



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO E013 OF 2021

IN THE MATTER OF: THE CONSTITUTION OF KENYA OF 2010

AND

IN THE MATTER OF: ARTICLES 1,10,19,20,21,22,23,27,28,29,48,50,165.(3(6),258

(1) FAIR TRIAL GENERALLY

AND

IN THE MATTER OF: ARTICLE 35(1),(2) CORRECTION OR DELETION OF UNTRUE OR MISLEADING INFORMATION

AND

IN THE MATTER OF: KISUMU CIVIL APPEAL NO.262 OF 2019

AND

IN THE MATTER OF: ENVIRONMENT AND LAND COURT AT ELDORET

IN E.L.C CASE NO.157 OF 2016

OGLA JEMELI BARNGETUNY.....PETITIONER

AND

SHIRJI NARAN VIRJI.....1ST RESPONDENT

ERIC KIPKEMBOI BARNGETUNY.....2ND RESPONDENT

MAGDALINE JEPKEMBOI KIBOR.....3RD RESPONDENT

KIPLELEI COMPANY LTD.....4TH RESPONDENT

ISAAC KIPKENEI TERER.....5TH RESPONDENT

ARUSEI AND CO. ADVOCATES.....6TH RESPONDENT

MBALUKA & COMPANY ADVOCATES.....7TH RESPONDENT

JANE CHOGE.....8TH RESPONDENT

ENVIRONMENT AND LAND

COURT AT ELDORET.....9TH RESPONDENT

COURT OF APPEAL AT KISUMU.....10TH RESPONDENT

AND

THE CHIEF LAND REGISTRAR.....1ST INTRESTED PARTY

THE COUNTY LAND REGISTRAR

UASIN GISHU COUNTY.....2ND INTRESTED PARTY

AGRICULTURAL FINANCE

CORPORATION.....3RD INTERESTED PARTY

DOREEN J. BARNGETUNY.....4TH INTERESTED PARTY

RULING

1. This is a ruling in respect of two preliminary objections. The first preliminary objection is brought by the 1st and 2nd Respondents based on the following grounds:-

a) **THAT** this Honourable Court lacks jurisdiction to hear and determine both the Petitioner's application and petition dated 27/09/2021 since-

i. This Honourable Court lacks **supervisory jurisdiction** to supervise, re-open, revisit and/or intervene on the proceedings before or decided by the Environment and Land Court and the Court of Appeal pursuant to Articles 165(6) and (7) of the Constitution of Kenya, 2010.

ii This Honourable Court lacks jurisdiction to determine the issues in the application and petition as they are **res judicata**, having been raised in the suit involving the same parties and determined conclusively by the Environment and Land Court and the Court of Appeal, which are courts of competent jurisdiction.

iii) This Honourable Court **lacks the jurisdiction to stay execution proceedings** before the Land and Environment Proceedings as the same is **sub judice**.

2. The Second preliminary objection is brought by the 1st and 2nd Interested Parties based on the following grounds:-

a. That the Petitioner's suit is incurably defective, a non-starter, scandalous, frivolous, vexatious, bad in law suit as it is *res judicata*.

b. The court is *functus officio* to re-hear and re-determine the matter based on fresh complaints brought by the Petitioner.

c. The court lacks the jurisdiction to entertain the matter as provided by Article 165(6) of the Constitution.

3. On 28/9/2021, the petitioner filed a Constitutional petition in which she sought the following reliefs:-

(A) A declaration of a mistrial in ENVIRONMENT AND LAND COURT AT ELDORET IN E.L.C CASE NO.157 OF 2016 and the resultant Judgment a nullity as the Respondent either singly jointly and/or severally contravened/infringed Petitioner's fundamental rights and freedoms enshrined in Articles 28,31,35,40,45,48 and 50 of the Constitution of Kenya due to their several acts/inaction and or omissions.

(B) Orders of Certiorari do issues quashing and setting aside the Judgments in Kisumu Civil Appeal No. 262 of 2019 and Environment and Land Court at Eldoret in E.L.C Case No.157 Of 2016.

(C) A declaration that the Petitioner has a right under Article 35 (2) to have all untrue or misleading information that affecting her in ENVIRONMENT AND LAND COURT AT ELDORET IN E.L.C CASE NO. 157 OF 2016 be corrected or deleted.

(D) Eldoret Municipality Block 13/886 is Matrimonial property of the petitioner and not vacant as it appears in Judgment records and the same be deleted/corrected as provided for by the Constitution of Kenya Article 35(2).

(E) A declaration that the Lease Certificate to Eldoret Municipality Block 13/530 was issued on 6th December, 2011 therefore the purported Sale Agreement dated 28th May 2011 is null and void for failing to meet the legal threshold of a valid enforceable land Sale Agreement in any event, and therefore non-enforceable.

(F) A declaration that occupation of 1st and 2nd Respondents on the parcel of land Eldoret Municipality Block 13/885 since July 2016 to the complete exclusion of the Petitioner is without any legal basis, unlawful, null and void hence:

I. Permanent restraint against the 1st and 2nd Respondent do issue by this Honourable Court.

II. an eviction notice do equally issue;

III. Resultant damages for trespass and continued illegal and unlawful occupation over the same since July 2016 to the time of eviction.

(G) A declaration that representation of the Petitioner by 6th and 7th Respondents was way below the reasonable professional standard required of an Advocate of the High Court of Kenya.

(H) An order that Trial Court refund or give back the following to the Petitioner:

I. Title Deed Eldoret Municipality Block 13/886 held by it, and

II. Kenya Shillings 100,000 deposited to Court for security services which never took place.

(I) An order that the 6th Respondent to refund the cost of Kenya Shillings 60,000/= paid to private Forensic Expert due to negligence of law and protection of client incurring unnecessary cost.

(J) An order that the 7th Respondent to refund the balance of legal fee paid for services not rendered Kenya Shillings 210,000/=.

(K) An order of damages in compensation in favour of the petitioner.

(L) Costs of this Petition.

(M) Any other relief this Court may deem fit to grant in the general interest of Justice.

4. The Petitioner contemporaneously filed a Notice of Motion in which she sought the following orders:-

1. Spent

2. THAT an interim injunction restraining the 1st, and 2nd Respondents, and/or their servants, workmen, agents, and any person acting on their instructions from entering onto, remaining therein or wasting, surveying, allocating any portion thereof or in any manner whatsoever engaging in any acts/dealings or in any way interfering with the Petitioner's enjoyment of parcel of land known as ELDORET MUNICIPALITY BLOCK 13/885 pending the hearing and determination of this Application and Petition.

3. THAT this Honourable Court be pleased to stay any intended execution proceedings, interim, of the Judgment/Decree dated 29th August 2019 in Eldoret Environmental and Land Court E.L.C Case No. 157 of 2016 pending the hearing and determination of this application.

4. THAT this Honourable Court be pleased to stay any intended execution proceedings of Judgment/Decree dated 29th August 2019 in Eldoret Environmental and Land Court E.L.C Case No.157 of 2016 pending the hearing and determination of this Petition.

5. THAT this Honourable Court be pleased to grant any other order in the interests of Justice that it may deem so fit to grant.

6. THAT costs of this application be provided for.

5. The Petitioner was sued by the 1st Respondent in Eldoret E.L.C No 157 of 2016 in which the 1st Respondent sought an order of specific performance over LR No Eldoret Municipality Block 13/886 (Suit Property). The 1st Respondent also sought a permanent injunction against the Petitioner. The case was heard and a judgment was given in favour of the 1st Respondent on 29/8/2019.

6. The Petitioner being aggrieved with the judgment in Eldoret E.L.C 157 of 2016 preferred an appeal against the judgment through Kisumu Civil Appeal No 262 of 2019. This appeal was heard and the same was dismissed in a judgment delivered on 29/1/2021.

7. The Petitioner being aggrieved by the judgment of the Court of Appeal applied for leave to file an appeal to the Supreme Court pursuant to the provisions of Article 163(4) of the Constitution. This application was dismissed in a ruling delivered on 23/9/2021.

8. When the Petitioner's Notice of Motion came up for hearing on 18/11/2021 it was agreed that the two preliminary objections be argued first. As the two preliminary objections were similar, they were argued together.

9. Mr Maina for the 1st and 2nd Respondents argued that this court does not have jurisdiction to entertain both the Notice of Motion and the Petition itself. Under the jurisdiction issue, Mr Maina argued that this Petition had been filed in a wrong court without jurisdiction. He argued

that the Environment and Land Court was only mandated to handle matters relating to Article 42 and 70 of the Constitution and that as the Petitioner is contending that her constitutional rights were violated, then she should have filed the petition in the High Court which has jurisdiction to hear issues relating to violation of rights under the Constitution.

10. On the issue of jurisdiction, Mr Maina argued that this court does not have Supervisory jurisdiction over the Environment and Land Court and the Court of Appeal. He argued that what the Petitioner is seeking in the Petition is to have the proceedings in both the Environment and Land Court and the Court of Appeal quashed, something which this court cannot do. He argued that the Environment and Land Court only has jurisdiction to supervise the lower court and not superior courts.

11. Still on the issue of jurisdiction, Mr Maina argued that both the Petition and Notice of Motion are *res-judicata* in that the issues raised in both the Petition and the Notice of Motion have been adjudicated and finally concluded and therefore the Petition and the Notice of Motion contravene the provisions of Section 7 of the Civil Procedure Act.

12. The other argument raised on jurisdiction is that this Petition is *sub judice*. Mr Maina argued that there is Eldoret E.L.C 157 of 2016 where the case is pending execution proceedings and that there was a ruling pending in that case which was set to be delivered on 15/12/2021.

13. The last argument on jurisdiction is that the Petitioner had not exhausted the avenues open for redress of her grievances. Mr Maina argued that the Petitioner is seeking a refund of the monies which she paid as legal fees to the Advocates who represented her both before the Environment and Land Court and the Court of Appeal. It was argued that the issue of fees and negligence of an Advocate are supposed to be addressed in accordance with mechanisms provided under the Advocates Act and rules thereunder. The Petitioner did not exhaust the avenues open to her before she came to this court.

14. The other point taken up by the 1st and 2nd Respondents is that this Petition and Notice of Motion are an abuse of the process of court. Mr Maina argued that the Petitioner lost before the Environment and Land Court and the Court of Appeal as well. The Petitioner's decision to file this petition is an abuse of the process of the court which is only meant to vex the 1st Respondent who is a decree holder in Eldoret E.L.C 157 of 2016.

15. M/S Kiget for the 6th Respondent, M/s Kamunya for 7th Respondent and M/s Jepkemei for 9th and 10th Respondents and for the 1st and 2nd Interested Parties associated themselves with the submissions of Mr. Maina for 1st and 2nd Respondents.

16. In answer to the two preliminary objections, the Petitioner who was acting in person relied on an affidavit which she swore on 29/11/2021. The Petitioner contends that the preliminary objections do not meet the threshold set out in the case of Mukisa Biscuits Manufacturing Company Limited -Vs- West End Distributors [1969] EA 696.

17. The Petitioner argues that this court is being invited to ascertain facts of this Petition and that therefore the points raised do not qualify to be preliminary points of law which can dispose of the Petition.

18. The Petitioner further argues that what she has raised against her former Advocates does not amount to complaints which would come under the purview of Sections 53 to 63 of the Advocates Act.

19. The Petitioner further argues that the Petition herein is neither *res-judicata* nor *sub judice* as the issues relating to violation of her rights have not been litigated before any court.

20. I have carefully considered the preliminary objections raised herein, the arguments in support and against the same. I have now to decide whether the preliminary objections will succeed on all or any of the grounds stated in the two preliminary objections.

“In the case of Mukisa Biscuit Manufacturing Co Ltd -vs-West End Distributors Ltd [1969] EA 696 Law JA stated as follows:-

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Further on , Sir Charles Newbold JA, stated :

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what it sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

21. One of the ground in the preliminary objections is that this court does not have jurisdiction to handle this matter. I will deal with this issue on two aspects that is Supervisory jurisdiction and *res judicata* which is also an issue of jurisdiction.

22. A look at the prayers in the Petition shows that the Petitioner is asking for quashing of the Judgment in Eldoret E.L.C 157 of 2016 and Kisumu Civil Appeal No 262 of 2019. The Petitioner is also seeking a declaration that Eldoret E.L.C 157 of 2016 was a mistrial and that the

resultant judgment is a nullity. This court has no jurisdiction to supervise let alone look at the merits or demerits of a judgment of a court of concurrent jurisdiction which judgment has gone to the Court of Appeal and has been affirmed.

23. It will be absurd if this court purported to clothe itself with jurisdiction to overturn a decision of the Court of Appeal. In the case of Kenya Hotel Properties Limited -Vs- Attorney General & 5 others [2018] eKLR, the appellant had filed a Constitutional Petition in the High Court in which it asked the court to declare that a Court of Appeal judgment dated 2/4/2009 in Civil Appeal No 149 of 2007 was a nullity and should be set aside. The trial Judge stated in his judgment that he did not have jurisdiction to grant the reliefs sought. The Appellant being aggrieved with the decision appealed to the Court of Appeal. The Court of Appeal dismissed the appeal holding that the Judge was right in declining jurisdiction as he could not purport to nullify a decision of a higher court. The Court of Appeal stated as follows:-

“It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this court to quash or annul them, or that it could purport to direct court to re-open and re-hear a concluded appeal”

24. Just as in the Kenya Hotel Properties Limited case (Supra), the Petitioner is asking this court to declare Eldoret E.L.C Case No 157 of 2016 and Kisumu Civil Appeal No 262 of 2019 nullities and quash the same. This court has no jurisdiction to grant those reliefs.

25. On the aspect of *res judicata*, I must point out at the outset that *res judicata* is an issue of law which goes to jurisdiction. The principle of *res judicata* is predicated on Section 7 of the Civil Procedure Act which states 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. 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.”

26. The Principle of *res judicata* ensures that there is finality to litigation. It ensures that a party should not be vexed with endless litigation where courts of competent jurisdiction have adjudicated over a matter. In the instant case, the Petitioner is arguing that this Petition is not *res judicata* because the issue of violation of her Constitutional rights has never been litigated before.

27. I have looked at the Petitioner’s petition as well as the judgment in Eldoret E.L.C 157 of 2016 and Kisumu Civil Appeal 262 of 2019. A look at the Petition clearly shows that the Petitioner wants a second bite of the cherry. The Petitioner complains that there were certain issues which were not brought up during the hearing in Eldoret E.L.C No 157 of 2016. For instance, she argues that there could have been no valid agreement made as the title was charged to Agricultural Finance Corporation the 3rd interested party yet the agreement stated that the property was being sold free of any encumbrances and that the lease had expired and no extension had been applied for. The issues which the Petitioner is raising squarely fall under explanation 4 of Section 7 of the Civil Procedure Act. They should have been made ground of defence or attack in Eldoret E.L.C 157 of 2016.

28. I have looked at the Judgment in Eldoret E.L.C 157 of 2016 and Kisumu Civil Appeal 262 of 2019. The issues which the Petitioner is raising now were fully addressed by the two courts. The parties in both Eldoret E.L.C 157 of 2016 and Kisumu Civil Appeal No 262 of 2019 were the same. The Petitioner cannot escape the doctrine of *res judicata* by merely adding other parties in the Petition who were not parties in the two previous proceedings before the Environment and Land Court and the Court of Appeal. [See the case of E.T. -Vs- Attorney General & another [2012] Eklr.

29. The Petitioner relied on the case of Muhu Holdings Ltd -Vs- James Muhu Kangari [2017] eKLR where Justice Ohungo rejected a preliminary objection based on *sub judice* on the ground that no evidence had been tabled before him to enable him ascertain who the parties were in Nairobi High Court Succession cause No 1027 of 1989 and suggested that if the defendant wished to have the plea of *sub judice* properly adjudicated, he should consider bringing an application to that effect with appropriate supporting evidence.

30. In the case of John Florence Maritime Services Limited & another -Vs- Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, the Court of Appeal had occasion to address the issue of whether *res judicata* is applicable in Constitutional Petitions or whether it was a legal requirement that the doctrine of *res judicata* should only be invoked by way of a formal application. The court stated as follows:-

“ (1) The doctrine of *res judicata* is applicable in 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 clearest of cases.

(2)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”

31. The Petitioner has annexed proceedings in Eldoret E.L.C 157 of 2016 to her petition. The 1st Respondent has annexed the Judgment in Eldoret E.L.C 157 of 2016, the judgment in Kisumu Civil Appeal 262 of 2019 as well as the ruling in respect of an application for leave to file an appeal to the Supreme Court. I have perused the judgments as well as the ruling. All the issues which the Petitioner is raising were

addressed by the judgment in Eldoret E.L.C 157 of 2016 which judgment was affirmed by the judgment of Kisumu Civil Appeal 262 of 2019. The Petitioner attempted to move to the Supreme Court but her attempts were rejected by the Court of Appeal. What the Petitioner is seeking to achieve through this petition is what she failed to get in both the Environment and Land Court and the Court of Appeal. I therefore find that this petition is *res judicata*. This is enough to dispose of this matter but I wish to address the issue of abuse of the process of court.

32. This petition is a classic example of how the court process can be used to vex the opposite party in litigation. The Petitioner was the registered owner of LR No Eldoret Municipality Block 13/530. The Petitioner agreed with the 1st Respondent to sell half of the property which had by then not been subdivided into Eldoret Municipality Block 13/885 and Eldoret Municipality Block 13/886.

33. When the 1st Respondent filed Eldoret E.L.C 157 of 2016 he sought an order of specific performance in respect of LR Eldoret Municipality Block 13/886. He obtained judgment in his favour in E.L.C 157 of 2016. The judgment was affirmed in Kisumu Civil Appeal No 262 of 2019. Despite this being the case, the Petitioner contends that the 1st Respondent has forcefully occupied LR No Eldoret Municipality Block /885. This property was not subject of the suit before the Environment and Land Court or the Court of Appeal.

34. In the Petition, the Petitioner has made all manner of allegations against the 1st Respondent and her two previous lawyers whose law firms she has sued in this petition. She has even sued the witnesses who testified in the case before the Environment and Land Court and even the two courts which adjudicated upon the dispute.

35. It is clear that the Petitioner is very vindictive. She has brought into this Petition the issue of Eldoret High Court Succession cause No 299 of 2014 which touches on the estate of her late father Ezekiel kiplelei Barngetuny. She accuses the 2nd Respondent who is her brother of taking over the vast estate of the deceased and using the money therefrom to influence the outcome of the cases involving her. The Petitioner accuses parties named in this Petition of influencing her star witness the 4th Interested party who is her sister to recant her evidence.

36. This Petition was not filed in good faith. It was calculated to hit at all the parties whom the petitioner perceived to have been the cause of her predicament. This Petition is also wanting in bona fides and was meant to oppress the 1st Respondent. The Court of Appeal in the case of Muchanga Investments Limited -Vs-Safaris Unlimited (Africa) Ltd & 2 other[2009] eKLR quoted from Wikipedia, the free encyclopaedia on abuse of process of court where it stated as follows:-

“The Person who abuses the process is interested only on accomplishing some improper purpose that is collateral to the proper object of the process and offends justice”.

37. In the same case of Muchanga Investments Limited (Supra) the court quoted the case of Beinosi -Vs- Wyley 1973 SA 721 [SCA] at page 734 F-G, a South African case heard by the Court of Appeal of South Africa, where Mohomad CJ, set out the applicable principles as follows:-

“ What does constitute an abuse of the process of court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept “abuse of process”. It can be said in general terms, however, that an abuse of process takes place where proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective”.

38. The Court of Appeal in the same case of Muchanga Investments Limited (Supra) quoted from the Court of Appeal in Abuja Nigeria in the case of Attahiro -Vs- Bagudo 1998 3 NWLL Pt 545 Page 546 where it was stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

39. The Petition herein has all the characteristics of abuse of the process of court. The Petition has an element of malice in it as the Petitioner has gone on an expedition of attacking all those she perceives to have not aided her in her bid to ensure the 1st Respondent did not get the property which he purchased from her. This is a petition which should not have been filed in the first place. In this regard, I agree with the Court of Appeal’s observation in the case of Muchanga Investments Limited (Supra) when they stated as follows:-

“ In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice”

40. From the above analysis, it is clear that this court has no jurisdiction to hear this matter which is *res judicata*. I uphold the preliminary objection on ground of jurisdiction. As I said hereinabove, this is a classic example of cases where litigants abuse the court process. I proceed to strike out the Petition together with the Notice of Motion with costs to the 1st, 2nd, 6th, 7th, 9th and 10th Respondents as well as the 1st and 2nd Interested parties.

It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF FEBRUARY 2022.

E. OBAGA

JUDGE

3/2/2022

In the virtual presence of:-

Court Assistant –Mercy

Mr. Maina for 1st and 2nd Respondents.

Mr. Kuria for 9th and 10th Respondents and 1st and 2nd Interested parties.

Ms. Kiget for Ms. Koech for 6th Respondent.

Petitioner in person.

E. OBAGA

JUDGE

3/2/2022