REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC PETITION NO. 21 OF 2019

1. ROBINSON NALENGEYO OLE TOROME

2. TOBIKO OLE MUNTET

3. LUNKE OLE KAPIANI

4. LOSIKA OLE NINA

5. ESHO OLE SHOKORET

6. PATRICK KIROTIE TUMANKA

7. MACK TINKOI

8. RAPHAEL KERENKE..PETITIONERS

VERSUS

KEDONG RANCH LIMITED..1ST RESPONDENT

KENYA RAILWAYS CORPORATION..........................2ND RESPONDENT

NATIONAL LAND COMMISSION...............................3RD RESPONDENT

THE HON. ATTORNEY GENERAL................................4TH RESPONDENT

RULING

1. This ruling is in respect of the petitioners' Notice of Motion dated 29th October 2020 and the 1st respondent's Notice of Preliminary Objection dated 22nd November 2019.

2. The Notice of Motion seeks the following orders:

1. [Spent]

2. [Spent]

3. The Honourable court be pleased to restrain the 1st Respondent by itself, its servants, employees and/or authorized agents from leasing, charging or selling land reference number L.R 8396 (I.R 11977) and/or in any manner interfering with the Petitioners/Applicants possession of land reference number L.R 8396 (1.R 11977) in any manner whatsoever detrimental to the Applicants pending hearing and determination of this Petition.

4. The Honourable court be pleased to restrain the 2nd Respondent by itself, its servants, employees and/or authorized agents from evicting the Petitioners/Applicants from the suit property or in any way dealing with the land reference number L.R 8396 (1.R 11977) in any manner whatsoever detrimental to the Applicants pending hearing and determination of the Petition herein.

5. The Honourable court be pleased to stop any further dealings in the Parcel of land reference number L.R 8396 (I.R 11977)

pending the hearing and determination of the Petition herein.

6. The Honourable court be pleased to grant an order for substituted service in at least one daily newspaper of national circulation.

7. THAT the costs of the application be provided for.

3. On the other hand, the Notice of Preliminary Objection is on the following grounds:

a) The application dated 29th October 2019 and the petition filed therewith offended the provisions of section 7 of the Civil Procedure Act Cap 21 Laws of Kenya as the matter directly and substantially in issue herein has been directly and substantially in issue in a former suit Nakuru High Court Petition No. 57 of 2014 between the Maasai Community under whom the Petitioners are litigating and the 1st Respondent and which suit has been heard and finally decided by the said Court.

b) The application dated 29th October 2019 and the petition ought to be dismissed with costs for the being res judicata.

4. The Notice of Motion is supported by an affidavit sworn by Robinson Nalengoyo Ole Torome. He deposed that he was born and raised in land reference number LR 8396 (I.R 11977) the suit property herein commonly known as Kedong Ranch where his parents and thirty thousand families from the Maasai community have been residing. That the land was allocated by way of grant by the then Colony and Protectorate of Kenya to Akira Ranch Limited in 1950, was later transferred to Ol Magogo Estates Limited and a year later to Kedong Ranch Limited in 1972. That the exchange in ownership over the years has deprived the community of its ancestral land and rendering them landless.

5. He deposed further that the 1st respondent has already subdivided the said land and transferred to Kengen Company Limited and as a result, the petitioners were evicted from the suit property, that further the 2nd respondent has already constructed the Standard Gauge Railway through the suit property thereby occasioning eviction of the Maasai Community and that the 3rd respondent compensated some of the residents living in the said land. He added that despite the community having made significant developments in the suit property, the government has recently earmarked land for development of the proposed Naivasha Dry port within the suit property without undertaking compensation to the affected local Maasai Community who are the inhabitants of the suit land.

6. The 1st respondent responded to the application through a replying affidavit and a supplementary affidavit sworn by Christine Cronchey. She deposed that the court in **Nakuru High Court Petition No. 57 of 2014** determined the issue of whether the suit property was community land belonging to the Maasai community. That in its judgment delivered on 24th September 2015, the court found that the suit property became private land in 1950 in the hands of the 1st respondent. She deposed further that the issue of occupation of the suit property by the petitioners and the Maasai community, the court in **Nakuru High Court Civil Case No. 21 of 2010 (OS)** pronounced itself that the Maasai community was not in occupation of the suit property and had not accrued any proprietary interest thereon.

7. The 2nd respondent responded to the application through a replying affidavit sworn by Stanley Gitari and grounds of opposition. He deposed that the suit property was compulsorily acquired by the 3rd respondent on behalf of the government for the construction of SGR which has since been constructed and for the construction of a dry port. He deposed further that the 3rd respondent paid compensation to persons with proprietary interests over the suit property.

8. The 3rd respondent responded to Notice of Motion through grounds of opposition denying all the averments therein.

9. The Notice of motion and the preliminary objection were canvassed together through written submissions. All the parties save for the 3rd and 4th respondents filed submissions. The petitioners argued that the preliminary objection does not meet the threshold set in law as there are contested facts that require determination. They relied on the cases of **Mukisa Biscuit Manufacturers Ltd vs. West End Distributors Ltd [1969] E.A 696** and **Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others [2015] eKLR**. They further submitted that the preliminary objection is not capable of disposing of the entire suit since although **Nakuru High Court Petition No. 57 of 2014** existed, the parties therein are not the same as the ones in the current suit and that there have been new developments after determination of **Nakuru High Court Petition No. 57 of 2014**. They relied on the cases of **Margaret Nyiha Gatambia & 2 Others v Peninah Ngechi Njaaga & 3 Others [2019] eKLR** and **Quick Enterprises Ltd vs. Kenya Railways HCCC No. 22 of 1999** as cited in **Hannah Wanja Njenga Njenga & Another v Peter Kiarie Warui & 4 Others [2019] eKLR.**

10. Thirdly, they argued that they have *locus standi* to institute representative the petition since they were born and reside on the suit property and will be affected by the outcome of this matter. They cited **Order 1 rule 8 (2)** of the **Civil Procedure Rules** and the case of **Law Society of Kenya vs. The Commissioner of Lands [2003] KLR** as cited in **Lawrence Sese & 5 Others v Jeremiah Otieno Okenye & Others [2009]**. They also argued that the petition is not frivolous, vexations, bad in law, incompetent or an abuse of the court process and that they have demonstrated that they have a claim in the suit property and have real issues to be determined by this court.

11. As regards whether the matter is *res judicata*, they submitted that whereas **Nakuru High Court Petition 54 of 2014** indeed filed, the parties and issues therein were different from those in this matter and that there have been new events and a new course of action has arisen therefrom. They relied on the case of **Republic v City Council of Nairobi & 2 Others [2014] eKLR** wherein the court cited **Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462.** They therefore argued that they should be granted the prayers sought in the application.

12. The 1st respondent argued in their submissions that the issues in dispute in **Nakuru High Court Petition No. 57 of 2014** are also directly and substantially in dispute in the current petition since the prayers in both matters are similar, and further that the parties in **Nakuru High**

Court Petition No. 57 of 2014 are similar to the parties in the instant petition since the claimants in both matters are said to be over 30,000 members of the Maasai Community. That accordingly, the petition herein is *res judicata* and should be dismissed with costs.

13. The 2nd respondent associated itself with the 1st respondent's submissions on the preliminary objection and urged the court to uphold it.

14. I have considered the application, preliminary objection, the affidavits and the submissions. I will deal with the preliminary objection first since it raises the jurisdictional question of *res judicata*. In the event that the objection fails then I will consider Notice of Motion dated 29th October 2020.

15. For a preliminary objection to be valid, it must raise 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. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (**1969) EA 696.**

16. The petitioners have argued that the preliminary objection does not meet the above threshold and that there are contested matters of fact that will require the court to determine. That notwithstanding, they have in their submissions acknowledged that **Nakuru High Court Petition No. 57 of 2014** existed. Does the question of existence of the said suit and its outcome in the circumstances amount to a contested matter of fact that requires taking of evidence? I do not think so.

17. Firstly, because the petitioners acknowledge that the suit was filed. Secondly, because it is possible to know the outcome of a case in a superior court of record without having to take evidence on the particular issue of outcome. A statutory body known as National Council for Law Reporting has been established pursuant to **Section 2** of the **National Council for Law Reporting Act, 1994** and mandated under **Section 3** of the said Act to prepare and publish reports known as the Kenya Law Reports which contain judgments, rulings and opinions of superior courts of record. By simply looking at the case number, it is obvious that **Nakuru High Court Petition No. 57 of 2014** was filed in the High Court which is a superior court of record. Under **Section 19** of the **National Council for Law Reporting Act, 1994** every judge of a superior court of record is required to, as soon as practicable after delivering a judgment, ruling or an opinion cause a copy of it to be furnished to the editor of the Kenya Law Reports. A perusal of the Kenya Law Reports so as to read a judgment with a view to knowing the issues in a case and its outcome does not amount to taking evidence, more so in the circumstances of this case where existence of **Nakuru High Court Petition No. 57 of 2014** is acknowledged. To insist otherwise would amount to laying undue emphasis on procedural technicalities with resultant injustice and delays in administration of justice.

18. Indeed, the duty of the court to see to it that a just, expeditious, proportionate and accessible resolution of disputes is attained and that substantive justice prevails is emphasized under **Section 3** of the **Environment and Land Court Act**, **Sections 1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2)** of the **Constitution**. Although the petitioners argued that the preliminary objection does not meet the threshold as there are contested facts that require determination, it has not been shown what those contested matters are, besides the ascertainment of the issues in **Nakuru High Court Petition No. 57 of 2014** which as I have noted above, does not require the taking of evidence. Further, to the extent that the preliminary objection raises *res judicata*, it has the capacity if successful, to dispose of the entire petition. I therefore find that the preliminary objection herein is a valid one. I will consider it.

19. The objection herein is that this suit is *res judicata*. **Section 7** of the **Civil Procedure Act** has codified *res judicata* 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 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***.

20. For an objection based on *res judicata* to be upheld there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**. Further, applies even in constitutional petitions. The Supreme Court stated in **Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another [2016] eKLR** as follows:

> ***[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights …***
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> ***[54] The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.***

21. A perusal of the Kenya Law Reports reveals a judgment delivered on 24th September 2014 in **Nakuru High Court Petition No. 57 of 2014** and reported as **Parkire Stephen Munkasio & 14 others (suing on their own behalf and behalf of their families and all the members of the maasai community living on land reference no.8396 (i.r 11977) situated in kedong) v Kedong Ranch Limited & 8 others [2015] eKLR**. It immediately becomes apparent that the 2nd and 7th petitioners herein were petitioners in **Nakuru High Court Petition No. 57 of 2014** while the 1st respondent herein was also a respondent in the matter. At paragraph 3 of the judgment, it is stated that the petitioners in the said case presented the petition on their own behalf and on behalf of their families and all other over 30,000 members of the Maasai Community residing on the land parcel No. 8396 (I.R No. 111977). At paragraphs 2, 24 and 26 of the present petition, the

petitioners describe themselves as persons who have resided on L.R 8396 (I.R No. 111977) since birth who bring the petition on their own behalf and on behalf of over 30,000 members of the Maasai Community. Both by virtue of their own description and pursuant to **Explanation (6)** of **Section 7** of the **Civil Procedure Act**, the petitioners herein were clearly claiming under the actual petitioners in **Nakuru High Court Petition No. 57 of 2014**. I am therefore satisfied that parties in this matter are the same as those in **Nakuru High Court Petition No. 57 of 2014**.

22. Further perusal of the judgment in **Nakuru High Court Petition No. 57 of 2014** shows that the petitioners therein *inter alia* sought a declaration that they, their families and all the members of the Maasai Community residing on LR No. 8396 (I.R No. 11977) were in lawful occupation of the said land on account of it being their ancestral land and communal land, a declaration that they had acquired title to the said parcel as well as an order of cancellation of the title.

23. In the present petition, the petitioners seek a declaration that they, their families and all members of the Maasai Community residing on L.R No. 8396 (I.R No. 11977) are in lawful occupation of the said land on account of it being their ancestral land, a declaration that the said parcel lawfully belongs to the members of the Maasai Community and an order directing the Chief Land Registrar to cancel any titles, transfers and subdivisions made in respect of the suit land. Thus, the core reliefs sought in the present petition are the same as those in **Nakuru High Court Petition No. 57 of 2014**. The dispute still revolves around ownership of L.R No. 8396 (I.R No. 11977) by the petitioners, their families and the so called over 30,000 members of the Maasai Community residing on the said parcel.

24. Upon hearing the petition in **Nakuru High Court Petition No. 57 of 2014**, Munyao Sila J dismissed the petition and stated as follows in the process:

> ***52. The land in issue is registered in the name of Kedong Ranch. It is a leasehold interest for a term of 999 years from 1 May 1950. It cannot be argued that the land is public land and neither can it constitute community land. Looking at the definitions of public land, community land and private land, the land is definitely private land in favour of the 1st respondent.***
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> ***53. The petitioners made arguments that this land forms part of the Maasai community land. I am afraid that it does not. The land is private land in the hands of Kedong Ranch. In fact it became private land way back in 1950 and has remained so all along. It matters not that the petitioners believe that the land was their ancestral land. In fact it is immaterial whether the land was at one point or another, the ancestral land of the Maasai, or the ancestral land of the petitioners. The land is now private land, as provided by our Constitution which is the supreme law of this country.***

25. Thus, the issue of ownership of the suit property was thereby conclusively determined in **Nakuru High Court Petition No. 57 of 2014**. The petitioners or the so called over 30,000 members of the Maasai Community cannot have another bite at the cherry however tempting it is.

26. In view of the foregoing, the preliminary objection has merit. I uphold it. The petition herein is accordingly struck out for being *res judicata*. Costs are awarded to the respondents.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF MARCH 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Opola for the petitioners

No appearance for the 1st respondent

Mr Dachi for the 2nd respondent

No appearance for the 3rd respondent

No appearance for the 4th respondent

Court Assistants: B. Jelimo & J. Lotkomoi