



Musimba v National Land Commission & another; China Road & Bridge Construction Company (Interested Party) (Environment & Land Petition 6 of 2018) [2022] KEELC 14643 (KLR) (7 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14643 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 6 OF 2018
TW MURIGI, J
NOVEMBER 7, 2022

BETWEEN

DR. PATRICK MUSIMBA PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

AND

CHINA ROAD & BRIDGE CONSTRUCTION COMPANY INTERESTED PARTY

RULING

1. The Petitioner Dr Patrick Musimba instituted this Petition on August 7, 2015, and sought for the following orders: -
 - a. A declaration that the Respondents have violated and contravened the Petitioner's right to property under Article 40 of the Constitution.
 - b. A declaration that the Respondents have contravened the Petitioner's right under Article 40(3) of the Constitution not to be deprived of his property without just compensation and in accordance with the law.
 - c. A declaration that the Respondents have contravened the Petitioner's right to fair administrative action under Article 47 of the Constitution.
 - d. Mesne profits for trespass by the Respondents on the Petitioner's property.
 - e. An order for inquiry into and prompt payment of just compensation due to the Petitioner.



- f. An order for inquiry into and prompt payment of damages by the Respondents.
 - g. A Conservatory order restraining the 1st and 2nd Respondents from entering into, trespassing, taking or retaining possession, alienating or howsoever dealing with Land Reference number Kai 439 the property of the Petitioner pending the hearing and determination of this Petition.
 - h. Costs.
 - i. Any other relief the Honourable Court may deem fit.
2. In response to the Petition, the 1st Respondent filed a Notice of Preliminary Objection dated May 4, 2016 on the grounds that the Petition and Application are res judicata as the matter in issue has directly been litigated by the parties herein in Petition No 613 of 2014 Patrick Musimba Vs National Land Commission & 4 Others.
 3. Similarly, the Interested Party filed a Notice of Preliminary Objection dated September 23, 2019 on the following grounds:-
 - a. The Petition herein is res judicata on account of the judgment delivered by the High Court in [*Patrick Musimba Vs National Land Commission & 4 others \[2016\] eKLR*](#).
 - b. The Environment and Land Court does not have the original jurisdiction to hear or determine this dispute to the extent that it is challenging the compulsory acquisition of land by the National Land Commission. In addition, the Interested Party claims that this Court is not clothed with original jurisdiction to hear and determine the dispute to the extent that under Sections 112, 118, 119 and 120 of the [*Land Act*](#) vests such original jurisdiction to hear and determine a dispute on compulsory acquisition of land with the National Land Commission.
 - c. The dispute does not fall within the jurisdiction of the Environment and Land Court exercising its jurisdiction as a Constitutional Court.
 - d. That the Interested Party has been wrongly sued since it does not have any role in either the process of compulsory acquisition or compensation thereafter. That the role of the Interested Party is that of an agent of a disclosed principal who is the 2nd Respondent and thus, it ought not to have been sued. It is prayed that the Petition herein be struck out with costs to the Interested Party.
 - e. The 2nd Respondent filed Grounds of opposition dated February 16, 2022 in respect to the Petition. The main grounds of opposing the Petition are that this Court lacks the requisite jurisdiction to hear and determine the Petition as the [*Land Act*](#), 2012 has established a statutory framework for resolving disputes related to compulsory acquisition of land which the Petitioner has not explored. The 2nd Respondent argued that the Petition is fatally defective on grounds of res judicata as the issues that have been raised were canvassed and a sound judgment delivered in Petition No 613 of 2014 Patrick Musimba Vs National Land Commission and 4 Others. The 2nd Respondent prays that the Petition herein be dismissed with costs.
 4. In response to the two preliminary objections, the Petitioner filed a Replying affidavit sworn by himself on July 5, 2016. He averred that he is the owner of the suit property LR No Kai 439. He stated that it was true that Petition No 613 of 2014 Patrick Musimba Vs National Land Commission & 4 Others was heard and dismissed vide a Judgment delivered on March 29, 2016 and that no appeal was pending. He further averred that the parties in Petition No 613 of 2014 and the instant Petition are different. That the Respondents in the present Petition are: -



- a. The National Land Commission.
 - b. The Kenya Railways Corporation.
 - c. China Road & Construction Company (Interested Party).
- While in ELC Petition No 613 of 2014 the Respondents were: -
- a. The National Land Commission.
 - b. The Kenya Railways Corporation.
 - c. The Attorney General.
 - d. China Road Bridge & Construction Company (Interested Party).
5. He contends that he filed Petition No 613 of 2014 in his capacity as the Member of Parliament Kibwezi West Constituency and that the reliefs sought in the said Petition were for public and not for his personal gain.
 6. He further averred that in the instant Petition, the reliefs sought are with regards to his personal grievances and to be compensated on a personal basis. He argued that the cause of action in the instant Petition is different from that of Petition No 613 of 2014. He asserted that the plea of res judicata is one of mixed fact and the law therefore ill-suited for determination through a preliminary objection. That if allowed, the two preliminary objections will have the effect of driving him away from the seat of justice without a fair hearing.

The Submissions

7. The preliminary objections were canvassed by way of written submissions. The parties herein filed their respective submissions to the preliminary objections which were duly highlighted on March 10, 2022.

The 1st respondent's submissions

8. The 1st Respondent's submissions were filed on January 8, 2020.
9. Learned Counsel for the 1st Respondent submitted that the instant Petition is barred by the doctrine of res judicata as embodied under Section 7 of the *Civil Procedure Act*. Learned Counsel submitted that the Petitioner herein instituted Petition No 613 of 2014 on behalf of his constituents against the 1st, 2nd Respondents and the Interested Party challenging the process of compulsory acquisition of land known as LR No Kai 439 located in Kibwezi Constituency while in the instant Petition the Petitioner is inviting the Court to determine the same issue. That in both Petitions, the Petitioner is challenging the process of compulsory acquisition of land claiming that it was in violation of Article 40 (3) and 47 of the *Constitution*.
10. Counsel maintains that the issue of compulsory acquisition of the Petitioner's land was determined by a Court of competent jurisdiction and a judgment delivered on March 29, 2016 hence, this Petition is res judicata.
11. To buttress his submission, Counsel relied on the Court of Appeal case of *Kenya Commercial Bank Limited Vs Benjob Amalgamated Limited [2017] eKLR*.

The 2nd respondent's submissions

12. The 2nd Respondent filed its submissions on February 18, 2022. Learned Counsel for the 2nd Respondent raised the following issues for the Court's determination: -



- i. Whether the Environment and Land Court has jurisdiction to hear and determine the present Petition.
 - ii. Whether the present Petition before this Honourable Court is defective on account of being res judicata.
13. With regards to the issue of whether the Environment and Land Court has jurisdiction to hear and determine this Petition, Counsel argued that Sections 112 – 120 of the [Land Act](#), 2012 provides a statutory framework for the resolution of disputes concerning compulsory acquisition of land. Counsel submitted that the Petitioner bypassed the dispute resolution mechanism provided under the said Statute.
14. As regards the second issue, the 2nd Respondent reiterated that this Petition is res judicata on account of the judgment delivered in Petition No 613 of 2014. To buttress its submissions, the 2nd Respondent relied on the list and bundle of authorities dated February 16, 2022.

The interested party's submissions

15. The Interested Party's submissions were filed on June 6, 2020. The Interested Party raised the following issues for the Court's determination: -
 - i. Whether the suit is res judicata on account of Patrick Musimba Vs National Land Commission & 4 others (2016) eKLR.
 - ii. Whether the Environment and Land Court has original jurisdiction in disputes challenging compulsory acquisition by National Land Commission.
 - iii. Whether the dispute raises constitutional issues for determination by the Environment and Land Court in exercise of its Constitutional jurisdiction.
16. In answer to the first issue, Counsel submitted that the Petition is res judicata as the Petitioner herein is re-litigating the issue of constitutionality of the compulsory acquisition of land in Kibwezi West by the 1st Respondent when that issue was resolved vide the judgment in Patrick Musimba Vs National Land Commission & 4 Others [2016] eKLR. Counsel argued that in both Petitions, the parties and the subject matter in dispute are the same.
17. With regards to the second and third issue, Counsel submitted that Sections 112 – 120 of the [Land Act](#), 2012 vests original jurisdiction on the National Land Commission to determine disputes on ownership, value and compensation payable on compulsory acquisition of land. Counsel argued that the Petitioner has not exhausted the statutory mechanism for dispute resolution provided by the law before approaching the Court.
18. As regards the 4th issue, Counsel submitted that the Petition does not disclose a reasonable cause of action against the Interested Party since no specific claim or remedy has been sought against it. Counsel maintains that the Interested Party being an agent of a disclosed principal has no role in the process of compulsory acquisition and hence, it cannot be sued.
19. In praying for the striking out of this Petition with costs, the Interested Party relied on its list and bundle of authorities filed on October 4, 2019.

The Petitioner's Submissions

20. The Petitioner's submissions were filed on July 25, 2021.



21. Learned Counsel for the Petitioner raised the following issues for the Court's determination: -
- i. Whether ELC Petition No 6 of 2018 is res judicata on account of Petition No 613 of 2014 Patrick Musimba Vs National Land Commission & 4 Others (2016) eKLR.
 - ii. Whether the Environment and Land Court has jurisdiction to hear and determine this Petition.
22. In answer to the first issue, learned Counsel for the Petitioner submitted that the pleadings herein and those in Petition No 613 of 2014 reveal separate causes of action. Counsel for the Petitioner contends that Petition No 613 of 2014 was filed by the Petitioner in his capacity as a Member of Parliament while the present Petition has been filed in his personal capacity. Counsel further submitted that the parties in the present Petition are not the same as those in Petition number 613 of 2014. Counsel contends that the preliminary objection on the basis of res judicata was without merit and incapable of disposing of the suit.
23. With regards to the issue of whether the Environment and Land Court has the requisite jurisdiction to hear and determine this Petition, Counsel contended that this Court is vested with original and appellate jurisdiction to hear and determine all disputes in accordance with Section 13 of the *Environment and Land Court Act*. Counsel argued that the fact that the 1st Respondent has jurisdiction to determine disputes on compulsory acquisition does not oust the jurisdiction of this Court. It was prayed that the preliminary objections be dismissed with costs. The Petitioner relied on the authorities annexed to its list and bundle of authorities dated July 22, 2021.

Analysis And Determination

24. The law on Preliminary Objection is settled. A Preliminary Objection must be on a pure point of law.
25. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696*, Law JA stated;
- ' So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.'
26. 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 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 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 issue. The improper practice should stop.'
27. In *Oraro Vs Mbaja (2005) eKLR* Ojwang J (as he then was) described it as follows;
- ' I think the principle is abundantly clear. 'A Preliminary Objection' correctly understood is now well identified as, and declared to be a point of law which must not be blurred with



factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.'

28. The Court of Appeal in *Nitin Properties Ltd Vs Singh Kalsi & Another (1995) eKLR* also captured the legal principle when its stated as follows;

' A preliminary objection 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.'

29. The preliminary objection if allowed may dispose off the entire suit without giving the parties an opportunity to be heard. Having considered the objection raised by the 1st Respondent and the Interested Party, the Court finds that the issue of res judicata can dispose of the matter preliminarily without having to ascertain the facts. The preliminary objection raised by the 1st Respondent and the Interested Party fits the description of a preliminary objection stated in the Mukisa Biscuits case supra.

30. Having considered the preliminary objection, the grounds of opposition, the replying affidavit and the rival submissions, I find that the issue that arises for determination is whether this Petition is res judicata on account of Petition No 613 of 2014 Patrick Musimba Vs National Land Commission and 4 Others.

31. The doctrine of res judicata is anchored in Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya which 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.

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. - (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. -(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.

32. The doctrine of res judicata has been defined in the [Black's Law Dictionary, 9th Edition](#) at page 1425 as follows:

'A thing adjudicated' 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.'



33. The elements which must be present to succeed on a defence of res judicata were enunciated in *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR* where the Court of Appeal held that: -

' Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'

34. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

35. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of *Nicholas Njeru Vs the Attorney General and 8 Others Civil Appeal No 110 of 2011 [2013] eKLR*. The essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. That was the holding in *Omondi Vs National Bank of Kenya Ltd and Others (2001) EA 177*.

36. Firstly, the matter in issue should be directly and substantially the same as in the former suit. The Petitioner, a member of Parliament for Kibwezi West Constituency, instituted Petition No 613 of 2014 and sought for the following orders: -

- a. A conservatory order be and hereby issued restraining the 1st, 2nd, 3rd and 4th Respondents by themselves or their agents or servants from continuing the process of compulsorily acquiring, from paying compensation, and from taking possession or otherwise howsoever dealing with private in Kibwezi West Constituency pending hearing and determination of this application.
- b. A conservatory order be and is hereby issued restraining the 1st, 2nd, 3rd and 4th Respondents by themselves or their agents or servants from continuing the process of compulsorily acquiring, from paying compensation, and from taking possession or otherwise howsoever dealing with private in Kibwezi West Constituency pending hearing and determination of this Petition.
- c. A conservatory order be and is hereby issued restraining, the 1st, 2nd, 3rd and 4th Respondents by themselves or their agents or servants from undertaking any project or development or plan in Kibwezi West Constituency for or in furtherance of the construction of the Standard Gauge Railway pending hearing and determination of the Petition.



- d. A conservatory order be and is hereby issued restraining the 1st, 2nd, 3rd and 4th Respondents by themselves or their agents or servants from undertaking any project or development or plan in Kibwezi West Constituency for or in furtherance of the construction of the Standard Gauge Railway pending hearing and determination of the Petition.
- e. The status quo be maintained pending hearing of the petition filed herein.
- f. A declaration that the exercise by the Respondents threatens and or has contravened the right to property of the residents of Kibwezi West Constituency under Article 40 of the [Constitution](#).
- g. A declaration that the exercise by the Respondents threatens and or has contravened the right to just compensation of the residents of Kibwezi West Constituency under Article 40(3) of the [Constitution](#).
- h. A declaration that the exercise by the Respondents has contravened and (sic) the rights of the residents of Kibwezi West Constituency to fair administrative action under Article 47 of the [Constitution](#).
- i. A declaration that the exercise by the Respondents threatens and or has contravened the national principles of transparency, accountability, public participation and the Rule of Law under Article 10 of the [Constitution](#).
- j. A declaration that the Respondents have contravened and threaten further violation of the residents of Kibwezi West Constituency under Article 28 of the [Constitution](#).
- k. A declaration that the Respondents have contravened and threaten further violation of the right of the Petitioner and the residents of Kibwezi West Constituency to access to, publishing and publication of information concerning the construction of the Standard Gauge Railway at the National and County level under Article 35 of the [Constitution](#).
- l. A declaration that the Respondents have violated the rights of the Petitioner and the residents of Kibwezi West Constituency to a clean and healthy environment under Article 42, 60 and 69 of the [Constitution](#).
- m. A declaration that the Respondents have acted in breach of the rules of Natural Justice.
- n. A declaration that the Respondents have acted in breach of the due process.
- o. A declaration that the Respondents have breached the Environmental Management and Coordination Act.
- p. A declaration that the Respondents have breached the [Land Act](#).
- q. An order of Certiorari to quash all proceedings of the 1st and 2nd Respondents in Kibwezi West Constituency for acquisition of land including but not limited to land surveys and any inquiry.
- r. An order of Certiorari to bring to the High Court to be quashed all Gazette Notices published by the 1st and 2nd Respondents for Kibwezi Constituency.
- s. An order or Mandamus directed to the 1st and 2nd Respondents to conduct the process and procedure of acquisition of land in Kibwezi West Constituency in accordance with the [Constitution](#), the law, rules of Natural Justice and good governance.



- t. An order of Mandamus directed to the 1st and 2nd Respondents to undertake Environmental Assessment Reports for the construction of the Standard Gauge Railway in Kibwezi West Constituency in accordance with the Environmental Management and Coordination Act.
 - u. Any other relief that the Court may deem fit to grant.
37. Under per paragraph 1, 9 and 11 of Petition No 613 of 2014, the Petitioner sued the Respondents and the Interested Party on his own behalf and that of the residents of his Constituency. His grievance surrounded the process of compulsory acquisition of land in his Constituency particularized into finer aspects such as just compensation, public participation, environmental impact, identification of individual owners and the valuation criteria. Among the reliefs sought in the said Petition under prayers (f), (g) and (h) were declarations that the Respondents had infringed the constitutional rights of the residents of Kibwezi West Constituency under Articles 40, 40(3) and 47 of the Constitution.
38. Dismissing the Petition vide the judgment delivered on March 29, 2016, it was the finding of the five judge bench at paragraph 162 that the process of compulsory acquisition of land in the Petitioner's Constituency was not in contravention of Articles 10, 28, 40 and 47 of the Constitution or any written law.
39. Similarly, in the instant Petition, the Petitioner has sought for similar declaratory reliefs under prayers (a), (b) and (c). The issues for determination in Petition No 613 of 2014 were summarized well in paragraph 162 of the Judgment as follows: -
- i. Whether or not the compulsory acquisition process of land within the Petitioner's constituency was or is inconsistent with and or in contravention of Articles 10, 28, 40 and 47 of the Constitution and/or any written law.
 - ii. Whether or not the project is being undertaken in full compliance with the relevant environmental laws and principles both under the Constitution and under the Environmental Management and Coordination Act (Cap 387).
 - iii. Whether there has been a breach of the Petitioner's right to information under Article 35 of the Constitution.
40. Under paragraph 7 of the Petition herein, the Petitioner has admitted that LR No Kai 439 is within Kibwezi West Constituency. The Petition presented to this Honourable Court entirely arises from the same cause of action, which was the compulsory acquisition of land in Kibwezi West Constituency.
41. This Petition is purely about compulsory acquisition of land in a region where it was previously held to have been consistent with the Constitution and the Statutes. The Petitioner in the present Petition sought for similar prayers in ELC No 613 of 2014 in respect to the same parcel of land. The cause of action and the reliefs sought in the previous Petition is wholly similar to the instant Petition.
42. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The parties in ELC Petition No 613 of 2014 were the Petitioners versus the Respondents. The Petitioner in the present Petition herein was also the Petitioner in Petition No 613 of 2014. The two Respondents herein and the Interested Party were similarly sued in Petition No 613 of 2014. In addition to the two Respondents herein, the National Environment Management Authority and the Attorney General were sued in Petition No 613 of 2014. It goes without saying that the parties in both cases are similar and indeed litigating under the same title.



43. Lastly for res judicata to be sustained, the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided. It is not in dispute that the Court seized with ELC Petition No 613 of 2014 had the requisite jurisdiction to determine the dispute therein. Petition No 613 of 2014 Patrick Musimba Vs National Land Commission and 4 Others was heard and determined vide the Judgment delivered on March 29, 2016. The said Judgment has neither been appealed against nor set aside.
44. 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 pronounced itself as follows:
- ' The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.'
45. It follows therefore, that the Preliminary Objections raised by the 1st Respondent and the Interested Party were based on pure points of law, that is the doctrine of res-judicata, and did not require additional evidence to substantiate the objection. From a perusal of the Judgment dated March 29, 2016 in ELC Petition No 613 of 2014, it is clear the issue of the process of compulsory acquisition was dealt with in previous litigation. This Court is of the view that the issue of the process of compulsory acquisition is therefore res judicata.
46. This Court finds and holds that no further discourse was necessary on whether this Court is vested with original jurisdiction to hear and determine the dispute.
47. The upshot of the foregoing is that the preliminary objections are merited. Accordingly, the Petition dated August 7, 2015 is struck out with costs to the Respondents and the Interested Party.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF NOVEMBER, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Mapesa holding brief for Ms Kilonzo for the Petitioner.

Musila for the Interested Party and also holding brief for Baraza for the 1st Respondent.

