



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CONSTITUTIONAL PETITION NO. 2 OF 2019

RICHARD MALAKWEN SANG1ST PETITIONER

DANIEL KIPKIRUI CHUMO.....2ND PETITIONER

SAMSON KIPNGETICH CHEBOCHOK.....3RD PETITIONER

JUSTICE KIBET CHEPKWONY.....4TH PETITIONER

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF

HOUSING AND URBAN DEVELOPMENTS.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE DIRECTOR –SURVEY OF KENYA.....3RD RESPONDENT

THE LAND SETTLEMENT-

BOARD OF TRUSTEES.....4TH RESPONDENT

THE REGISTRAR OF LANDS- NAKURU COUNTY.....5TH RESPONDENT

ATTORNEY GENERAL.....6TH RESPONDENT

JUSTUS MWANIKI.....7TH RESPONDENT

EUSTACE MWANIKI.....8TH RESPONDENT

AUGUSTINE NG'ANG'A MUCHIRI.....9TH RESPONDENT

AND

PETER NGINGA MWANIKI.....APPLICANT

RULING

1. The Petitioners, have brought the present petition on behalf of sixty one families who resided within Sondu River Settlement Scheme upto 13th June 2018 before they were allegedly inhumanly and brutally evicted at the instance of the Respondents. The Petitioners aver the parents of the sixty one families worked for the white settlers and that during the land adjudication were entitled to be allocated the land upon which

they had settled. However the land measuring 108.1 hectares or thereabouts was allocated to the 7th Respondent who did not meet the terms of the allocation but the 8th Respondent somehow got the title of the land processed and issued in his name on 13th August 2018.

2. The petitioners allege that the sixty one families have been subjected to and have been victims of historical injustices and that their constitutional rights to equal protection, fair treatment, right of human dignity and access to justice have been violated and seek inter alia, declarations they have been discriminated against; that they are entitled to prompt payment of just compensation for deprivation of their property and infringement of their constitutional rights; and orders of judicial review to quash any decision of the respondents allocating the land parcel **Nakuru/Sondu River/1** to the 7th & 8th Respondents.

3. The Petition was supported on the affidavits sworn in support by Richard Malakwen Sang, the 1st Petitioner herein.

4. The 8th respondent entered appearance and filed a statement of grounds of opposition to the petition dated 12th March 2019 and simultaneously also filed a Notice of preliminary objection of even date. The statement of the grounds of opposition was in the following terms:-

1. That the allocation and ownership of all that parcel of land originally known as plot No.1, Sondu River Scheme No.552, and which is now registered as land title number Nakuru/Sondu River /1, was adjudicated upon and determined in favour of the 8th Respondent by both the High Court of Kenya and the Court of Appeal in Nakuru High Court Civil case No. 47 of 2003 and Civil Appeal No.184 of 2007 (Nakuru) – Philip Koskei Biego & 56 others-vs- Eustace Mwaniki Nginga.

2. That by reason of the determination/decisions of both the High Court and the Court of Appeal in the said Civil case and the said Civil Appeal, on ownership of the subject parcel of land, the petition dated 15th January, 2019 is res judicata.

3. That the eviction that is complained of by the petitioner/applicants was carried out in execution of the judgement and decree in the said Nakuru High Court Civil case No.47 of 2003.

4. That the 8th respondent is the original, genuine and legitimate allottee and owner of the said plot No.1 Sondu River Scheme No. 552, and which is now registered as Land Title Number Nakuru/Sondu River/1, as already determined by both the high court and the Court of Appeal and the petitioners and or the persons evicted there from have no valid claims or interest in the said parcel of land whatsoever.

5. That the petitioners/applicants have failed to disclose material fact in their petition and application dated 15th January 2019.

6. That the petition dated 15th January, 2019 is scandalous, frivolous and vexatious.

7. That the petition dated 15th January, 2019 is an abuse of the court process.

8. That by reason of the foregoing, the petition dated 15th January, 2019 and the application dated 15th January, 2019 should be struck out on limine, with costs to the 8th respondent.

5. The Notice of Preliminary Objection was in the following terms:-

1. That the matters raised in the petition dated 15th January, 2019 are res judicata by reason of the decisions of the High Court of Kenya and the Court of Appeal in Nakuru HC Civil Case No. 47 of 2003 and Civil Appeal No. 184 of 2007 (Nakuru)- Philip Koskei Biego & 56 others -vs- Eustace Mwaniki Nginga, touching on and involving the same subject matter in the instant petition.

2. That the petition dated 15th January, 2019 is scandalous, frivolous and vexatious.

3. That the petition dated 15th January, 2019 is otherwise an abuse of the court process.

4. That the petition dated 15th January, 2019 and the application dated 15th January, 2019 should be struck out in limine with costs to the 8th Respondent.

6. The 8th respondent Peter Nginga Mwaniki upon being substituted, further on 26th November 2019 filed a replying affidavit in opposition to the petition. Vide the replying affidavit, the 8th respondent annexed copies of the High Court judgment in Nakuru HCCC No. 47 of 2003 and the Court of Appeal judgment in Civil Appeal No. 184 of 2007 arising from the High Court judgment.

7. The court on 12th February 2020 gave directions that the 8th respondents preliminary objection dated 12th March 2019 be heard first and directed that parties argue the preliminary objection by way of written submission. The 8th respondent and the petitioners have filed their respective submissions. The other respondents did not file any submissions. Mr Ondieki Senior State counsel appearing for the Attorney General and for the 1st, 2nd, 4th and 5th Respondents affirmed he would file no submissions indicating he associated himself fully with the submissions filed by the 8th Respondent.

8. The 8th Respondent's preliminary objection is predicated on the ground that the petition is Resjudicata by reason of the decisions rendered by the High Court and the Court of Appeal in Nakuru HCCC No.47 of 2003 and Court of Appeal civil appeal No. 184 of 2007 (Nakuru)

where the parties were Philip Koskei Biego & 56 others -vs- Eustance Mwaniki Nginga. Whether or not a suit is Resjudicata is an issue of law. The issue goes to the jurisdiction of the court to sustain and/or entertain the suit. Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya embodies the Resjudicata doctrine and provides as follows:-

7. Res judicata 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 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.

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.

9. It is the 8th Respondent's submission that the instant petition is Res Judicata, as the issues raised in the petition were the same similar issues that were in issue in Nakuru HCCC No. 47 of 2003 where the 8th Respondent had instituted the suit against Philip Koskei Biego and other persons claiming ownership of all that parcel of land originally known as plot No.1 Sondu River settlement Scheme No.552 presently registered as Title Number Nakuru/Sondu river. The 8th Respondent asserts that in the suit he sought an order of eviction against the defendants and an order of permanent injunction to restrain any further trespass onto the land by the defendants. The 8th Respondents submitted that the issues of allocation and ownership of the subject land was adjudicated upon and the court entered judgment in favour of Eustance Mwaniki Nginga (now deceased) and the court issued orders for eviction and permanent injunction against the defendants.

10. An appeal lodged by the defendants to the Court of Appeal vide Civil Appeal No. 184 of 2007 Philip Koskei Biego and 56 other -vs- Eustace Mwaniki Mwaniki Nginga was partly allowed in regard to the award of mense profits but was dismissed on the issue of allocation and ownership of the suit land meaning the High Court's order for eviction and permanent injunction against the defendant's was sustained. The 8th respondent contended that the instant petition raises the same issues that were raised and conclusively determined in the High court suit and the subsequent appeal before the Court of Appeal and thus the present petition is res judicata.

11. The petitioners in their response submissions have countered that the preliminary objection is not merited. The petitioners argue that the parties in the petition are different from the parties that were in the earlier suit Nakuru HCC No.47 of 2003 and Civil Appeal No. 184 of 2007. The petitioners further argue that different prayers are sought in the petition though the land the subject matter is the same. The petitioners submitted the petition seeks enforcement of fundamental rights conferred under Articles 27,28,40 and 50 of the constitution which they alleged had been violated by the respondents and that the petition ought to be allowed to proceed to be heard and determined on merits rather than be dismissed on technicalities. The petitioners in support of their submissions placed reliance on the case of **Okiya Omtata, Okoiti -vs- Communication Authority of Kenya & 14 others (2015) eKLR**. In the case Lenaola, J (as he then was) at paragraphs 17 and 18 in his judgment stated as follows respecting the application of res judicata:-

*“ 17. For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been previously decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (see the case of **Karia and Another -vs- The Attorney General and Others (2005) IEA83**.*

18. *The rationale behind the provisions of section 7 above entrenching the doctrine of res judicata is that if the controversy in issue is finally settled, determined or decided by a competent court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was what was held with approval in **Omondi -vs- National Bank of Kenya Ltd and others (2001) EA 177**”*

12. The petitioners further submitted the 8th Respondent's preliminary objection did not qualify as one, as the court would before making a determination regarding whether the matter was res judicata or not be required to ascertain various facts. In the instant matter for instance the court would be required to examine the previous pleadings and judgment in the previous case. They submitted a preliminary objection cannot be raised if any facts have to be ascertained or what is sought would be the exercise of judicial discretion. For this submission they relied upon the case of **Mukisa Biscuit manufacturing Co. Ltd –vs- West End distributors Ltd (1969) EA696** where **Sir Charles Newbold, P** stated:-

“...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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is exercise of judicial discretion..”

13. The petitioners argued that there are disputed facts as relates to the nature of the suit and reliefs sought in the earlier suit and the present petition which they maintained can only be ascertained if the petition proceeds to trial. The petitioners in this regard placed reliance on the case of **Oraro-vs- Mbaja (2005) eKLR** WHERE **Ojwang, J** as he then was stated as follows:-

“ any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement with learned counsel, Mr, Ogo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

14. The petitioners finally submitted that a plea of res judicata ought not to be raised by way of preliminary objection and in support of this submission placed reliance on the case of **George Kamau Kimani & 4 others -vs- County Government of Trans-Nzoia & Another (2014) eKLR** where **Obaga J**, took the position that the proper procedure for raising a plea of res judicata was by way of a Notice of Motion.

15. It is not disputed that Nakuru HCCC No. 47 of 2003 was heard on merits and a judgment rendered that provoked Nakuru Civil Appeal, No. 184 of 2007 related to the land which is the subject matter in the present petition. The 8th respondent Eustace Mwaniki Nginga (deceased) who was substituted by Peter Nginga Mwaniki was the plaintiff and the Respondent in the Appeal respectively. The High Court judgment delivered by **Musinga, J** (as he then was) on the 31st May 2007 and the majority judgment of **Sichale JA** concurring with **Nambuye JA** and the dissenting judgment by **Gatembu Kairu JA** delivered on 20th March 2014 were exhibited in the replying affidavit of the 8th respondent.

16. In order for the Court to determine whether or not a matter is res judicata it is in my view incumbent upon the court before which the issue of res judicata is raised to peruse the decision and/or the pleadings in the earlier suit to satisfy itself who the parties in the earlier suit were; what issues were canvassed and what decision was reached. I cannot see on what other basis, the court would be in a position to pronounce itself on the issue whether or not the current suit would be said to be res judicata.

17. I have consequently perused and considered the judgment of the High Court in Civil case No. 47 of 2003 and have noted that amongst the issues the court set out for determination were as follows :-

1. Who the lawful allottee of the suit premises was?
2. When the plaintiff occupied the suit premises?
3. Whether the defendants were in occupation of the suit premises prior to the plaintiff's occupation of the same?
4. Whether the defendants were trespassers into the suit premises and from when?
5. Whether the defendants were in lawful occupation of the suit premises?
6. Whether the defendants had acquired prescriptive rights over the suit property?

18. On the question of who the parties were in the earlier suit, especially as relates to the defendants, the judge, before considering and determining the issues observed as follows :-

“ Before I proceed to determine the above issues, it is important to point out that on 23rd August 2006, 46 people filed an application by way of Chamber summons under Order 11 Rules 2 and 3 of the Civil Procedure Rules, seeking to be joined as defendants in this suit. They stated that they are also in occupation of the suit premises. On 15th January 2001 consent was entered into by the advocates for the plaintiff and all the defendants whereby the additional people were joined as defendants. In the circumstances, all the people who are now in occupation of the suit premises numbering 57 in total became defendants. However only seven of them testified. Under order 1 rule 12 of the civil Procedure Rules, where there are more than one defendants, any one or more of them may be authorised by any other of them to appear, plead or act for the rest in the proceedings. Such authority has to be in writing signed by the party giving it and must be filed in the case. In these proceedings, no such authority was ever given. Consequently, the position in law is that except those who testified, the rest of the defendants did not adduce evidence (emphasis added).

19. In the present petition, the petitioners are stated to be those persons who were occupying the suit premises and who claimed to have been forcibly evicted from the land. From the paragraph in the judgment of **Musinga, J** that I have reproduced above, all the persons who were occupying the suit premises were enjoined to the suit as defendants. These (defendants) must be the same persons who have instituted the

present petition as petitioners. The Court of Appeal in its judgment reproduced paragraphs 3,4 and 5 of the defence and it is evident the defendants were staking claim of ownership to the suit premises and denied they were trespassers on the land.

20. Indeed the defendants claimed to have enjoyed quiet possession of the suit land and had by virtue of that become legal owners by virtue of prescription. I am in the premises satisfied that the petitioners were indeed parties as defendants and as appellants in the High Court suit and the Court of Appeal in the respective cases in the two Courts. The 8th Respondent was the plaintiff and the respondent in the High Court and in the Court of Appeal cases respectively. In the Court of Appeal case of **John Florence Maritime Service Limited & Another -vs- Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR** the Court of Appeal held that a Court in determining what questions of law and fact were determined in the earlier suit was entitled to look at the record of the previous suit. The court stated thus:-

“The JR was tried before a competent Court and judgment delivered. Halsbury’s Laws 9 4th edition, Volume 16 para 1527- 1529) stated that in deciding what questions of law and fact were determined in the earlier judgment the Court is entitled to look at the judge’s reasons for his decisions, and his notes of the evidence and is not restricted to the record. As correctly submitted by counsels for the respondents, nothing would therefore prevent a court from accessing its own records in previous proceeding—“.

21. In the petition before the court the petitioners as observed were parties in the suit before the High Court and the Court of Appeal. They had the opportunity to participate and they did. They raised issues of the allocation of the suit land, their long period of occupation and their claim of legal ownership by reason of prescription. These issues were appropriately considered both at the High Court and before the appellate court and were finally adjudicated. These issues were directly in issue in the earlier suit and are directly and substantially in issue in the present petition. The petition cannot be determined without considering who was validly allocated the suit premises and whether the petitioners are lawful occupiers and/ or are trespassers on the suit land. These issues have been determined previously by a competent court and this court cannot properly adjudicate the same issues a second time. The petitioners ought not to be allowed to re-open the same case again on what they allege are a violation of the constitution. The constitution is being used as a camouflage to seek to reopen the litigation.

22. In the case of *John Florence Maritime Limited case (supra)* the Court of Appeal in deciding whether Res judicata was applicable in Constitutional petitions and/or whether the doctrine ought to be invoked only by way of a formal application held thus:-

“ (i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

(ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application, it can be raised through pleadings as well as by way of preliminary objection.

23. Although the petitioners have clothed this matter as raising constitutional issues under the Bill of Rights, it has all the hallmarks of a Civil suit being disguised as such. The matter is not helped by the fact that there has been a prolonged litigation involving the petitioners and the 8th Respondent respecting the land that is at the centre of the dispute. The litigation has been conclusively determined and the execution of the resultant decree is indeed what provoked the filing of the instant petition.

24. The petitioners are in a culdesac and I see the petition as an attempt to reopen the litigation between themselves and the 8th Respondent through the backdoor and in the process to have a second bite of the cherry. The court cannot condone that and cannot allow litigation to be mutated and to go on endlessly. There has to be an end to litigation and parties ought not to be permitted to “panel beat” their cases by merely introducing new parties and or by introducing what may otherwise be described as innovative causes of action. (See the case of **E.T -vs- Attorney General & Another (2012) eKLR**).

25. I entertain no doubt that this matter is res judicata and I accordingly uphold the preliminary objection. The petition is ordered struck out with costs to the 8th respondent.

Ruling dated signed and delivered virtually at Nakuru this 4th day of February 2021.

J M MUTUNGI

JUDGE