**Batian Grand Hotel Company Limited v Nyeri County Government & 3 others (Environment & Land Petition 6 of 2018) [2023] KEELC 551 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 551 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYERI**

**ENVIRONMENT & LAND PETITION 6 OF 2018**

**JO OLOLA, J**

**FEBRUARY 2, 2023**

**BETWEEN**

**BATIAN GRAND HOTEL COMPANY LIMITED ..... PETITIONER**

**AND**

**NYERI COUNTY GOVERNMENT ..... 1ST RESPONDENT**

**DAVID NGUNJIRI, ERUSTUS KIAMA & JORAM KIBUCHI (AS TRUSTEES OF UNITED SOCIAL CLUB) ..... 2ND RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3RD RESPONDENT**

**ATTORNEY GENERAL ..... 4TH RESPONDENT**

**RULING**

1. By this petition originally filed at the High Court at Nyeri as Constitutional Petition No 10 of 2016, Batian Grand Hotel Company Limited (the petitioner) prays for orders listed as follows:

    (a) A declaration that the right of the petitioner to property over title LR No Nyeri Municipality Block III/232 enshrined under article 40(3) of the *Constitution* has been violated/infringed;

    (b) The title to title LR No Nyeri Municipality/Block III/99 registered in the name of 2nd respondent be and is hereby revoked;

    (c) An order of permanent injunction do issue restraining the respondents whether by (themselves), agents, servants from selling, transferring, charging, interfering or otherwise dealing in any manner whatsoever with the suit property Title LR No Nyeri Municipality/Block III/232;

(d) Compensation by way of damages be paid by the Respondents to the petitioner for the breach of the constitutional right enshrined under article 40 (of the) Constitution;

(e) Compensation by way of mesne profits at market rates be paid to the periods the 2nd respondent (has) been in wrongful possession of LR No Nyeri Municipality/Block III/232;

(f) Costs of the petition; and

(g) Any other relief or order as the court may deem fit to grant.

2. Those prayers arise from the petitioner's contention that on June 19, 1991, the suit property was allotted to the petitioner following which the petitioner was issued with a certificate of Lease on June 15, 1992. The petitioner avers that after acquisition of the land, the 1st respondent's predecessor then known as Nyeri Municipality sought to compulsorily acquire the same for purposes of building a bus stop and/or extending the then existing open air market.

3. The petitioner further avers that while the 1st respondent's predecessor abandoned all claims to the suit property on October 18, 1994, the 2nd respondent trespassed thereon claiming ownership through its trustees. It is the petitioner's case that despite knowledge that it was the owner of the suit land, the respondents herein went ahead and caused another certificate of lease to be issued to the 2nd respondent for the same parcel of land on March 15, 2011 as a result whereof the 2nd respondent has remained on the suit property much to the petitioner's inconvenience.

4. The petitioner asserts that as a result of the illegal occupation by the 2nd respondent, it has been unable to enjoy quiet possession of the land and has thereby been illegally deprived of his rightfully acquired property contrary to the law.

5. The Nyeri County Government (the 1st respondent) is opposed to the orders sought in the petition. In a replying affidavit sworn by its legal officer Francisca Ndirangu and filed herein on January 17, 2021, the 1st respondent avers that the petition is misconceived and incompetent. The 1st respondent asserts that the suit property has never been registered in the name of the petitioner as the same has always been in the name of United Social Club being a public social club for civil servants.

6. The 1st respondent further avers that the issues raised in the petition are *res judicata* as the same are similar to the issues raised in Nyeri HCCC No 19 of 2006 between the petitioner and the 2nd respondent.

7. In addition to the affidavit in reply, the 1st respondent has filed a notice of preliminary objection dated January 12, 2022 objecting to the petition on the grounds that:

(i) The issues raised in the petition are res judicata vide Nyeri High Court Civil Case No 19 of 2006 in a judgment delivered on September 28, 2007;

(ii) The petition is misconceived and incompetent; and

(iii) This suit is untenable in law and a gross abuse of the process of the court.

8. David Ngunjiri, Erustus Kiama and Joram Kibuchi sued as the trustees of United Social Club (the 2nd respondent) are equally opposed to the petition. In their response to the petition dated July 14, 2020 but filed herein on October 7, 2021, the 2nd respondent avers that it was allocated the suit property way back on September 8, 1960 and have been in occupation thereof to-date.

9. The 2nd respondent therefore contends that the petitioner is not entitled to quiet possession of the property as it has no proprietary interests thereon.

10. In a replying affidavit sworn on its behalf by Erastus Kiama Gichuki on July 4, 2020, the 2nd respondent avers that all the issues raised in the petition were directly and substantially in issue in Nyeri HCCC No 19 of 2006; Batian Grand Hotel Limited -vs- Mathew Rubia & 2 others.

11. The 2nd respondent further avers that it is in occupation of LR No Nyeri Municipality Block III/99 and not the LR No Nyeri Municipality Block III/232 being claimed by the petitioner.

12. In addition and by a notice of preliminary objection dated July 14, 2020 as filed herein on August 6, 2020, the 2nd respondent objects to the petition on the grounds that the issues raised therein were directly and substantially in issue in the said Nyeri HCCC No 19 of 2006 and that hence the petition is res judicata.

13. By the consent of the parties herein it was agreed that the two preliminary objections as raised by both the 1st and 2nd respondents be disposed off by way of written submissions. I have accordingly carefully perused and considered the submissions and authorities placed before me by the learned advocates representing the parties herein.

14. The two preliminary objections are both centered on the ground that this petition is res judicata as the issues in dispute were directly and substantially in issue in a suit previously filed by the petitioner as against the 2nd respondent herein.

15. Section 7 of the *Civil Procedure Act* captures the doctrine of res judicata and provides 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.'

16. That being the case, for a party to successfully rely on the defence of res judicata, there must be:

    (i) A previous suit in which the matter was in issue;

    (ii) The parties were the same or litigating under the same title;

    (iii) A competent court heard and determined the matter in issue; and

    (iv) The issue has been raised again in a fresh suit.

17. In the matter herein, the petitioner has not denied that it did file Nyeri High Court Civil Case No 19 of 2006. From a perusal of the documents attached to the 1st and 2nd respondents affidavits, that suit was filed by the petitioner as the plaintiff against one Mathew Rubia and David Ngunjiri. The two defendants were sued in their capacity as officials of the United Social Club – the 2nd respondent herein.

18. It was also clear from a perusal of the proceedings in the said case as well as the judgment delivered therein on September 28, 2007 that the subject matter was the same parcel of land described by the petitioner herein as Nyeri Municipality/Block III/232. It was the petitioners case that it was the bonafide purchaser for value of the said property and it sought orders of eviction against the defendants who were accused of encroaching thereon. The petitioner (as the plaintiff) further sought an order of mesne profits at the then commercial rate from the date of filing the suit until vacant possession.

19. The defendants on their part denied the petitioner's claim asserting that the land was allocated to the club in 1960 as Nyeri Municipality Block III/99 and that they had since built a Sports Club thereon for use by its members.

20. Having heard the dispute and in her judgment delivered on September 28, 2007 as aforesaid Lady Justice Mary Kasango dismissed the petitioner's suit having found that there was no evidence produced to demonstrate the allotment of the land to the petitioner and that it remained a mystery how the petitioner had obtained title to the land that had been allocated to the 2nd respondent herein.

21. That being the case, it was not open for the petitioner to wait some 10 years later and to bring another suit in the guise of a constitutional petition seeking to be declared the owner of the same parcel of land. As the Court of Appeal stated in *Independent and Electoral Boundaries Commission v Maina Kiai and 5 others [2017] eKLR*:

> ' The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in and endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.'

22. As it were the mere addition of the 1st and 3rd respondents as parties in this subsequent suit does not render the doctrine of res judicata inapplicable. A party cannot escape the doctrine by simply undertaking a cosmetic surgery to his pleadings. As was stated in *Omondi v National Bank of Kenya Limited and Others [2001] EA 177*, parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.

24. It follows that I am persuaded that there is sufficient merit in the two preliminary objections. This petition is res judicata and I accordingly strike out the same with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 2ND DAY OF FEBRUARY, 2023.**

**In the presence of:**

**Mr. Muhoho Gichimu for the 2nd Respondent**

**Mr. Wahome Gikonyo for 1st Respondent**

**No appearance for the Petitioner**

**No appearance for the Attorney General for 3rd and 4th Respondents**

**Court assistant - Kendi**

**.....**

**J. O. OLOLA**

**JUDGE**