



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MIGORI**

**ELC PETITION CASE NO. 18 OF 2017**

**(Formerly KISII ELC PET No. 1 of 2014)**

**JOEL OYIEKE OYIEKE.....PETITIONER**

**AND**

**THE DISTRICT LAND REGISTRAR, RACHUONYO DISTRICT**

**THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS**

**AND**

**ALBERT ADAMS YUGI.....INTERESTED PARTY/APPLICANT**

**RULING**

1. This ruling is in respect of a notice of motion dated 12<sup>th</sup> October 2017 (Herein after referred to as the application) pursuant to sections 3A, and 7 of the Civil Procedure Act (Cap 21 laws of Kenya) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The interested party, Albert Adams Yugi (the applicant) who is currently represented by Achillah T.O and Company Advocates, seeks the following orders:-

***i. The petition filed herein be declared res judicata and forthwith be struck out and decree of High Court at Kisii Civil case 352 of 1990 be given effect.***

***ii. Mandatory orders compelling the respondent, Land Registrar to give effect the decree of this court dated 25<sup>th</sup> August 1997.***

***iii. Cost of this application.***

2. The application is anchored on ten (10) grounds on it's face. The grounds include:-

***a) The petitioner has defied the orders dated 17<sup>th</sup> January,2014 and in contempt of the same, has started to cultivate the land without any authority whatsoever.***

***b) The decree of this court issued in 1990 has not been reversed by any other court and the same is still in force and neither the petitioner nor any other person has brought evidence to contradict it or convince the court to depart from it.***

***c) Constitutional petition herein is just but another method to abuse the jurisdiction of this court and spectate around the law and is merely a formulation by the petitioner to evade res-judicata.***

3. The application is also supported by the applicant's affidavit sworn on even date. He has annexed to the affidavit a copy of judgement dated 22<sup>nd</sup> October 1996, a copy of a decree dated 25<sup>th</sup> August 1997 and a copy of ruling dated 8<sup>th</sup> November 2013 all in respect of Kisii ELCC NO 352 of 1990 marked as AAY-O1 AAY-02 and AAY-03 respectively. The applicant averred, inter alia, that the petitioner's case is a rebrand and repaint of Kisii ELCC NO 352 of 1990 hence the petition is res judicata. That the petition is an abuse of the court process and that it be struck out with cost.

4. The suit land is LR number West Karachuonyo/Kibiri/Kanyipir/616. It is approximately 4.6 hectares in area.

5. The petitioner through M/s Oguttu Ochwangi, Ochwal and company advocates opposed the application by way of seven (7) grounds of opposition filed on 23<sup>rd</sup> October 2017. The said grounds are, inter, alia:-

- i. The instant notice of motion application, is pre-mature, misconceived, incompetent and otherwise legally untenable.*
- ii. The instant application has been drawn and/or crafted without the requisite authorization. In any event, the instant application is contrary to and in contravention of the provisions of Order 9 Rules 6,7 and 8 of the Civil Procedure Rules,2010.*
- iii. The application herein founded and/or anchored on the doctrine of res judicata is bad in law and otherwise legally untenable.*
- iv. On the other hand, the instant application does disclose any reasonable cause of action, whatsoever and/or howsoever.*
- v. At any rate, the instant application amounts and/or constitutes an abuse of the due process of court and is otherwise an attempt to obstruct, delay and/or defeat the expeditious disposal of the instant suit.*
- vi. Besides, the interested party/applicant herein is non-suited.*
- vii. In the premises, the notice of motion application herein is devoid of merits, whatsoever and/or howsoever.*

6. On 17<sup>th</sup> October 2018, this court ordered that the application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules , 2010 and Practise Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions ,2014.**

7. Learned counsel for the interested party filed submissions dated 16<sup>th</sup> December 2018 wherein reference was made to the petition dated 17<sup>th</sup> January 2014, termed the same res judicata by dint of the decision in Kisii ELCC NO 352 of 1990 and urged the court to dismiss the petition with costs. Counsel also framed and analysed three(3) issues for determination namely:-

- a) Whether the petitioner herein has any legal rights and/or interests in respect of LR No. West Karachuonyo/Kibiri/Kanyipir/616, the subject matter herein, protectable under the Constitution of Kenya.*
- b) Whether the subject matter herein is still open to litigation?*
- c) Who is entitled to costs?*

8. Counsel cited **sections 7 and 34(1) of the Civil Procedure Act (Cap 21)** to fortify his submissions. Counsel further relied on the decision of **Mumbi Ngugi J in Robert Mwangi-VS- Shepherd Catering Ltd and another (2012) eKLR** with regard to jurisdiction as succinctly put in **The owners of the Motor vessel “Lilian”-vs- Caltex Oil Kenya Ltd (1989) KLR1.**

9. Esther Opiyo, learned litigation counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents by submissions dated 19<sup>th</sup> March 2019, and filed on 20<sup>th</sup> of March 2019, supported the application. She submitted that the petition is res judicata as the subject matter was litigated and decided in Kisii ELCC 352 of 1990. She urged this court to dismiss the petition. Counsel framed three (3) issues for determination including whether the interested party has locus standi to prosecute and or defend the petition and whether the matter is res judicata.

10. To buttress the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ submissions, counsel cited section 7 of the Civil Procedure Act and relied on the following authorities :

- a) Libya oil Kenya Ltd -vs- Irene Juliet Otinga and 4 others (2016) eKLR**
- b) Nathaniel Nguni Kihui -vs- Housing Finance (2018) eKLR**
- c) E.T vs- Attorney General and Another (2012) eKLR**
- d) Grace Njeri Kabiru -vs- Stephen Wagiita Kiboi and 2 others (2018) eKLR.**

11. Learned counsel for the petitioners filed submissions dated 7<sup>th</sup> February 2019 providing the background of the matter, identified and analysed four (4) issues for determination including whether the court has the requisite jurisdiction over the instant matter and whether the matter is res judicata. Counsel termed the application devoid of merits and that the same ought to be dismissed with costs.

12. Counsel cited **sections 7 and 34 of the Civil Procedure Act (Cap 21), Articles 22(1), 165 and 258 (1) of the Constitution of Kenya, 2010.** Counsel also relied on the case of **Anisminic Limited -v- The Foreign Compensation Commission and another (1969) 1 ALL ER 208-256** and the decision in the case of **D.T. Dobie and Company (K) Ltd -vs- Muchina (1982) KLR 1-16,** among other authorities.

13. I have carefully considered the entire application and the grounds of opposition as well as the submissions of the parties in the instant matter. The central issues for determination are whether the petition filed herein is res judicata and whether the orders sought in the application are merited.

14. On the issue of res judicata , the interested party averred that the decision in Kisii ELC case No. 352 of 1990 as shown in document

marked AAY-01 has not been reversed and is still in force. That the present petition is another method to abuse the jurisdiction of this court as the same is res judicata.

15. In the petition, the orders sought include that :-

*i. Declaration be issued to the effect that the petitioner is entitled to protection under the Constitution.*

*ii. Declaration that the proceedings, Judgment and the resultant decree rendered on the 22<sup>nd</sup> day of October 1996 vide Kisii HCC No. 352 of 1990, touching and/or concerning ownership and registration of LR No. West Karachuonyo/Kibiri/Kanyipir/616, in the name of Yason Oyieke Ogwen, deceased, who died on the 7<sup>th</sup> day of May 1989, prior to the filing of the suit, are void, illegal and incapable of implementation and/or enforcement.*

*iii. Declaration that the gazette notice number 5429, dated and published on the 20<sup>th</sup> May 2011, seeking to revoke and/or cancel the title in favour of Yason Oyieke Ogwen, deceased and replace same with title in favour of Samwel Ogada Yugi, is nullity and/or ultra vires.*

16. In his replying affidavit sworn on 11<sup>th</sup> April 2014 filed pursuant to leave of the court dated 13<sup>th</sup> March 2014, the interested party who was initially represented by Bana and Company Advocates, opposed the Petition. He averred, inter alia, that the court in Kisii HCCC No. 352 of 1990 passed a decree in favour of his brother one Samwel Ogada Yugi (deceased). That it is the execution of the decree that is the subject of this petition and if allowed may cause absurdity in the law and be recipe for endless litigation.

17. The 1<sup>st</sup> respondent also opposed the petition by way of a replying affidavit sworn on 26<sup>th</sup> October 2015 by Julius Oyatsi Osiolo, the Land Registrar of Rachuonyo South and North sub counties. He averred that he received a decree and Judgment in Kisii HCCC No. 352 of 1990 and that he was only following orders of the court by making entries in the green card. That the petitioner ought to have lodged an appeal against the said judgment.

18. The 1<sup>st</sup> respondent further averred that the petitioner waited for eighteen (18) to pursue this matter in court. He relied on a copy of the decree and judgment in Kisii HCCC No. 352 of 1990 marked as JOO-1 (a) and 1 (b) respectively. He also relied on copies of green card and entries made in respect of the suit land marked as JOO- 2 (a) and 2(b).

19. According to **Black's Law Dictionary 10<sup>th</sup> Edition**, the term "**res judicata**" is comprised of three (3) elements:-

a) **An earlier decision on the issue**

b) **A final Judgment on merits and**

c) **The involvement of the same parties or parties in privy with the original parties.**

20. **Section 7 of the Civil Procedure Act (Cap 21)** provides for the term "**res judicata**" and it reads:-

**"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."** (Emphasis added)

21. The suit land LR. No. West Karachuonyo/Kibiri/Kanyiri/616 appears at paragraphs 3 and 5 of the petition as well as relief number (b) sought therein. The same land is disclosed at paragraph 3 of the interested party's replying affidavit and shown on document marked AAY-01 thereof and paragraph 3 of the 1<sup>st</sup> defendants replying affidavit and documents marked JOO-2(a) and 2 (b). Therefore the subject matter in Kisii HCCC no. 352 of 1990 and the present petition is the same.

22. The petitioner stated at paragraph 2 of the petition that:-

**"Besides, the petitioner herein is a son and duly constituted legal Administrator of the estate of Yason Oyieke Ogwen, now deceased, who died on the 7<sup>th</sup> day of May 1989."** (Emphasis laid)

23. Interestingly, the said Yason Oyieke Ogwen (deceased) was the 1<sup>st</sup> defendant in Kisii HCC No. 352 of 1990 as confirmed at paragraph 3, 4 and 6 of the interested party's replying affidavit and paragraph 20 of the 1<sup>st</sup> respondent's replying affidavit. By virtue of **section 7 of the Civil Procedure Act (Cap 21)**, the petitioner who is privy to the said deceased as revealed at paragraph 2 of the petition, can not be allowed to revive the same dispute; see also **Nathaniel Ngure Kihui, E.T. and Njeri Kabiru cases (supra)**.

24. Notably, Kisii HCC No. 352 of 1990 was finally determined on 22<sup>nd</sup> October 1996 as shown in document marked AAY-01 attached to the application. It is also revealed at paragraphs 10 and 12 of the petition, paragraphs 4,5, and 6 of the interested party's replying affidavit and paragraphs 2,3,5, and 6 of the 1<sup>st</sup> respondent's replying affidavit.

25. Since the subject matter of the petition was finally determined by way of the decree dated 25<sup>th</sup> August 1997 as envisaged under **section 7**

**of the Civil Procedure Act (Cap 21)**, litigation has to come to an end; see also **Hal'sbury's Law of England (4<sup>th</sup> Edition Volume 26 page 272 and Black's Law Dictionary (supra)** . Therefore, the orders (a) and (c) sought in the application are meritorious.

26. Regarding order (b) for mandatory orders to give effect the decree in Kisii HCC No. 352 of 1990, as sought in the application, the same ought to have been directed to that court which issued the decree, for consideration. I decline to grant the said order in the circumstances. Nonetheless, the respondent and the interested party are at liberty to make necessary application in the relevant court with regard to the said order.

27. Accordingly, I partially grant order (a) sought in the application. The instant petition dated 17<sup>th</sup> January 2014 and filed on 21<sup>st</sup> January 2014 is declared res judicata and hereby struck out forthwith.

28. By dint of the proviso to **section 27 (1) of the Civil Procedure Act (Cap 21)** and the decision in **Samwel Kamau Macharia and another –v- Kenya Commercial Bank and 2 others (2012) eKLR**, the parties in the petition to bear their own costs.

29. It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 10<sup>th</sup> day of JULY 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of :-**

Mr. Agure Odero holding brief for Tom Achillah learned counsel for the interested party/ applicant.

Ms. W. Ochwal learned counsel for the petitioner

Tom- Maurice – Court Assistant