



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC PET CASE NO. 34 OF 2020

COAST LEGAL AND RESOURCE

FOUNDATION (CLARF) KENYA.....PETITIONER

VERSUS

ABDULLAHI HASSAN FARAH.....1ST RESPONDENT

WAHIDA JAMAL MBARAK.....2ND RESPONDENT

THE LAND REGISTRAR MOMBASA.....3RD RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LANDS.....4TH RESPONDENT

AND

ESHA ABDALLA TAIB.....INTERESTED PARTY

RULING

(Constitutional petition filed allegedly to protect some public right over land; issues having been determined in previous litigation or being subject of continuing litigation by persons interested in title to the suit land; petition thus sub judice and/or res judicata; petition also improper for claiming a public right over land when it is clearly asserting a right to a private individual who is capable of filing her own suit and has indeed done so; petition incompetent and is dismissed with costs).

1. This suit was commenced through a petition filed on 15 October 2020. The petitioner describes itself as a Non-Governmental Organisation (NGO) with legal mandate to offer legal aid and enforce the rule of law and uphold the tenets of the constitution for the benefit of the public in general. It is pleaded in the petition that the 1st and 2nd respondents caused the petitioner's parcel of land Mombasa/Block XI/784 to be consolidated with the Plots No. 715 and 765 thus creating a new number MSA/Block XI/795, and registered the same in their names, thus unlawfully dispossessing and alienating the petitioner's parcel of land. It is pleaded that the resurvey, consolidation and registration into the names of the 1st and 2nd respondents was done irregularly and fraudulently. It is pleaded that the interested party, Esha Abdalla Taib, has never sold or offered for sale the land parcel MSA/BLOCK XI/784 where Spaki Social Club Hall stands, thus the resurvey, consolidation and registration was unlawful. It is pleaded that this was only discovered by the petitioner upon the 1st and 2nd respondents starting the process of demolishing the petitioner's houses standing thereon. It is further pleaded that the 3rd, 4th and 5th respondents, (the Land Registrar Mombasa, The Cabinet Secretary Ministry of Lands, and the Honourable Attorney General, respectively), acted with impunity. It is pleaded that there is breach of the Fundamental Rights and Freedoms contained in the constitution. In the petition, the petitioner prays for:

a. A declaration that the petitioners are (sic) the legal owners of the suit parcel of land and of registration, the 1st and 2nd respondents was and is irregular, wrongful, unlawful and null and void (sic).

b. A declaration the Respondents have constitutional duty to respect uphold and defend the constitution and the fundamental rights and freedom of individuals as enshrine in the constitution (sic).

c. A prohibitory order freezing and/or restraining any sale transfer, charging and/or transactions whatsoever nature further development therein, encroachment upon, grant of licences or permits by the Respondents and/or any state organs access to and/or dealing of whatever nature on the suit parcel of land.

d. An order directing the land registrar Mombasa to rectify the register and to register the Petitioners (sic) as owners and to issue the relevant title deeds.

e. An order for payment of menses profit (sic).

f. Cost of this petition and any other orders this Honorable Court may deem fit.

2. Together with the petition, the petitioners filed an application dated 15 October 2020. What the application basically seeks is for an order of injunction to restrain the 1st and 2nd respondents from selling, disposing, transferring or dealing with the disputed property, pending hearing of the petition. The application is supported by an affidavit sworn by Joseph Juma Mukewa, who has described himself as one of the directors of the petitioner. He has deposed that the petitioner received a complaint from the interested party regarding the land parcel Mombasa/Block XI/795 and that the Organisation (I assume the petitioner), investigated and confirmed that the plot was registered in the name of the interested party and two others. He alleges that on 22 December 2010, the title was transferred to one Wahida Jamal Mbarak but no title was issued. He further alleges that on 22 March 2011, the plot was transferred to the respondent and title issued. He claims that the Organisation investigated and established that there was no sale agreement between the registered owner and Wahida Jamal Mbarak. In a nutshell, he claims irregularity in the title to the 1st and 2nd respondents.

3. The 1st respondent opposed the motion through a replying affidavit. He has deposed inter alia that the petitioner is a stranger to the issues herein. He deposes that he is not aware of any investigation of fraud by the requisite agencies. He has further deposed that the petitioner is not among those vested with any investigative powers. He states that he was issued with title to the land parcel Mombasa/Block XI/795 on 22 March 2011, and since that period, no one has ever applied to expunge the said title. He has deposed that he filed *Mombasa Civil Case No. 2418, Abdullahi Hassan Farah vs Famau Amani & 4 Others*, where he sought orders of demolition of a structure the defendants had constructed on a portion of the land. He deposes that judgment was entered in his favour and the structure has since been demolished. He avers that there was an appeal, being *Mombasa ELC Appeal No. 11 of 2019*, where the defendants sought a stay of execution, which was granted on conditions that were never met. The appeal was eventually dismissed for want of prosecution. He deposes that another appeal, *Civil Appeal No. 181 of 2019* was filed. He deposes that the issues now being raised were considered in *Mombasa Chief magistrate's Civil Case No. 2418 of 2014* and thus the issue is *res judicata*. He annexed the pleadings in the mentioned suits. He avers that the so called interested party is the one who approached the petitioner to file this suit and are indeed the defendants in *Mombasa CMCC No. 2418 of 2014*. He states that there are no constitutional issues demonstrated in this petition and the same ought to be struck out.

4. Indeed, the 1st respondent filed a preliminary objection on the grounds inter alia that this petition is *res judicata*. He argues that by virtue of the existence of *Civil Appeal No. 11 of 2019* and *Civil Appeal No. 8 of 2019*, relating to issues of ownership of the land parcel Mombasa/Block XI/795, it is improper for this petition to remain standing.

5. I directed that the application for injunction and the preliminary objection be heard together by way of written submissions. I have seen and gone through the submissions of Mr. Mkan for the petitioner, and Mr. Gikandi for the 1st respondent, and I have considered them before arriving at my determination. I opt to start with the preliminary objection, for if I am to allow it, then the whole petition, including the application, will fall by the wayside.

6. The preliminary objection basically raises the issue of *res judicata*. It is the position of the 1st respondent that the issues in this suit have been determined in *Mombasa CMCC No. 2418 of 2014*. I have gone through the pleadings in that case. The plaintiff was the 1st respondent, whereas the defendants were Famau Amani, Rashid Tewa, Abdalla Nanji, Hemed Mohamed Msalendo, and Salim Mzee. The 1st respondent (as plaintiff) asserted ownership of the land parcel Mombasa/Block XI/795 and wished to have the defendants evicted from the said land and for their structures to be demolished. The defendants filed defence where they pleaded inter alia that the structure belongs to Sparki Gardens Social Club, a community based organisation. They pleaded that they were allowed to access this land by the personal representatives of the previous owner, one Shariff Abdalla Taib, when the piece of land where the structures stood was the Plot No. 134/Section XI/MI. They pleaded that this plot was subsequently subdivided leading to the Plot Mombasa/Block XI/795 but they continued occupying the premises. They claimed entitlement to occupy the land and asked that the suit be dismissed. Among the witnesses in that case was Esha Abdalla Taib, who is the interested party in this petition. The case was heard and judgment delivered on 27 February 2019, with judgment being entered in favour of the 1st respondent and the defendants being asked to vacate the land and demolish their structures. It appears as if two appeals were filed to this court, being *Mombasa ELCA Nos. 8 and 11 of 2019*. In appeal No. 11 of 2019, the appellants sought stay of execution of the decree in *Mombasa CMCC No. 2814 of 2014*. I did grant an order of stay of execution subject to deposit of the sum of Kshs. 540,000/= as security, which sum was never deposited, and I am made to understand, through the affidavit of the 1st respondent, that execution has now been completed and vacant possession taken by the 1st respondent. There is also mention of dismissal of *Mombasa ELCA No. 11 of 2019*. There is no mention of *Mombasa ELCA No. 8 of 2019* which I presume is still subsisting and awaiting determination. Apart from the suit *Mombasa CMCC No. 2814 of 2014*, I have seen evidence of another suit, *Mombasa CMCC No. 18 of 2018*, where the plaintiff is Esha Abdalla Taib (the interested party herein) and the defendants are Wahida Jamal Mbarak and Abdulahi Hassan Farah (the 2nd and 1st respondents herein respectively). It does seem that this suit was stayed pending hearing of the suit *Mombasa CMCC No. 2418 of 2014*, for I have seen annexed to the replying affidavit of the 1st respondent, a Memorandum of Appeal filed in the High Court at Mombasa, as *Mombasa HCCA No. 181 of 2018*, contesting the order of stay. The 1st respondent has also annexed a plaint for the suit *Mombasa ELC No. 109 of 2018, Esha Abdalla Taib vs Wahida Jamal Mbarak & Abdulahi Hassan Farah*. I have gone through that plaint. Esha pleads inter alia that she and her siblings were registered as owners of the land parcel Msa/Block XI/784 (Plot No. 784) which resulted from a subdivision of the land parcel Msa/Block XI/134. The cause of action is contained in paragraphs 5 to 8 of the plaint where she pleads as follows :-

(5) The 1st defendant (2nd respondent in this petition) caused plot No. Msa/Block XI/784 to be consolidated with plot Nos. 715 to 765 and thereby caused the same to be re-surveyed creating plot No. Msa/Block XI/795 in place of plot No. Msa/Block XI/784 as one of the subdivisions and thereby registering the same in her name denying the Plaintiff the ownership of the said plot.

(6) The said consolidation and registration into the 1st defendant's name was done irregularly and fraudulently and without the

plaintiff's knowledge causing the same to be registered as owner of plot No. Msa/Block XI/784 in the 1st defendant and thereby acquiring ownership of the same from the plaintiff illegally and without the plaintiff's consent.

(7) The plaintiff has never sold or offered for sale plot No. Msa/Block XI/784 to the 1st defendant and has not caused any registration to be carried out in the 1st defendant's name.

(8) The plaintiff has now discovered that the said plot has been irregularly sold to the 2nd defendant (1st respondent in this petition) and the same has been surveyed and registered as plot No. Msa/Block XI/784 in the 2nd defendant's name.

Particulars of fraud 1st and 2nd defendant:-

- a. Consolidating plot No. Msa/Block XI/784 with plot No. Msa/Block XI/715 to 785.
- b. Resurveying plot No. Msa/Block XI/784 to form plot No. MsaBlock XI/795.
- c. Registering plot No. Msa/Block XI/784 and 795 in the 1st and 2nd defendants (sic) names.
- d. Irregular consolidation of plot No. 784 to create plot No. 795.
- e. Registering plot No. 784 or 795 into the 1st and 2nd defendants' names.

7. The prayers sought in the plaint are for cancellation of all transactions which were caused on plot No. 784 to form plot No. 795 and to have the same revert to its original state in the Plaintiff's (interested party herein) name.

8. She alleges that the 1st defendant (Wahida) caused the said Plot No. 784 to be consolidated with Plot numbers 715 and 765 and thereby caused the same to be re-surveyed creating plot No. Msa/Block XI/795 in place of Plot No. 784 as one of the subdivisions and thereby registering the same in her name denying the plaintiff the ownership of the said plot.

9. It will be seen from the foregoing, that Esha Abdalla Taib, the interested party herein, has two suits that she has filed over the same subject matter that is the subject of this petition. Indeed, it is apparent that she is a person who has a direct interest in the land and wishes to have the land under her ownership.

10. It has not been alleged that the two suits filed by the interested party do not exist. Neither is it contested that there is also pending the *ELC Appeal No. 8 of 2019*.

11. Given the foregoing, it is clear to me that this suit offends the *res sub judice* principle and also the *res judicata* principles which are enshrined in Sections 6 and 7 of the Civil Procedure Act. These two sections are drawn as follows :-

6. Stay of suit

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. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court. [Act No. 10 of 1969, Sch.]

7. Res judicata

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.

12. Although the above provisions are contained in the Civil Procedure Act, the principles enunciated therein are apt even for constitutional petitions. It will be seen from a reading of Section 6 above, that a court is barred from proceeding with a case where the issues are similar to the issues in a previously instituted suit which is still pending. At the very least, the suit *Mombasa ELC No. 109 of 2018* is still pending. Under Section 7, the court is barred from hearing a suit where the issues were substantially in issue in a former suit. I do not see any difference between the issues being raised in this petition and the issues that arose in the suit *Mombasa CMCC No. 2418 of 2014* which has already been decided. I am informed that there is a pending appeal, being *Mombasa ELCA No. 8 of 2019*.

13. It matters not that the parties are different. The subject matter and the substance of the suit herein is the same as that presented in the previous litigation that I have taken trouble to outline above.

14. Apart from the foregoing, I am not persuaded that the petition is well suited. The issues raised in this petition are not constitutional by any stretch of the imagination. What is being raised here are private rights of ownership, occupation, and right of use of land, which ought to be raised by the parties interested in such rights. There is nothing public about this litigation which would entitle a body such as the

petitioner to file suit. In fact, it is apparent to me that this suit is being filed for the benefit of the interested party. The petitioner has no right to file suit on behalf of a private individual who has capacity to file suit on her own behalf to protect her own private proprietary rights. The situation here is even worse, for the interested party, as I have pointed out, has filed two suits to protect her perceived right over the disputed land. It is an abuse of the process of court for the petitioner to try and assert those private rights of the interested party through a suit disguised as a constitutional petition. In as much as the petitioner claims to be acting in public interest, it will be observed that it is asserting the rights of the interested party, not any public.

15. It will be noted from the discourse above that I am not persuaded that this petition is properly before this court and I am of opinion that the same is an abuse of the process of court. What is disheartening is that counsel for the petitioner is the same counsel for the interested party in the suits that she has filed, and is also counsel on record for the defendants in *Mombasa CMCC No. 2418 of 2014* and the appeals that ensued therefrom. Counsel is well aware of the previous suits and their results. I would have expected counsel to know better and to desist from allowing himself/herself to be used to perpetuate an abuse of the process of court.

16. For the above reasons, I allow the preliminary objection and I proceed to strike out this petition with costs.

17. Having struck out the petition, the application dated 15 October 2015 falls by the wayside and it is also dismissed with costs.

18. Orders accordingly.

DATED AND DELIVERED THIS 12TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA