



**REPUBLIC OF KENYA**

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

**ELC PET. No. 2 OF 2021**

**HUMPHREY OLWISI MURANDA .....1<sup>ST</sup> PETITIONER**

**EVERLYNE OMUSINDE OMUNGO .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**SHERRY WAMUKOYA WABUKO (Suing as the administrator of the**

**Estate of YAKOBET NESHESA WABUKO (Deceased) .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR .....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By petition dated 15<sup>th</sup> June 2021, the petitioners averred that the second petitioner is the registered owner of parcel of land known as Marama/Shianda/126 (the suit property) and that the Butere Land Disputes Tribunal made orders in Claim No. 8 of 2001 for cancellation of the second petitioner's title and that title be issued to Yakobet Neshesa Wabuko (deceased). That the petitioners appealed to the Provincial Land Disputes Tribunal, High Court and Court of Appeal but all the appeals were unsuccessful.

2. The petitioners further averred that the Butere Land Disputes Tribunal did not have jurisdiction to annul a title and that the respondents infringed on their fundamental rights under **Articles 22, 40 and 159** of the **Constitution of Kenya**. The petitioners therefore prayed for the following orders:

*a) THAT pending the hearing and determination of this application petition, the Honourable Court do grant conservatory orders restraining the respondents and any other person on their behalf as servants, employees, or any capacity from selling, transferring, charging, leasing, disposing or in any other manner adversely dealing with title No. MARAMA/ SHIANDA/126.*

*b) THAT this Honourable Court do issue a declaration that the BUTERE LAND DISPUTES TRIBUNAL had no jurisdiction to issue an order for nullification of title for land parcel No. MARAMA/SHIANDA/126 made vide case No. 8 of 2001.*

*c) THAT this Honourable Court do issue a declaration that BUTERE LAND DISPUTES TRIBUNAL had no jurisdiction to issue an order for the issuance of the title to land parcel no. MARAMA/ SHIANDA/126 to the respondents herein vide case No. 8 of 2001.*

*d) THAT this Honourable Court do issue a declaration that the petitioner herein has not been heard through a fair hearing as provided for under Article 50 brought about by the repealed law.*

*e) THAT this Honourable Court do issue a declaration that the Land Disputes Tribunal was unfair in so far as it only allowed Magistrates Court to adopt a decision without questions considering that the composition of those sitting were not schooled in matters law and land.*

*f) THAT this Honourable Court do issue a declaration that the Land Disputes Tribunal Act further limited the powers of the Court of Appeal to hear appeals emanating from the tribunal was illegal and has caused a lot of injustices.*

*g) THAT this Honourable Court do issue a declaration that the rights of the petitioners herein to own property under article 40 were infringed upon by the creators of Land Disputes Tribunal Act and its deficiencies has caused a breach of justice.*

*h) That Costs of and incidental to this this Petition be and hereby awarded to the petitioner.*

3. The petition is supported by an affidavit sworn jointly by the petitioners. They deposed that the second petitioner is the registered owner of the suit property and the first petitioner is the second born son of the late Muranda Anyonje who became the sole proprietor of the suit property in 1998 having inherited it from his parents. That the suit property was later registered in the second petitioner's name and that the petitioners and their brothers had been in occupation of the suit property until 2001 when they were summoned before Butere Land Disputes Tribunal Court having been sued by the first respondent who claimed that her husband had purchased the suit property from the petitioners' father in the year 1975.
4. The petitioners went on to depose that the tribunal determined that the first respondent was the rightful owner of the suit property on the basis of an agreement that was never produced before the court and that the tribunal had no power to annul a title to land. That being dissatisfied with the tribunal's decision, they unsuccessfully appealed to the Provincial Land Disputes Tribunal, the High Court through Kakamega HCC No. 55 of 2002 and the Court of Appeal through Kisumu Appeal No 9 of 2006 later Appeal No 44 of 2006. That they later filed Kakamega High Court Civil Appeal No. 93 of 2008 and the High Court held that it had no jurisdiction thus referring them back to the Chief Magistrate's Court which had no option but to adopt the tribunal's decision.
5. In response, the first respondent filed a replying affidavit in which she deposed that she is the legal representative of the estate of Yakobet Neshesa Wabuko (deceased) who was her mother. She deposed that it is not true that the second petitioner is the current registered owner of the suit property and added that the suit property has been subject to protracted litigation from the year 2002 between the petitioners and her late mother. That her late mother passed away on 27<sup>th</sup> January 2019 after delivery of judgement in Kakamega ELC No. 50 of 2016 in her favour in terms of decree issued on 5<sup>th</sup> October, 2016, which decree the petitioners unsuccessfully sought to stay.
6. The first respondent further deposed that following her mother's death, she was allowed to substitute her mother in Kakamega ELC No. 50 of 2016 on 27<sup>th</sup> May 2019 and that she executed the decree with the result that she is now the registered proprietor of the suit property. That the petitioners sought stay of execution and extension of time to file appeal out of time from the Court of Appeal through Kisumu Civil Appeal (Application) No. 168 of 2019 but the application was dismissed with costs on 23<sup>rd</sup> April 2021. She added that the dispute has been the subject of several cases being Kakamega CMC. Award No. 38 of 2002, Kakamega HCCA No. 55 of 2002, Kisumu CA. No. 9 of 2006, Kisumu CA. No. 44 of 2006, Kakamega HCCA No. 93 of 2008, Kakamega ELC No. 50 of 2016 and Kisumu CA. No. 168 of 2019.
7. She added that the transfer of the suit property by the first petitioner to the second petitioner was cancelled through Kakamega ELC No. 50 of 2016 and not in Kakamega CMC. Award No. 38 of 2002 as alleged. That litigation must come to an end and that the court cannot issue orders to restrain her from enjoying the fruits of all lawful judgements decreed by competent courts.
8. The first respondent also filed grounds of opposition in which she averred that the petition is *res judicata* and also offends the doctrine of constitutionality by not certainly setting out which rights have been violated.
9. On their part, the second and third respondents filed grounds of opposition taking the position that in as much as the petitioners may have and enjoy rights under the constitution, such rights have limitations by dint of **Article 24 (1) (d)** of the **Constitution** and that petitioners have a corresponding duty to respect and not to infringe on the rights and fundamental freedoms of the respondents. That the tribunal having determined the matter, it is the petitioners who have deprived the first respondent her right to property and the fruits of her judgement. That this court, being of concurrent jurisdiction as the High Court, cannot overrule the latter's decision and that the petitioners are seeking an appeal or review through the back door. They added that the petition is *res judicata*.
10. The petition was canvassed through written submissions. The petitioners argued that for *res judicata* to apply, the matter ought to have been heard by a competent tribunal or a court with jurisdiction and that the Butere Land Dispute Tribunal did not have jurisdiction to award title to land. That for *res judicata* to apply, the case should have been heard on merit which was not done in the instant case. Relying on the cases of **John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR** and **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR**, the petitioners took the position that *res judicata* is not applicable to this case and that their right to a fair hearing under **Article 50** of the **Constitution** was infringed upon. They urged the court to allow the petition.
11. The first respondent highlighted principles applicable to constitutional interpretation as against those applicable to statutory interpretation and argued that the constitution should be given a purposive, liberal interpretation and that its provisions must be read as an integrated whole without any provision destroying the other. Reliance was placed on the case of **Council of County Governors vs Attorney General & Another [2017] eKLR**. Regarding whether the petitioners' right to be heard was infringed upon, the first respondent submitted that it is not in dispute that the petitioners were heard before the Butere Land Dispute Tribunal where they called witnesses who testified on their behalf and that the petitioners further exercised their right to appeal to the Provincial Appeals Tribunal, to the High Court and even to the Court of Appeal. Consequently, the first respondent urged the court to hold that no breach of **Article 50** has been established.
12. Regarding whether the tribunal exceeded its jurisdiction, the first respondent relied on **Section 3** of the **Land Disputes Tribunals Act, 1990** (repealed) and submitted that the tribunal had powers to determine ownership of land. Further, the first respondent argued that the petitioners have not stated with clarity and specificity the manner in which they allege their rights under **Article 40** of the **Constitution** have been violated. She accordingly urged the court to dismiss the petition with costs.
13. The second and third respondents argued that the petitioners have not established with a reasonable degree of precision the provisions infringed and the manner of infringement. Reliance was placed on the cases of **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. The second and third respondents further submitted that the petitioners did not raise the issue of jurisdiction before the tribunal or even before the subordinate court and superior courts that later handled the dispute. Relying on **Lennox Mwadzoya Mwasirya v Joyce Leng'a & 4 others [2021] eKLR** and **Paul Muraya Kaguri v Simon Mbaria Muchunu [2015] eKLR**, the second and third respondents further argued that the petitioners cannot now re-litigate the issue under the guise of a constitutional petition.
14. Additionally, the second and third respondents argued that the petition is *res judicata* and relied on the Court of Appeal case of **John**

Njue Nyaga –vs- Attorney General & 6 others [2016] eKLR. In conclusion, they submitted that the petition lacks merit and urged the court to dismiss it with costs.

15. I have carefully considered the petition, the affidavits filed, the grounds of opposition and the submissions of parties. The issues that arise for determination are whether the petition is *res judicata* and whether the reliefs sought should issue.

16. The doctrine of has been codified in Kenyan Law at **Section 7** of the **Civil Procedure Act** 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.***

17. For *res judicata* to be established, 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.

18. It is now settled that although founded in ordinary civil jurisdiction, *res judicata* is a doctrine of general application which also applies in litigation concerning constitutional rights. The Supreme Court stated as follows in regard to the doctrine generally and its applicability to constitutional petitions in Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another [2016] eKLR:

***[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 ...***

***[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.***

19. The Supreme Court recently reiterated the position in John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR.

20. There is no dispute that Yakobet Neshesa Wabuko (deceased) who is represented in this matter by the first respondent as the administrator of her estate, filed Claim No. 8 of 2001 at Butere Land Disputes Tribunal against Humphrey Muranda, the first petitioner herein. The subject matter of the dispute was the suit property herein and tribunal among other orders recommended the nullification of title held by Humphrey Muranda and issuance of a new title to Yakobet Neshesa Wabuko (deceased). Being dissatisfied with the outcome, Humphrey Muranda appealed to the Provincial Appeals Committee through Case No. 26 of 2002. The appeal was dismissed on 14<sup>th</sup> May 2002. Undaunted, Humphrey Muranda yet again appealed to the High Court at Kakamega through High Court Civil Appeal No.55 of 2002. Ultimately, Kakamega High Court Civil Appeal No. 55 of 2002 was dismissed for failure by Humphrey Muranda to comply with directions given by the High Court. Humphrey Muranda appealed to the Court of Appeal through Civil Appeal No. 44 of 2006 (Kisumu), which appeal was struck out on 25<sup>th</sup> April 2008. The respondent in all the appeals was Yakobet Neshesa Wabuko (deceased). Thus, the parties in all previous proceedings are the essentially the same as in this petition save for the second and third respondents herein.

21. **Section 8** of the **Land Disputes Tribunals Act, 1990** (repealed) provided in part as follows:

***8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.***

...

***(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.***

***(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:***

***Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.***

22. Thus, Kakamega High Court Civil Appeal No. 55 of 2002 could only have been an appeal on a point or points of law. Indeed, from the material placed on record by the petitioners, it is apparent that on 16<sup>th</sup> July 2002, Waweru J certified that Kakamega High Court Civil Appeal No. 55 of 2002 raised points of law.

23. The thrust of the petitioner's case is that the Butere Land Disputes Tribunal did not have jurisdiction to annul a title and that they were not accorded a fair hearing. Jurisdiction and fair hearing are questions of law. Under **Section 8 (9)** of the **Land Disputes Tribunals Act, 1990** (repealed), the petitioners had an opportunity to raise the issues of jurisdiction and fair hearing in Kakamega High Court Civil Appeal

No. 55 of 2002. If the petitioners did not raise those issues in Kakamega High Court Civil Appeal No. 55 of 2002 then they only have themselves to blame. *Res judicata* covers all issues which might and ought to have been made ground of defence or attack in former suits. The whole idea is to avoid piecemeal litigation. The petitioners must equally bear the consequences of the failure to prosecute Kakamega High Court Civil Appeal No. 55 of 2002.

24. A question may arise as to whether dismissal of Kakamega High Court Civil Appeal No. 55 of 2002 without a determination on the merits would be a bar to the application of *res judicata*. The answer is that *res judicata* still applies. The Court of Appeal addressed the issue in **Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR** as follows:

***18. Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative ...***

***In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. ....***

25. The Court of Appeal reiterated as much more recently in **Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR**.

26. The outcomes of Claim No. 8 of 2001 at Butere Land Disputes Tribunal, the appeal to Provincial Appeals Committee and the appeal to the High Court at Kakamega through High Court Civil Appeal No. 55 of 2002 have since conclusively translated into fruit for Yakobet Neshesa Wabuko (deceased) as well as her estate and liability for the petitioners.

27. I have said enough to demonstrate that as between the parties herein, the issues of whether the decision of Butere Land Disputes Tribunal should be interfered with for want of jurisdiction to annul a title and whether the petitioners were accorded a fair hearing have been settled in favour of Yakobet Neshesa Wabuko (deceased) and by extension the first respondent and are therefore *res judicata*. That being the case, I need not determine whether the reliefs sought by the petitioners should issue.

28. In the result, I strike out the petition herein with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MARCH 2022.**

**D. O. OHUNGO**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

**NO APPEARANCE FOR THE PETITIONERS**

**MR OKALI HOLDING BRIEF FOR MR GETANDA FOR THE 1ST RESPONDENT**

**MR JUMA FOR THE 2ND AND 3RD RESPONDENTS**

**COURT ASSISTANT: E. JUMA**