



**Oguku & 2 others v Speaker of the County Assembly, Kisii County & 3 others (Land Case Petition 2 of 2023) [2024] KEELC 6003 (KLR) (17 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6003 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
LAND CASE PETITION 2 OF 2023**

**M SILA, J  
SEPTEMBER 17, 2024**

**BETWEEN**

**JOSEPH NYAKWEBE OGUKU ..... 1<sup>ST</sup> PETITIONER  
JOSEPH MAUTI KENYANYA ..... 2<sup>ND</sup> PETITIONER  
ELIJAH MACHONI MOCHAMA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**SPEAKER OF THE COUNTY ASSEMBLY, KISII COUNTY ... 1<sup>ST</sup> RESPONDENT  
HON PAUL OKOMBO AYIEMBA, MEMBER OF COUNTY ASSEMBLY,  
BOIKANGA WARD ..... 2<sup>ND</sup> RESPONDENT  
COUNTY ASSEMBLY, KISII COUNTY ..... 3<sup>RD</sup> RESPONDENT  
KISII COUNTY GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

(Claim by the 1<sup>st</sup> and 3<sup>rd</sup> respondents that this suit is *res judicata*; court’s assessment is that the suit does not raise the same dispute that was present in the previous suit; application dismissed)

1. The application before me is that dated 29 February 2024 filed by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. It seeks orders that this petition be struck out on the contention that it is *res judicata* the case Kisii High Court Civil Suit No. 4 of 2014. The application is opposed by the petitioners.
2. It is trite that for the plea of *res judicata* to succeed the issues raised in the instant suit must be the same as those raised in the previous alleged suit. So what is the issue in this case ?
3. The petitioners are residents of Boikanga Ward, within Kisii County. They lodged this petition on 12 July 2023 and they averred that they have commenced the petition on behalf of the residents of



Boikanga Ward. Their complaint is on the location of the Boikanga Ward offices and they wish to have the following orders :

- a. A declaration that the construction was on an unapproved parcel of land without public participation having been conducted;
  - b. a permanent injunction to stop the said construction on the assigned parcel of land;
  - c. an order of prohibition to stop the said construction; and
  - d. any other order the court may deem fit.
4. In the supporting affidavit to this motion, the pleadings in Kisii HCC No. 4 of 2014 have been annexed. I can see that the said suit was commenced by 12 plaintiffs through a plaint filed on 5 February 2014 against two defendants, that is the County Government of Kisii and the County Representative Boikanga Ward. The complaint was again on location of the Ward offices for Boikanga Ward. It was urged that the centre for Boikanga Ward used to be in Nyakembene which was claimed to be centrally located but the offices have been moved to Nyakeiboreire, which was alleged to be at the far end, without the blessings of the community. They also raised issue that the Ward Administrator was posted at Nyakeiboreire and not Nyakembene. In the suit the plaintiffs asked for the following orders :
- a. A declaration that the defendants be ordered to restore the Boikanga Ward at Nyakembene Centre and not Nyakeiboreire Centre as the will of the majority people of Boikanga Ward.
  - b. All developments within Boikanga Ward be withheld.
  - c. Costs of the suit be granted.
  - d. Any further relief this honourable court may deem fit and just to grant.
5. The parties were directed to negotiate the matter out of court and an award ensued in the following terms :
1. That a neutral and central place which is not any of the contested places be adopted as the ward headquarters. Ichuni centre was proposed by Hon. Kombo and was unanimously accepted by all the people.
  2. That community should identify suitable public land at Ichuni for the ward office and if none is available, Mr. Onderi the Executive Committee member in charge of lands who was present was tasked to purchase land for that purpose.
  3. That the court case be unconditionally withdrawn by the people who filed it as the issue of the location of the ward office has been resolved.
  4. That a task force was formed constituting the following members from both sides to assist the MCA in identifying the land for the ward offices and other relevant matters.  
(12. ames listed).
6. In this petition, it is contended that the residents of Boikanga Ward met on 25 May 2023 and unanimously agreed that the office of the Member of County Assembly (MCA) would be constructed on the land parcel South Mugirango/Bikanga/239 which is land measuring 10 acres. It is said that this land is neutrally located between two main clans that form Boikanga Ward, is centrally located, and ideal for delivery of services to all residents of the ward. It was claimed that the County Assembly commissioned construction of the MCA's office on a piece of land allocated exclusively for the market without seeking approval from the community. It is added that the new location lacks centrality and



public participation was not done. It is urged that construction of the MCA office in land allocated for the market is against the intention of the members of Boikanga Ward.

7. In my assessment of the above pleadings I am not persuaded that this case is *res judicata* the case Kisii HCCC No. 4 of 2014. It is true that both cases complain about location of the ward offices but it cannot be said to raise the same issues. In Kisii HCCC No. 4 of 2014 the complaint was that the offices were proposed to be constructed at Nyakeiboreire and it would appear that the case was settled with the formation of a task force to identify land at Ichuni. In our case the complaint has nothing to do with construction of Ward offices at Nyakeiboreire but at a parcel of land which is alleged to have been set aside for a market. When I dealt with the application for injunction, which had been filed alongside the suit, I did mention that it would be rare for a court to interfere with the political decision of where to locate county offices. However, where there is an allegation that a construction is violating planning laws, in this case, building an office block on land set aside for a market, or violating the spirit of the constitution on issues related to public participation, then the court may have reason to step in. It is on that basis that the court is proceeding with this matter.
8. I further observe that in the previous suit it was never settled where the Ward offices would be sited for that was left for the task force. I am not informed that the task force settled on the disputed land nor the basis upon which the respondents made the decision to build the Ward offices at land alleged to be set aside for a market. That of course will need to be canvassed during the hearing. But as far as this application is concerned, my view is that we are dealing with two different disputes and this suit does not infringe the *res judicata* rule as I have explained myself in the foregoing.
9. For the above reasons, this application is dismissed with costs to the petitioners.
10. Orders accordingly.

**DATED AND DELIVERED THIS 17 DAY OF SEPTEMBER 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Mr. Marita for the petitioners

Ms. Muma h/b for Mr. Onserio for the 1<sup>st</sup> & 3<sup>rd</sup> respondents

Mr. Mosota for the 4<sup>th</sup> respondent

N/A for the 2<sup>nd</sup> respondent

Court Assistant : David Ochieng'

