



**Wanyilu & another v Deputy County Commissioner Masinga District
& 3 others; Matheka (Interested Party) (Environment & Land Petition
15 of 2019) [2022] KEELC 2194 (KLR) (10 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2194 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 15 OF 2019**

CA OCHIENG, J

MAY 10, 2022

N THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF ARTICLES 47, 22, 23 AND
165 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 39 (A) TO (G) , 3 (A) TO (D) , 7, 9(1) (4),
11(1) A, E, H (2) (A) TO (D) OF THE FAIR ADMINISTRATIVE ACT 2015**

BETWEEN

YULA WANYILU 1ST PETITIONER

KISEVU MWEU 2ND PETITIONER

AND

**DEPUTY COUNTY COMMISSIONER MASINGA DISTRICT 1ST
RESPONDENT**

**DEPUTY COUNTY COMMISSIONER MASINGA DISTRICT 2ND
RESPONDENT**

CHIEF LANDS REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

MUSYOKI MATHEKA INTERESTED PARTY



RULING

1. What is before Court for determination is the Interested Party's Notice of Preliminary Objection dated the 5th August, 2020 against the Petitioner's Notice of Motion Application including Petition both dated the 14th August, 2019, seeking the same to be struck out with costs, on the following grounds:
 1. That the matter is res judicata and an abuse of the court process as it had been determined by the Minister in Land Appeal Case Numbers 258 of 2006 and 07 of 2007 on 26th June, 2017.
 2. That the Petition is brought in bad faith and ought to be struck out as it violates the provisions of Section 29(1) of the *Land Adjudication Act* Cap 294, thus the Court is bereft of jurisdiction to entertain this Petition.
 3. That the entire suit is legally incompetent, fatally defective, frivolous, vexatious, scandalous and a paragon of abuse of due process of this Court and should be terminated in limine pursuant to Order 2 Rule 15 (1) (a), (b), (c) and (d) of the *Civil Procedure Rules*.
 4. That the proceedings herein glaringly fly in the face of the annexed decision of J. Mutungi Judge Kisii Petition No. 6 of 2016 – *Saeni v Daniel Aramat Lolungiro and 2 others*.
 5. That the application dated 14th August, 2019 is fatally defective.
2. The Preliminary Objection was canvassed by way of written submission.

Analysis and Determination

3. Upon consideration of the Notice of Preliminary Objection dated 5th August, 2020 including the rivalling submissions, the only issue for determination is whether this Honourable Court should strike out the Petitioners' Notice of Motion application including Petition both dated the 14th August, 2019 with costs.
4. The Interested Party in its submissions provided a background of the dispute herein and highlighted the findings of the Panel hearing the dispute. It insists the decision of the Minister was final pursuant to Section 29(1) (b) of the *Land Adjudication Act* and could only be challenged by way of Judicial Review. Further, that the Petitioners had filed this Petition more than two year seeking to challenge the 1st Respondent's decision. It reiterates that its Preliminary Objection is merited. Further, that this court has no jurisdiction to entertain the instant Petition. It contends that the Minister's decision is final hence the instant Petition is res judicata as the Petitioners failed to challenge the Minister's decision by way of judicial review. Further, that the instant Petition is tantamount to seeking an Appeal against the Minister's decision through the back door. It states that the Petitioners did not exhaust the remedy set out in the *Land Adjudication Act*. To buttress his arguments, he relied on various relevant decisions including: *Mukbisa Biscuits Manufacturing Co. Ltd Vs West End Distributors* (1969) EA 696; *Speaker of the National Assembly Vs Karume* (1992) eKLR; *Mwangi Njangu Vs Mesback Mbogo Wambungu & Another* HCC No. 234 of 1991 (unreported) and *Lepore Ole Maito Vs Letwat Korton & 2 Others* (2016) eKLR.
5. The Petitioners in their submissions contend that their Petition is against the procedure and proceedings leading to the 1st Respondent's decision made on 26th June, 2017. They insist they are aggrieved with the procedure adhered to and not the substantive rights hence the Interested Party cannot invoke section 29 of the *Land Adjudication Act*. To buttress their averments, they have relied



on the case of *Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others* [2015] eKLR.

6. The Interested Party seeks to have the Petition and the Notice of Motion Application herein struck out with costs for being res judicata and contrary to Section 29(1) of the *Land Adjudication Act*, which Notice of Preliminary Objection is opposed by the Petitioners.
7. On perusal of the Petition herein, I note the fulcrum of the dispute revolves around fair administrative action as the Petitioners' allege that they were denied the right to call witnesses; were not informed of other dates for further hearing; were not aware of the date set for the visit to the locus in quo and the outcome of the decision was not communicated to them in time. They further contended that they only learnt of the judgement when they applied for proceedings and noted the said judgement was delivered on 28th June, 2017 which fact was never communicated to them. The Respondents though duly served did not oppose the Petition and the Notice of Motion application but Interested Party filed the instant Notice of Preliminary Objection to oppose the Petition including Notice of Motion.
8. The doctrine of res judicata is set out in the Civil Procedure Act at Section 7 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 can 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."
9. The Civil Procedure Act provides explanations with respect to the application of the res judicata rule. Explanations 1-6 states thus:

"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."
10. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held that;

"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 has to be ascertained or if what is 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 issues. This improper practice should stop.”

11. While in the case of *Uhuru Highway Development Ltd V Central Bank & Others*, CA No. 36 of 1996 the Court of Appeal stated that: -

“In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”*

12. Further in the case of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004, the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”*

13. From the legal provisions cited above, it is pertinent that for a party to rely on the doctrine of res judicata, the decisions must emanate from the same court with competent jurisdiction. In this instance, the Interested Party has not provided any court decision that determined the issues raised in the Petition concerning the resolution of the dispute herein. Further, since the Petition has raised constitutional issues touching on fair administrative action and right to be heard, I opine that for the doctrine of res judicata to apply, in this instance, there should be demonstration that the same issues have been heard and determined by court of competent jurisdiction; same parties litigated under the same title and issues have been raised once more with the same parties, which is not the case herein. In the circumstance, I decline to strike out the Petition and instant application on this ground.

14. On the issue that an Appeal from the Minister is final and hence this court is divested with jurisdiction to deal with this matter as stipulated under Section 29(1) of the *Land Adjudication Act*, I will make reference to the case of *Nyakinyua and Kang’ei Farmers Company Ltd vs. Kariuki Gathecha Resources Ltd (No 2)* [1984] KLR 110 where it was held that:

“The Act declares that the decision of the board, one way or another, shall be final and conclusive and shall not be questioned in any court. Such words ousting the powers of the High Court to review such decisions must be construed strictly. They do not oust this power if the board has acted without jurisdiction or if it has done or failed to do something in the course of its inquiry which is of such a nature that its decision is a nullity (i.e. breached the rules of natural justice).”

15. See also the decision in *Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others* [2015] eKLR.

16. In this instance, the Petitioners have claimed that the Respondents failed to grant them proper audience while dealing with the Appeal. Further, they were not aware of the verdict from the Appeal and learnt of the same much later. Insofar as the Interested Party has raised important issues, it is trite that he should have filed a reply to Petition to deny the Petitioners’ averments first and anchor his Preliminary Objection. To my mind the Interested Party’s averments also require evidentiary proof.

17. From the explanation in the Petition including the supporting affidavit which remains uncontroverted, it is my considered view that the Respondents breached the rules of natural justice as well as fair administrative action culminating in the Petitioners filing the instant Petition. Insofar as Section 29(1) of the *Land Adjudication Act* stipulates that verdict from an Appeal to the Minister is final,



in associating myself with the decisions cited above as well as relying on Articles 47 and 50 of *the Constitution* that makes provisions on the right to be heard as well as right to fair administrative action, I will decline to strike out the Petition on this point.

18. It is against the foregoing that I find the Notice of Preliminary Objection dated the 5th August, 2020 unmerited and will disallow it.
19. Costs will be in the cause

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 10TH DAY OF MAY, 2022

CHRISTINE OCHIENG

JUDGE

