



**Maingi (Suing on Behalf of the Estate of M’Imangi Mutanthi - Deceased)
v Land Adjudication & Settlement Officer Igembe South Sub County
Adjudication Officer & 3 others; Miriti & another (Interested Parties) (Petition
E007 of 2023) [2024] KEELC 6950 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6950 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION E007 OF 2023
CK NZILI, J
OCTOBER 16, 2024**

BETWEEN

**JOHN GICHUNGE MAINGI (SUING ON BEHALF OF THE ESTATE OOF
M’IMANGI MUTANTHI - DECEASED) APPLICANT**

AND

**LAND ADJUDICATION & SETTLEMENT OFFICER IGEMBE SOUTH SUB
COUNTY ADJUDICATION OFFICER 1ST RESPONDENT**

DIRECTOR OF LAND ADJUDICATION 2ND RESPONDENT

LAND REGISTRAR – MAUA 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

SHIPRAH MUKOANJAGI MIRITI INTERESTED PARTY

JACINTA MUKOITI MIRITI INTERESTED PARTY

RULING

1. The petitioner filed a notice of motion dated 13.5.2024, seeking conservatory orders alongside the main petition challenging the ruling and proceedings of the Land Adjudication officer Igembe South Sub-County made on 17.11.2022 alleged to have infringed on the petitioner’s rights contained in the Articles 35, 40, 47, 48, 50, 60, 64, 68 & 159 of the Constitution by wrongly, fraudulently and unlawfully depriving him 8 acres of his ancestral land.



2. Upon perusing the application on 4.6.2024, the court directed that the application be served for an inter-parties hearing on 17.6.2024. Parties were also ordered to put in written submissions. When the application was called out on 17.6.2024, there was no appearance, and it was adjourned for 11.7.2024. Again, the petitioner did not show up. The application was then dismissed for non-prosecution, and the main petition was listed for mention on 16.9.2024.
3. The petitioner then filed an application dated 16.7.2024 to set aside the dismissal order. Under the certificate of urgency, which the court directed it be mentioned on 17.9.2024. When the matter was called out on 16.9.2024, Mr. Ngeera appeared for the 1st & 2nd interested parties while Mr. Juma appeared for the 1st – 4th respondents.
4. Mr. Ngeera brought to the attention of the court the existence of a previous matter involving the same parties, Meru ELC No. 15 of 2022, whose ruling had been delivered on 4.4.2024. He termed the instant petition as res-judicata.
5. Learned counsels present were not aware of the application dated 16.9.2024 due for hearing the following day. The court then directed that the hearing for 17.9.2024 remain. Come 17.9.2024, Mr. Kaberia appeared for the petitioner, Mr. Juma appeared for the respondent, and Mr. Atheru appeared for the interested parties. Learned counsel for the petitioner conceded that there was Meru ELC JR No. E015 of 2022, while Mr. Atheru advocate urged that the issue of res-judicata be determined first, for it goes to the jurisdiction of the court.
6. Parties were, therefore, directed to file written submissions by 30.9.2024. The interested parties take the view that the petition herein is res-judicata in view of the judgment in Meru ELC JR No. E055 of 2022, where the petitioner was the exparte applicant, the 1st, 3rd & 4th respondents, and the interested parties the only addition, being the Director of the Land Adjudication as the 2nd respondent.
7. Further, the interested parties submitted that in the former suit, the orders sought were to quash by way of certiorari the decision of the 1st respondent made on 17.11.2022 regarding Objections No 116 and 117 over Parcel No's. 1562 and 12946 Amung'enti "A" Adjudication Section, measuring 8 acres or thereabouts which are ideally the same reliefs sought herein, by way of a constitutional petition.
8. The parameters to consider as to whether a suit is and if a plea of res judicata is appropriately invoked were discussed in John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & others (2021) eKLR at the Supreme Court of Kenya. The elements include:
 - i. A former judgment which is final.
 - ii. The judgment or order was on merit. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties.
 - iii. There must be between the first and second action identical parties' subject matter and cause of action.
9. Just like in the instant suit, in John Maritime (supra), the initial suit was a judicial review application, whereas the subsequent suit was by way of a constitutional petition. The issues and the parties were identical. The court set the parameters that a party seeking to have a court give an exception to the application of the doctrine of res judicata must show that there would be substantial injustice if a court does not hear a constitutional matter or issues on its merits and secondly, that exceptional circumstances were in existence warranting the court to make an exception.
10. In CCK & others vs Royal Media Service Ltd & others (2014), the court observed that the concept of res judicata operates to prevent causes of action or issues from being relitigated once they have been



determined on the merits. The court said that based on the doctrine of estoppel, a party who previously litigated a claim is prevented from taking a second bite of the cherry to protect the integrity of the administration of justice. Further, the court observed that the issue of estoppel also prevents a party from taking an institutional detour to attack the validity of an order by seeking a different result from a different forum rather than through the designated appellate or judicial review route.

11. In *Kenya Hotel Properties Ltd vs AG & others* (2022) KESC 62 (KLR), the court held that the rule of the thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves.
12. In *Raila Odinga & others vs IEBC & others* (2013) KESC 8 (KLR), the court observed that a person with adjudicative and decision-making powers decides only once in relation to the subject matter and once a decision is made, subject to appeal or review, it would be final and conclusive and cannot thereafter be revoked and varied by its maker.
13. Applying the preceding case law, does the petition before me suffer from res judicata and the doctrine of functus officio? The notice of motion before the court is based on the same reasons and facts as in the instant case. The exparte applicant, now the petitioners herein, had invoked *the Constitution*, terming the 1st respondent's decision as in flagrant breach of his right to fair administrative action under Article 47 of *the Constitution*.
14. The 1st respondent had filed a replying affidavit through the Land Adjudication Officer Mr. J.M Muchiri confirming that the proceedings and the decisions of 17.11.2022 were in line with the law and the constitutional rights and freedoms to fair hearing and fair administrative actions act. The interested parties had filed a replying affidavit setting out the history of the suit land, since 1971 up to the hearing of the A/R Objections No. 116 and 117 over Parcels No. 1862 and 12946 by the 1st respondent.
15. All the parties in the judicial review application were also given an opportunity to file written submissions, which the court exhaustively went through and found that the exparte applicant had no locus standi to bring the suit, and hence, the reliefs sought were not available to him. The court struck out the notice of motion with costs to the respondents and the interested parties on 4.4.2024. In paragraphs 7-10 of the petition, the petitioner describes himself as a son of the late M'Imangi M'Mutanthi and the administrator and a beneficiary of the estate herein who, as children, are settled on the suit land and have extensively developed it, which his late father bought from Naathu clan for value, took vacant possession from 1950 and was still under their occupation to date. He blames the 1st – 4th respondents for fraud, irregularity, and unconstitutionally determining the A/R objection without a fair hearing, with a view to defeating his right to own property under Articles 35, 40, 47, 48, and 50, 60, 64, 68 and 159 of *the Constitution*.
16. The exparte applicant seeks the court to declare the acts of the respondent as irregular, fraudulent, arbitrary, wrongful, ambiguous, irrational, and unconstitutional. He also prays for the decision to be quashed, that the court declares him the owner of parcel No.1 562 and 12946 Amung'enti A Adjudication Section measuring 8 acres, mandamus compelling the chief land registrar to register the two parcels of land in the name of the estate of M'Maingi Mutanthi and general damages for breach of his right to property.
17. In *John Maritime* (supra), even though from the face of it appeared the issues to the present suit and the judicial review were directly and substantially the same, the apex court differed with the Court of Appeal since the appellant had predicated their petition on other grounds which a court sitting in determination in a judicial review application did not have jurisdiction to render itself on the issues. The apex court said the plea of res judicata was wrongly invoked. The court observed



that when determining a constitutional petition, the empowered to look beyond the process and not only examine but delve into the merits of the matter or a decision and may grant more reliefs as it may deem fit, including structural interdicts and supervisory relief as held in *MituBell Welfare Society vs Kenya Airports Authority and others* (2021) eKLR. The court said that in determining a judicial review application, the High Court exercises only a fraction of the jurisdiction it has in determining a constitutional petition. The court said a determination of a judicial review application could not be termed as a final determination of issues under a constitutional petition since the considerations, are different, including the orders capable of being granted, which are more expounded under a constitutional petition and therefore the outcome was considerations procedure and reliefs are different, and that the court will be playing different roles.

18. In this petition, the petitioner has defined the capacity in which he brings the petition as not only an administrator but also as a beneficiary of the estate and an occupant of the suit land. In the former suit, the court found him lacking letters of administration. The court did not determine the matter on merits and with finality. It merely struck out the judicial review notice of motion. There was no finality to the issues raised.
19. I think there are exceptional circumstances existing to discount the concept of *res judicata*. There will be substantial injustice if the court does not hear the constitutional matter or issues raised on merit. The upshot is that I dismiss the preliminary objection raised with no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 16TH DAY OF OCTOBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Kaberia for the petitioner

Atheru for 1st & 2nd interested party

