objection dated the August 7, 2020 and September 23, 2020 respectively. In the 2nd, 3rd and 4th respondents' notice of preliminary objection dated the August 7, 2020, it is based on the following grounds:
 1. That this petition is incompetent, bad in law as it offends the mandatory provisions of sections 29(1) (b) of the Land Adjudication Act cap 284 since the decision of the Minister is final.
 2. That the suit seeks to challenge an administrative decision which ought to be challenged by way of a judicial review in accordance with order 53 of the Civil Procedure Rules.
 3. That this suit contravenes the provisions of section 13A of the Government Proceedings Act as no notice of intention to sue Government was issued.

2. In the 1st respondent's notice of preliminary objection dated the September 23, 2020, it is premised on the following grounds:
 1. That in so far as the petition is premised on the decision of the Land Adjudication Appeal Tribunal No 228 of 2017, the same is now *res judicata* as the validity and legality of the said tribunal has already been determined in HC (JR) 112 of 2017; Republic v Cabinet Secretary, Ministry of Lands and Housing and others, ex-parte Josphat Mwanzia & 3 others Interested Parties, ex-parte Musyimi Kilonzo.
 2. That consequently this honourable court is functus officio in relation to the matters relating to the aforementioned proceedings.
 3. That the entire petition is premised on falsehoods and gross misrepresentation of facts because the rights sought to enforced have never accrued to the petitioner at any time material and the subject suit land has never belonged to the petitioner nor has the petitioner been the litigant in the various objections as alleged.
 4. That the petition does not disclose any cause of action as against the respondents and is therefore vexatious and an abuse of the court process.

3. In opposition to the notices of preliminary objection, the petitioner filed a replying affidavit sworn by Andrew Muthaisu Muthoka where he deposes that it is not true that the current petition is res judicata as alleged by the 1st respondent because the decision of the court in HC (JR) 112 of 2017; Republic v Cabinet Secretary, Ministry of Lands and Housing and others, ex parte Josphat Mwanzia & 3 others Interested Parties, ex-parte Musyimi Kilonzo was in relation to other parcels of land and not land parcel number 1525 Kangonde/ Masinga adjudication section. He contends that the estate of the late Mwangangi Muthoka which he represents was not a party in HC (JR) 112 of 2017; Republic v Cabinet Secretary, Ministry of Lands and Housing and others, ex-parte Josphat Mwanzia & 3 others Interested Parties, ex-parte Musyimi Kilonzo. He explains that for a matter to be res judicata, it must be



between the same parties and relate to the same subject matter as in other concluded proceedings before a competent authority but this is not the case in this instance as the subject matter including parties are different. He insists his petition raises triable issues and as such should be heard and determined on merit.

4. The two notices of preliminary objection were canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the two notices of preliminary objection dated the August 7, 2020 and September 23, 2020 respectively including the 1st respondent's replying affidavit as well as the rivaling submissions, the only issue for determination is whether this petition should be dismissed with costs.
6. The 1st respondent in his submissions provided a background of the dispute herein and insists this suit is *res judicata* as the issue herein was determined in DMCC L 48 of 1973 as well as HC (JR) 112 of 2017; *Republic v Cabinet Secretary, Ministry of Lands and Housing and others, ex-parte Josphat Mwanzia & 3 others Interested Parties, ex-parte Musyimi Kilonzo*. To buttress his averments, he relied on the case of *Fatma Tahir Sheikh Said & another v KCB Bank Ltd* [2021] eKLR.
7. The 2nd, 3rd and 4th respondents in their submissions insist this suit offends the provisions of section 29 of the *Land Adjudication Act*. They contend that this suit ought to have been initiated by way of judicial review application in accordance with order 53 of the *Civil Procedure Rules*. To support their arguments, they have relied on the following decisions: *Corave Amrnath (Suing on behalf of the late Amarnath Gupta) v Patricia Kazungu & 2 others* [2021] eKLR and *John Masiantet Saeni v Daniel Aramat Lolungiro & 3 others* [2017] eKLR.
8. On perusal of the petition herein including the 1st respondent's replying affidavit, i note the fulcrum of the dispute revolves around fair administrative action as the petitioner alleges that the 2nd to 4th respondents proceeded to make a decision on the disputed land parcel number 1525 Kangonde/Masinga adjudication section, without the presence or representation of the Estate of one Mwangangi Muthoka (deceased). The petitioner explains that the appeal was heard and determined when Mwangangi Muthoka was already deceased. Further, that the respondents failed to accord them equal rights with the 1st respondent who was alive at the point the appeal was heard and determined. They confirmed that the judgment was delivered on June 28, 2017. They reiterated that no written reasons were given by the respondents for their actions. Further that in the aforementioned Judicial Review Case Number 112 of 2017 which was filed by the 1st respondent against other parties, the estate of the petitioner was never represented therein and the court proceeded to quash the impugned decision of the Minister. The respondents insist the petitioner should have filed a judicial review instead and the petition is hence *res judicata*.
9. The doctrine of *res judicata* is set out in the *Civil Procedure Act* at section 7 which stipulates as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



10. The *Civil Procedure Act* provides explanations with respect to the application of the res judicata rule. Explanations 1-6 states thus:

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

11. In the case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Company Limited* (1969) EA 696; the court held that:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

12. While in the case of *Uhuru Highway Development Ltd v Central Bank & others*, CA No 36 of 1996 the Court of Appeal stated that: -

In order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

13. From the legal provisions cited above, it is pertinent that for a party to rely on the doctrine of *res judicata*, the decisions must emanate from the same court with competent jurisdiction. Further, that the parties must have been litigating under the same title and the matter was determined on merit. In the current scenario, the 1st respondent has not provided a copy of a decision from any court that determined the dispute as relates to land parcel number 1525 Kangonde/Masinga adjudication section. Further, I note HC (JR) 112 of 2017; *Republic v Cabinet Secretary, Ministry of Lands and Housing and others, ex-parte Josphat Mwanzia & 3 others Interested Parties, ex-parte Musyimi Kilonzo* did not determine the dispute relating to land parcel number 1525 Kangonde/Masinga adjudication section and the estate of Mwangangi Muthoka was not party to the said proceedings. I note the petition has raised constitutional issues touching on fair administrative action and right to be heard which the respondents insist should be dismissed. After perusing the annexures herein, I opine that the doctrine of res judicata cannot apply in this instance as there is no demonstration that the same issues have



been heard and determined by court of competent jurisdiction; same parties litigated under the same title and issues have been raised once more with the same parties, which is not the case herein. In the circumstance, I decline to strike out the petition on this ground.

14. On the issue that an appeal from the Minister is final and hence this court is devoid of jurisdiction to handle the petition as stipulated under section 29(1) of the [Land Adjudication Act](#), I wish to refer to the case of [Nyakinyua and Kang'ei Farmers Company Ltd v Kariuki Gathecha Resources Ltd \(No 2\)](#) [1984] KLR 110 where it was held that:

The Act declares that the decision of the board, one way or another, shall be final and conclusive and shall not be questioned in any court. Such words ousting the powers of the High Court to review such decisions must be construed strictly. They do not oust this power if the board has acted without jurisdiction or if it has done or failed to do something in the course of its inquiry which is of such a nature that its decision is a nullity (i.e. breached the rules of natural justice).”

See also the decision in [Republic v Musanka Ole Runkes Tarakwa & 5 others ex-parte Joseph Lesalol Lekitio & others](#) [2015] eKLR.

15. In this instance, the petitioner has claimed that the respondents never granted them audience while dealing with the appeal and proceeded to make a judgment on June 28, 2017. The respondents have not denied the fact that the appeal proceeded when one of the disputants was deceased and his estate was never represented in the said proceedings. Insofar as the respondents have raised important issues, it is my considered view that the 2nd to 4th respondents failed to grant the petitioner audience while dealing with the appeal culminating in the petitioner filing the instant petition. Insofar as section 29(1) of the [Land Adjudication Act](#) stipulates that verdict from an appeal to the Minister is final, in associating myself with the decisions cited above as well as relying on articles 22, 23, 47 and 50 of the [Constitution](#) that makes provisions on enforcement of the bill of rights; power of the court to grant appropriate relief including order of judicial review; the right to be heard as well as fair administrative action; I find that this petition is properly before this court. Further, I opine that article 47 of the [Constitution](#) and the [Fair Administrative Action Act](#) does not provide for a procedure in seeking reliefs therefrom which restricts a party to only instituting a judicial review application instead of a petition.
16. In the circumstances, I will decline to strike out the petition on this point and direct that the same be heard on merit.
17. It is against the foregoing that I find the two notices of preliminary objection dated the August 7, 2020 and September 23, 2020 respectively unmerited and will disallow them.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF JULY, 2022

CHRISTINE OCHIENG

JUDGE

