



Nyambok v Omollo & 2 others (Environment and Land Constitutional Petition E002 of 2022) [2022] KEELC 14640 (KLR) (9 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2022**

GMA ONGONDO, J

NOVEMBER 9, 2022

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 10(2B); 19(2); 22(1); 28;40;48;50;57 (C AND D);60(1B);
AND 64(1B); AND 64 OF THE CONSTITUTION OF KENYA ,2010;**

AND

**IN THE MATTER OF ENFORCEMENT & PROTECTION OF THE BILL
OF RIGHTS UNDER ARTICLES 10(2B); 19(2); 22(1);28;40;48;50;57(C
AND D); 60(1B); AND 64 OF THE CONSTITUTION OF KENYA ,2010;**

AND

**IN THE MATTER OF ENFORCEMENT &PROTECTION OF
THE PROVISIONS OF SECTIONS 25(1B) AND (2); 26(1B); 27(1A)
AND 28(B) OF TH LAND REGISTRATION ACT, NO.3 OF 2012.**

BETWEEN

BETWEEN

PETER ODERO NYAMBOK PETITIONER

AND

**BENARD ODHIAMBO OMOLLO (SUED IN HIS PERSONAL CAPACITY AND
AS THE ADMINISTRATOR TO THE ESTATE OF HENRY OMOLLO ODEKO -
DECEASED) 1ST RESPONDENT**

OGOLA OWUOR JACOB 2ND RESPONDENT

NANCY AUMA OJALLA 3RD RESPONDENT



RULING

1. This ruling is in regard to two preliminary objections namely;
 - a. The 2nd and 3rd respondents' preliminary objection dated May 4, 2022 and filed in court on May 9, 2022 (The 1st preliminary objection herein).
 - b. The 1st respondent's preliminary objection dated May 30, 2022 (The 2nd preliminary objection herein).
2. The 1st preliminary objection was generated by the 2nd and 3rd respondents who are represented by the firm of Kaimenyi Mutuma Advocates, It is anchored upon the following five grounds;
 - a. That pursuant to Order 2 Rule 10 of the Civil Procedure Rules, 2010 the Petitioner has not provided any particulars to justify the cancellation of the title deed issued to the 2nd and 3rd Respondent.
 - b. That the execution of the decree issued in Homa-Bay Miscellaneous Civil Case No 12 of 2008 is time barred by dint of section 4(4) of the Limitation of Actions Act as 12 years have elapsed since the award was issued by the Land Adjudication Board.
 - c. That the instant suit is resjudicata as the issues raised in this suit were determined in Migori ELC Case No 341 of 2017 and Homa-Bay Miscellaneous Civil case No 12 of 2008 between the Petitioner and the 1st Respondent and involving the suit property, Land reference number Kanyada/Kotieno/Katuma "A"/964
 - d. That the award and subsequent decree in Homa-Bay Miscellaneous Civil Case No 12 of 2008 being a subordinate court decision cannot override the decree issued by the High Court in Kisii Civil Case No 138 of 1995 in which the deceased, Henry Omollo Odeko was granted the suit property.
 - e. That the suit is scandalous, frivolous and vexatious and is in any event an abuse of the process of the court as it does not amount to a review or an appeal of the decision of the Honourable Court in Homa-Bay Miscellaneous Civil Case No 12 of 2008.
3. The 2nd preliminary objection was raised by the 1st respondent who is represented by learned counsel, Nancy Nyarige. The same is premised on three grounds thus;
 - a. The petitioner purporting to execute the decree issued in Homa-Bay Miscellaneous Civil Case No 12 of 2008 is not tenable in law as the same is statutorily time barred by dint of Section 4(4) of the Limitations of Actions Act as a period of over 12 years has lapsed since the said award was issued.
 - b. The instant petition is res judicata as what is claimed and the issues raised by the petitioner in this petition had already been determined in Migori ELC No 341 of 2017 and Homa-Bay Miscellaneous Civil Case No 12 of 2008 between the Petitioner and the 1st Respondent involving the suit property which decisions the petitioner has not appealed against.
 - c. The award and subsequent decree in Homa-Bay Miscellaneous Civil Case No 12 of 2008 being a Subordinate Court decision cannot override the decree issued by the Kisii High Court Civil Case No 138 of 1995 in which the 1st Respondent's father, Henry Omollo Odeko was granted the suit property; no appeal was preferred against the said decision.



4. On that account, the 1st respondent has sought that the entire petition be dismissed with costs to him.
5. By a thirty-five paragraphed replying affidavit sworn on sworn on June 17, 2022, the petitioner represented by learned counsel, Quinter Adoyo, opposed the 1st and 2nd preliminary objections and implored upon the court to dismiss the same with costs. He deposed in part that Migori ELCC No 341 of 2017 is not determined on merit and that the alleged outcome in Kisii HCC No 138 of 1995, was misleading as the suit was struck out. That the suit property is his ancestral land and may be evicted from it hence, a violation of his fundamental right. Reference was made to authorities including Safepark Ltd and Njuguna Githeru cases (infra) on limitation.
6. On June 13, 2022, the court ordered and directed that the petition be heard by way of written submissions. Subsequently, the court extended the orders on July 26, 2022.
7. Consequently, learned counsel for the 2nd and 3rd respondents filed submissions dated July 1, 2022. Counsel made reference to the 1st and 2nd preliminary objections, relied on authorities, inter alia, Mukisa Biscuits case (infra) and urged the court to dismiss the entire petition. Counsel submitted in part that;
 - “ 33. The Honourable court is being called to make a determination on issues that were allegedly determined in Homa Bay Miscellaneous Civil case No 12 of 2008 yet it is trite law that a suit that has already been determined can only be revisited by the court through a review or an appeal and this suit is neither an appeal nor a review.
 34. This is also the petitioner’s 4th attempt at litigation on the same parcel of land after Homa Bay Miscellaneous Civil Case No 12 of 2008, High Court Kisii Civil Case No 138 of 1995 and Migori ELC Case No 341 of 2017 and amounts to abuse of the court process.”
8. In the submissions dated September 16, 2022 and filed herein on September 22, 2022, learned counsel for the 1st respondent referred to the triple grounds of the 2nd preliminary objection and associated herself with the 1st preliminary objection and the 2nd and 3rd respondents’ submissions. Counsel analysed the three grounds in favour of the 2nd preliminary objection. It was submitted that the petitioner purports to execute the decree issued 14 years ago in Homa Bay Magistrates’ court Miscellaneous Civil Case No 12 of 2008 hence the same is barred by section 4 (4) of the Limitation of Actions Act. That this petition is res judicata in view of the ruling rendered in Migori ELC No 341 of 2017 and the decree in Homa Bay Miscellaneous Civil Case No 12 of 2008 cannot override the decree issued in Kisii High Court Civil Case No 138 of 1995.
9. To fortify the submissions, counsel relied on, inter alia, the said previous decisions on the matter and section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya. Counsel urged this court to find that the 2nd preliminary objection is devoid of merit. That therefore, this petition be struck out with costs to the 1st respondent.
10. By the submissions dated June 29, 2022 and filed July 1, 2022, learned counsel for the petitioner implored upon this court to dismiss the 1st and 2nd preliminary objections. Counsel submitted in part thus;
 - “It is the first time that this whole matter is being subjected to the jurisdiction of this Superior Court as a Constitutional Petition. Your Lordship, as such, it ought to be heard on merits in the interest of Articles 48; 50 and 159 of the Constitution of Kenya, 2010. Your



Lordship, we rely on the case of *Safepark Limited v Henry Wambega & 11 others(2019) eKLR* Court of Appeal at Mombasa. Your Lordship, the Petitioner is only seeking to enforce his rights and fundamental freedoms, the Respondents on the other hand have not demonstrated that prejudice has been occasioned to them by the filing of the present Petition.

Your Lordship, the Petitioner humbly submits that he has not delayed in bringing this Petition since through his life, from his youth until old age, he has been making numerous attempts to enforce his rights, with his resort to this Constitutional (ELC) court being the highest and very last attempt at lawfully saving himself and his family from being rendered homeless, destitute and vagabond and that he is not guilty of laches. This was the position by Lenaola J in the case of *Njuguna Githeru v Attorney General (2016)eKLR*”

11. It is important to note that on April 5, 2022, the petitioner originated the present petition dated April 4, 2022 for the orders infra;
 - a. A declaration that the Petitioner has the absolute right to the whole of the suit property and that this right is to be protected under Articles 40; 60(1b) and 64 of the *Constitution* of Kenya 2010.
 - b. A declaration that following the verdict of the Land Dispute of 2008, the decree of the court Miscellaneous Civil Case No 12 of 2008, the Petitioner is the rightful owner and proprietor of the suit property, with a justiciable right and claim thereto.
 - c. A declaration that the /deceased Henry Omollo Odeko and the 1st, 2nd and 3rd Respondents herein have all been holding the property in trust for the Petitioner and that despite their being registered as proprietors, the Petitioner has always had an unregistered overriding interest on the property.
 - d. A declaration that since the Petitioner has been in possession of the suit property to date, to the exclusion of all the Respondents, he cannot now be evicted from the suit property as he is shielded by the operation of the law of trust and the law on adverse possession.
 - e. A declaration that since the court had already nullified the titles of the deceased to the suit property, his subsequent transfer to his son, the 1st respondent and the transfer to the 2nd and 3rd Respondents are all null and void since both transferors no-longer held title that could be transferred.
 - f. A declaration that the 2nd and 3rd Respondents are holding the title to the suit property in trust for the Petitioner.
 - g. An Order directing the land Registrar-Homa-Bay to Register the transfer executed by the Homa-bay Court Executive Officer in favour of the Petitioner upon the Petitioner meeting such reasonable costs of the transfer as may be requisite.
12. The 1st respondent opposed the petition by way of a response dated May 30, 2022. He stated in part that having acquired the suit property from his deceased father, Henry Omollo Odeko, he sold and transferred the same to the 2nd and 3rd respondents for value. That the petitioner has never occupied the suit property and that the instant dispute had been determined previously as revealed in. inter alia, documents marked as “BOO-2A and BOO-2B, BOO-3 and BOO- 4” annexed to the response.
13. In that regard, the 1st respondent has sought the following orders;



- a. That it be determined that the Petitioner’s Petition is competent and is not supported by any valid, cogent and credible ground and thus the same should be dismissed accordingly.
 - b. That the petitioner be condemned to pay the costs of this petition to the first respondent.
14. I have anxiously considered the 1st and 2nd preliminary objections, the replying affidavit, the petition, the response thereto and the parties’ respective submissions. Therefore, the key issues for determination herein boil down to;
- a. Are the grounds of the 1st and 2nd preliminary objections tenable?
 - b. Depending on the outcome concerning issue (a) hereinabove, what orders can this court make to meet the best ends of justice?
15. It must be appreciated that this court’s jurisdiction in respect of the petition flows from Article 162 (2) (b) of the [Constitution](#) of Kenya, 2010 and section 13 (3) of the [Environment and Land Court Act](#), 2015 (2011). Further, the court is guided by the Supreme Court of Kenya pronouncement in the case of [Samwel Kamau Macharia and another v Kenya Commercial Bank Ltd and others \(2012\) eKLR](#) that jurisdiction of a court or tribunal flows from either the [Constitution](#) or statute or both.
15. On that score, this court has jurisdiction to deal with any Constitutional issue; see also [United States International University v Attorney General and 2 others \(2012\) eKLR](#) and [James Francis Angalia v Masinde Muliro University and others \(2010\) eKLR](#).
16. Plainly, the 1st and 2nd preliminary objections are on points of law including a plea of limitation and res judicata; see [Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Company Ltd \(1968\) EA 696](#).
17. Similarly, I echo the decision in [Oraro v Mbaja \(2005\) KLR 141](#) where Ojwang, J (as he then was) applied the decision in Mukisa Biscuits case (supra) and held, inter alia;
- “.....A preliminary objection....a point of law which must not be blurred by factual details liable to be contested.....”
18. It is well settled that a preliminary objection is a threshold question and best taken at inception of a case. That therefore, the same calls for a definite, determinative, and prompt pronouncement; see [Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others \(2013\) eKLR](#).
19. The respondents’ lamentation is that the execution of the decree issued in Homa Bay Miscellaneous Civil Case No 12 of 2008 is statute barred. On his part, the petitioner asserted that there is no delay in mounting the petition in light of, inter alia, the pronouncements in Safepark and Njuguna Githeru cases ([supra](#)).
20. The petitioner further asserted that he has made several attempts to enforce his rights as disclosed in paragraph 10 hereinabove. This court is also conscious of questions relating to execution or satisfaction of decree as provided for under section 34 (1) of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya. The respondents’ respective pleas of limitation as regards the decree issued in Homa Bay Miscellaneous Civil Case No 12 of 2008, are valid in view of the judgment delivered in Kisii HCCC No 138 of 1995 and in the spirit of section 4 (4) of the [Limitation of Actions Act](#) (supra)
21. [Black’s Law Dictionary 10th Edition](#) at page 1504 is quite succinct and instructive on the elements of the term “res judicata” upon which the 1st and 2nd preliminary objections are anchored; see also section 7 of the [Civil Procedure Act](#) (supra).



22. In Kisii Hccc No 138 of 1995, the court rendered judgment on merits and a decree was issued accordingly. Moreover, the petitioner's originating summons dated April 10, 2017 was determined on merits in Migori ELCC No 341 of 2017 on July 28, 2021.
23. The instant matter is neither an appeal nor a review sought in respect of decisions of a subordinate court or a tribunal to enable this court invoke section 13 (4) *Environment and Land Court Act* (supra). Clearly, res judicata principle is applicable to the issues in the instant petition.
24. This court is not unaware of the fundamental rights of the petitioner and the respondents to access justice and fair hearing, among others, as set out on the face of the petition; see also *Halsbury's Laws of England 5th Edition 2010 Volume 61 paragraph 639* and the case of *James Kanyita Nderitu and another v Marios Gbikas and another (2016) eKLR*, an authority cited, too, in the petitioner's submissions.
25. Be that as it may, it is common baseline that the present parties had previously litigated over the suit property. Their dispute was determined on merits as already noted hereinabove.
26. Quite clearly, this petition is an abuse of the process of the court; see the Court of Appeal decision in *Muchanga Investments Ltd v Safaris Un-Limited (Africa) Ltd and 2 others (2009) KLR 229*.
27. To that end, it is the finding of this court that the 1st and 2nd preliminary objections herein are meritorious. I proceed to uphold them accordingly.
28. A fortiori, this petition dated April 4, 2022 and lodged in court on April 5, 2022, fails and the same is hereby dismissed with costs to the respondents.
29. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 9TH DAY OF NOVEMBER 2022

G M A ONGONDO

JUDGE

Present

Petitioner

Mr Migele instructed by Quinter Adoyo, learned counsel for the petitioner

Mr M N Ndungu instructed by Kaimenyi, learned counsel for 2nd and 3rd respondents as well as instructed by N Nyarige, learned counsel for the 1st respondent

Okello, court assistant

