



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 28 OF 2019

GODFREY KARUME MACHARIA.....PETITIONER

VERSUS

1. RICHARD PREMCHARD RAMA

2. ARBI ALI MOHAMED MSSANI

3. ALBERT MUGUMBA KAZUNGU-CHAIRMAN

4. SIMEON NGOWA TABU KIRAO –SECRETARY

(Sued as officials of KAOYENI COMMUNITY SELF HELP GROUP

5. JOHN KAZUNGU MUTSUNGA

6. THE LAND REGISTRAR OF TITLES

7. THE ATTORNEY GENERAL.....RESPONDENTS

AND

BENARD TAURA

THE COUNTY GOVERNMENT OF KILIFI.....INTERESTED PARTY

RULING

1. By this Petition dated and filed herein on 1st October 2019, Godfrey Karume Macharia (the Petitioner) prays for some 11 orders framed as follows: -

a) A permanent injunction restraining the Respondents by themselves, their agents, servants representatives, assigns and any other person claiming under them from interfering with Plot No. 148 and its subdivisions being Portion No. 13753 (Original No. 148/2) Malindi, Portion No. 13754 Original No. 148/3) Malindi and Plot No. 148/1 Malindi, the amalgamations of Plot No. 148/1, Portion No. 13753 (Original No. 148/2 Malindi and Portion No. 13754 (Original No. 148/3 that bore Plot No. 16195 and the subsequent subdivision of Plot No. 16195 which led to Plot Nos. 16196 and 16197 to 161381 together with the Petitioner's Plot Nos. 44, 68, 281, 282, 283 and 284 and other investors' Plot Nos. 5, 6, 26, 28, 29, 31, 32, 37, 38, 39, 40, 42, 48, 145, 146, 148, 172, 173, 195, 196, 200, 224, 225, 226, 227, 228, 239, 241, 242, 243, 244, 245, 261, 262, 268, 276, 277, 279, 285, 289, 290, 291, 313, 314, 316, 317, 320, 321, 322, 323, 325 and 326 and from evicting and/or from removing beacons, removing or moving boundaries and/or fences erected by the Petitioner and other investors and/or from adversely dealing with the said Plots.

b) A declaration that the process of acquiring the Plots named above from Kaoyeni Community Self Help Group, the Allotment Letters, Acceptance Letters and the payments made to the Kaoyeni Self Help through the executive Committee members are valid and that the total amount of money paid by the Petitioner and the other investors remain owing from the Respondents and subsequently declare that the sale offer made between Mr. Abdul Razak Haji Adam and the Kaoyeni Community Self-Help Group members dated 30th September 2009 which was executed in the year 2011 has not been revoked thus is still valid and out rightly making the later undated sale agreement between the 1st, 2nd, 3rd, 4th and 5th Respondents and the Kaoyeni Community

Self Help Group members invalid.

c) A declaration that the transfer of ownership from the 2nd Respondent purporting that the 1st Respondent is the owner of the entire disputed land which was later sub-divided into several portions as stated herein above and the creation of indenture in respect of Land Portion No. 13753 (Original Plot No. 148/2) Malindi and Land Portion No. 13754 (Original Plot No. 148/3) Malindi dated 16th December 2015 is null and void.

d) An order directing and compelling the 2nd Respondent to execute a Transfer of the disputed land by way of an Indenture in favour of the Kaoyeni Community Self Help Group Trustees so as to allow the Kaoyeni people manage it as earlier intended.

e) An order compelling the 1st to 5th Respondents to prepare and issue Deed Plans to the Petitioner and the investors named herein above in respect of each and every plot as stated in Prayer (a) herein above upon completion of the required payments of Kshs 150,000/- or any balance thereof in respect of the completion of the process of acquiring the plots that were allocated to the investors by executive committee including the 3rd and 4th Respondents on behalf of the Kaoyeni Self Help Group.

f) An order do issue directing the 6th Respondent to cancel the two (2) indentures created and registered as Land Portion No. 13753 (Original Plot No. 148/2 Malindi and Land Portion No. 13754 (Original Plot No. 148/3) Malindi, dated 16th December 2015 registered in favour of the 1st Respondent and do rectify the Register and register the disputed land into its original Plot No. 148 Malindi in favour of Kaoyeni Community Self-Help Group;

g) An order do issue directing the 6th Respondent to halt any further registration on any parcel of land emanating from Plot No. 148 Malindi or from her sub-divisions Plot No. 13753 (Original Plot No. 148/2) Malindi and Land Portion No. 13754(Original Plot Number 148/3) or the Plots from the amalgamation to parcels No. 16195 and further sub-divisions to Plot Nos. 16196 and 16197 to 16181;

h) General damages;

i) In the alternative the Respondents jointly and severally do compensate the Petitioner and all the investors the sum valued of the amount paid in respect of the purchase of the respective plots at the current market price value of the respective area;

j) Costs of the Petition; and

k) Any other or further relief that the Honourable Court shall deem fit and just to grant.

2. The Petition is opposed by the Respondents. Richard Premchard Rama (the 1st Respondent) has in particular taken out an Amended Notice of Preliminary Objection dated 23rd November 2020 wherein he objects to the Petition on the grounds that: -

1. The Petition falls short on the doctrine of res sub judice and is an abuse of the Court process;

2. The Petition has been filed contrary to Section 6 of the Civil Procedure Act and the Court lacks jurisdiction to grant the orders sought;

3. There is an existing suit being Malindi ELC Case No. 78 of 2019 in which the same respondents herein have been sued as the defendants in the exact appearance over the same subject matter. The issues raised in this case and the prayers sought are identical to the issues vying for determination in Malindi ELC Case 78 of 2019;

4. There is another existing Petition No. 9 of 2018 in which (the) Petitioner has sued the 1st, 2nd and 6th Respondents herein as the first three respondents and the 3rd, 4th and 5th Respondents herein as interested parties again the issues raised in this case and the offers sought are identical to the issues vying for determination in that Petition;

5. The Petition is fatally defective as it flies into the face of the overriding objective of the Civil Procedure (Act) and the provisions of Article 159(2);

6. The Petition is fatally defective for including interested parties in the case without any legal basis whatsoever, when actually one of the said interested parties is Plaintiff in ELC 78 of 2019;

7. The Petition is an abuse of the process of Court as the Petition has failed to set out with reasonable precision that of which he complains as well as the provisions of the Constitution allegedly infringed and the manner of infringement; and

8. That there has been no violation of any constitutional rights to warrant invocation of Article 22 of the Constitution and hence the matter is purely one of a civil nature.

3. As the Preliminary Objection is contesting the jurisdiction of this Court to hear and determine the dispute, it was agreed that it would be disposed of first by way of written submissions. I have accordingly considered both the written submissions as well as the authorities placed before me by the Learned Advocates for the parties. The Preliminary Objection by the 1st Defendant was in this respect supported by the Honourable the Attorney General who also filed submissions on behalf of the 6th and 7th Respondents herein. Albert Mwugumba Kazungu

(the 3rd Respondent) and John Kazungu Mutsunga (the 5th Respondent) who had both filed Affidavits in reply to the Petition equally filed submissions in support of the objection.

4. The Preliminary Objection herein is founded on the provisions of Section 6 of the Civil Procedure Act which provides as follows: -

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

5. According to the 1st Respondent, there are in existence two suits being ***Malindi ELC Case No. 78 of 2019*** and ***Petition No. 9 of 2018*** in which the same Respondents herein have also been sued over the same subject matter. The 1st Respondent further contends that the issues raised in this case and the other two suits are identical to those vying for determination herein.

6. The Petitioner however denies the 1st Respondent’s contestations. According to the Petitioner, while indeed the said suits had been filed, they did not involve the same parties as those herein. The Petitioner further told the Court that the parties in the said matters were not litigating under the same title and further that the issues in contention were different and the matter did not therefore fall within the purview of Section 6 of the Civil Procedure Act.

7. As it turned out, the only pleading so far filed by the 1st Respondent is the Preliminary Objection which is the subject matter herein and there was nothing else filed by the 1st Respondent from which a deduction could be made as to the existence of the said suits. The existence of those two cases however becomes apparent from a perusal of the two affidavits filed in reply to the Petition by the 3rd and 5th Respondents herein.

8. From the annexures attached to the Replying Affidavit of the 3rd Defendant, it is apparent that ***Malindi ELC Petition No. 9 of 2018*** was filed by the Petitioner herein on or about 16th May 2018 essentially against all the parties herein and that the prayers sought were more or less the same as those sought herein. That Petition was however wholly withdrawn by a Notice of Withdrawal dated and filed in the same cause on 30th May 2019. That was more than a year before the Notice of Preliminary Objection was filed and to that extent the Objection is without basis.

9. In regard to ***Malindi ELC 78 of 2019***, the annexures reveal that it was instituted on 27th September 2019 by some four (4) Plaintiffs against the very same Defendants herein. While the Petitioner is not one of the parties, the said Plaintiffs pray for Judgment to be entered against the Defendants for the following: -

- i) A declaration that the Plaintiffs are the rightful legal owners of Portion Nos. 148/1, 148/2 and 148/3 originally Portion No. 148 Malindi having derived the right of title to the land by virtue of purchasing the same from the original owner;***
- ii) An order of perpetual injunction issued against the Defendants restraining them from erecting fences or any other illegal structures, encroaching upon and/or remaining on, or taking possession of, sub-dividing, alienating, selling or disposing off or interfering in any manner whatsoever with the Plaintiff’s occupation and peaceful enjoyment of the suit property or in any other way dealing with the Plaintiff’s original Portion No. 148 Malindi situated in Malindi currently registered in the names of Richard Premchard Rama but which the Plaintiffs have acquired proprietary interests as explained in the Plaint herein;***
- iii) That the Honourable Court do nullify and or revoke the transfers made by Arbi Ali Mohamed Musani the 5th Defendant herein to Richard Premchard Rama the 1st Defendant herein pursuant to all that parcel of land known as Portion Nos. 148/1, 148/2 and 148/3 originally Portion No. 148 Malindi;***
- iv) The Plaintiffs be registered as the proprietors of all that parcel of land known as Portion Nos. 148/1, 148/2 and 148/3 originally Portion No. 148 Malindi situated in Malindi, in place of the 1st Defendant by reason and fact that the Plaintiffs are the legal owners of the said land; and***
- v) Costs and interests of this suit.***

10. Arising from the foregoing, it is evident that the subject matter in the said ***ELC 78 of 2019*** is the very same suit property in contention herein. Considering the res sub-judice rule as encapsulated in Section 6 of the Civil Procedure Act in ***Kenya National Commission on Human Rights –vs- Attorney General & Others*** the Supreme Court aptly observed as follows: -

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as “Before the Court or Judge for determination”. The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Courts, with competent jurisdiction issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before Courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before Courts of competent jurisdiction and lastly, that the suits are between the same parties or their representatives.”

11. Guided therefore by these principles, it is clear that the 1st Respondent ought to have brought evidence that the two suits are between the same parties or those litigating under the same title in addition to what has been established that there are two suits concerning the same subject matter in two different Courts of competent jurisdiction. The result is that the second ground of objection must also fail.

12. The third major ground of contention was that the Petition is an abuse of the Court process as it fails to set out with reasonable precision that of which the Petitioner complains as well as the provisions of the Constitution allegedly infringed as well as the manner of infringement.

13. A perusal of the 63 paragraph Petition however left this Court in no doubt as to the Petitioners grievances. While the Petition is clearly unnecessarily long and verbose, a reading of paragraphs 40 to 48 of the Petition reveals that the Petitioner is complaining about collusion by the Respondents who include Government Officers to deprive him and others of land that he claims to have lawfully acquired. At paragraph 61 of that Petition, the Petitioner contends that his right to own land pursuant to Article 40 and 65 of the Constitution have been violated.

14. As the Court of Appeal stated in **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others (2013) e KLR: -**

“(4) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterances of the Constitutional provisions alleged to have been violated.....”

15. Accordingly, while the Petitioner may not have been precise in the pleadings filed herein, it was nevertheless evident to this Court that his claim against the Respondents is discernible from his lengthy pleadings herein.

16. In the premises, I am not persuaded that there was any merit in the 1st Respondent’s Preliminary Objection. I dismiss the same with costs to the Petitioner.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE