



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC PETITION NO. E003 OF 2020**

**IN THE MATTER OF: ..... THE CONSTITUTION OF KENYA;**

**IN THE MATTER OF: ARTICLES 22, 23, 47, 162, 258 & 259;**

**IN THE MATTER OF: ALLEGED VIOLATION OF RIGHTS OR FUNDAMENTAL FREEDOMS AND VIOLATION OR THREATENED VIOLATION OF THE CONSTITUTION UNDER ARTICLES 10, 19, 20, 21(1), 24, 27(2), 28, 31, 39(3), 40, 43(1) (B), 47, 48, 50, 60, 64, 67 AND 68 (c)(v);**

**IN THE MATTER OF: THE LAND ACT AND THE LAND ..... REGULATIONS, 2017;**

**IN THE MATTER OF: THE LAND REGISTRATION ACT;**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION**

**ACT;**

**IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT**

**BETWEEN**

**GREEN TWO ESTATE OWNERS AND RESIDENTS ASSOCIATION**

**(REPRESENTED BY: - HASSAN AHMEDNUR BARICHA, ABDIWALI MOHAMED, ABDULAHI MAKTAL, HASSAN ALI HAM, MOHAMED ALI SIME, BADOUR AHMED MOHAMED & IBRAHIM WARFA).....PETITIONERS**

**AND**

**CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**IIMBANI DISPENSARY PROJECT GROUP.....3<sup>RD</sup> RESPONDENT**

**FRANKLIN MUTHOKA MUMU.....4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL**

**INVESTIGATIONS.....5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**RULING**

The 4<sup>th</sup> Respondent filed a notice of preliminary objection dated 21/9/2020 in opposition to the petition and the notice of motion dated 30/7/2020. Four main grounds were proffered, firstly, that the court lacked jurisdiction to hear this petition and to grant the orders sought because the petition is *res judicata*, the issues in it having been decided in **Nairobi High Court of Kenya Civil Case No. 36 of 2007**.

Secondly, that Green Two Estate Owners and Residents Association does not exist and cannot therefore sue in its own name. Thirdly, that neither the list of registered trustees of Green Two Estate Owners and Residents Association nor the authority for the filing of the petition were availed by the Petitioner. The last ground was that the Petitioner did not have the *locus standi* to lodge this petition together with the application dated 30/7/2020.

Parties filed submissions on the preliminary objection which the court considered. The 4<sup>th</sup> Respondent submitted that he is the registered owner of land reference number (L.R. No.) 209/10772 situated in South C Mugoya Phase 4 within Nairobi County. He pointed out that the copies of titles annexed to the affidavit sworn in support of the petition were registered in the name of Abdirahman Abdi and not the Petitioners. Further, that the Petitioners had admitted in the supporting affidavit sworn by Hassan Ahmednur Baricha that the Association does not exist because the registration process was on course.

The 4<sup>th</sup> Respondent relied on Section 7 of the Civil Procedure Act which bars the court from entertaining a suit or issue in which the matter directly and substantially in issue was directly and substantially in issue in a former suit between the same parties and was decided by a competent court. The 4<sup>th</sup> Respondent submitted that the Petitioners had admitted in their petition that their parcels of land resulted from a subdivision of L.R. Nos. 209/16432 and 16433 and that it was not contested that these two subdivisions arose from L.R. No. 209/10772 which the 4<sup>th</sup> Respondent lays claim to. He contended that the copies of the certificates of titles annexed to the petition were registered in the name of Abdirahman Abdi and not the Petitioners.

The 4<sup>th</sup> Respondent submitted that ownership of L.R. No. 209/10772 was the subject matter of **Nairobi High Court Civil Case No. 36 of 2007** and that Abdirahman Abdi was a party to that suit. He contended that the parties in that suit and this petition were the same save for a mischievous addition of a few parties by the Petitioner in a bid to make the parties appear different. The 4<sup>th</sup> Respondent submitted that the Petitioners should not be allowed to re-litigate the same set of facts against the Respondents as this would be prejudicial to the 4<sup>th</sup> Respondent who would have been vexed twice against the law.

The 4<sup>th</sup> Respondent added that the Association does not exist and cannot sue in its own name because it was yet to be registered. The 4<sup>th</sup> Respondent challenged the authority attached to the petition and pointed out that some of the persons listed in that authority had not signed it. The 4<sup>th</sup> Respondent contended that that was in contravention of Order 1 Rule 8(1) and (2) which requires that where there are persons with the same interest in the suit, the parties must give notice to all such persons through personal service or public advertisement. The 4<sup>th</sup> Respondent contended that the Petitioners had not presented any evidence to demonstrate any ownership of the suit land and urged that there would be great damage if the Petitioners were allowed to wrongly invoke the jurisdiction of the court through this petition.

The Attorney General (AG) filed submissions in support of the preliminary objection. The AG submitted that the suit land was the subject of **Nairobi HCCC No. 36 of 2007– Safi Petroleum Products Limited v Abdirahman Abdi** in which ownership of the suit land was in dispute and that the advocate representing the Petitioners represented one of the parties in that suit. The AG relied on Section 7 of the Civil Procedure Act on the ingredients of *res judicata*. The AG further submitted that Green Two Estate Owners and Residents Association did not exist and that a suit filed by a non-existent entity was a nullity. The AG added that the Petitioners had not availed any written document to show that the Residents Association authorised the filing of this suit nor had the Petitioners produced minutes or a formal resolution authorising the filing of this suit. Both the 4<sup>th</sup> Respondent and the AG relied on several decided cases in support of the preliminary objection.

The Petitioners submitted that they brought this petition on their own behalf and on behalf of the registered proprietors of the parcels of land collectively known as Green Two Estate South C in Nairobi. The Petitioner relied on Article 22 (2) of the Constitution and Rule 4 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provide that court proceedings may be instituted by among others, a person acting as a member of, or in the interest of, a group or class of persons; or an association acting in the interest of one or more of its members. The Petitioner asserted that Article 22 of the Constitution and the Rules created under it expanded the *locus standi* and thus a group of persons can commence proceedings by whatever name the group goes by, in the group's own interest or in the interest of a member or members of the group.

The Petitioners submitted that the petition was about the individual titles of individual members of Green Two Estate Owners and Residents Association. The Petitioners contended that an important ingredient of *res judicata* is that the parties to the previous suit in which the issues raised in the subsequent suit are said to have been settled should be the same or the parties under or through whom any of them sue. Further, that it has not been shown that members of Green Two Estate Owners and Residents Association were parties to that suit hence this petition was not therefore *res judicata* as the 4<sup>th</sup> Respondent and the AG asserted. They averred that whenever a question of *res judicata* is raised, the court would look at the decision claimed to have settled the issues in question, the entire pleadings and the record of the previous case. The Petitioners urged that the court should ascertain whether the parties are the same, whether they are litigating under the same title and whether the previous case was determined by a court of competent jurisdiction. The Petitioners submitted that the 4<sup>th</sup> Respondent had not availed pleadings and proceedings of the former suit which he alleged had settled the issues raised in this suit. The Petitioners pointed out that Safi Petroleum Products Limited, which was the plaintiff in the previous suit is not a party to these proceedings. The Petitioners surmised that the preliminary objection must fail and urged the court to exercise its jurisdiction under the Environment and Land Court Act, the Land Registration Act, the Land Act and the Constitution and determine this dispute regarding the titles held by the Petitioners.

The Petitioners filed supplementary submissions mainly on the point that every person has the right to institute court proceedings under the Constitution and relied on some court decisions. Further, they urged that the proviso to Section 4 of the Societies Act negated the 4<sup>th</sup> Respondent's assertion that Green Two Estate Owners and Residents Association is an unlawful society and not competent to sue. On the authority to sue, the Petitioners relied on the further affidavit sworn on 6/11/2020 and pointed out that there is indeed written authority which members of the estate gave to the few in the suit to sue on their behalf. The Petitioner contended that the 4<sup>th</sup> Respondent had not produced any final determination of any court that the land in dispute was his.

The issue for determination is whether the court should strike out the petition for being *res judicata* or for want of authority to sue. The court notes that a document is attached at page 59 of the petition entitled "authority to represent several petitioners". It is indicated to be done at Nairobi on July 2020. The authority runs from pages 60 to 64 and bears different columns indicating the plots, plot numbers, names of the

proprietors or residents and their signatures. Many of the proprietors signed the authority save for a few where there are blank spaces. Based on Article 22 of the Constitution and this being a petition alleging violation of constitutional rights, the court is satisfied that the Petitioners have the legal standing to bring this petition. The authorities cited by the 4<sup>th</sup> Respondent and the AG on *locus standi* were decided before the promulgation of the 2010 Constitution which expanded the locus to institute proceedings for alleged contravention of rights and fundamental freedoms.

The court notes that the certificates of titles exhibited at pages 76 to 294 of the petition indicate that they were initially issued to Abdirahman Abdi but were later transferred to various persons and the transfers were duly entered in the certificates of title. It is not therefore true that all the certificates of title are registered in the name of Abdirahman Abdi and not the Petitioners as the 4<sup>th</sup> Respondent contended.

The 4<sup>th</sup> Respondent attached two rulings delivered in **Nairobi HCCC No. 36 of 2007 – Safi Petroleum Products v Abdirahaman Abdi**. The 4<sup>th</sup> Respondent's name does not appear in those suits and no nexus has been shown to exist between Safi Petroleum Products Limited and the 4<sup>th</sup> Respondent. Further, there is no indication that a final determination regarding the issues in dispute in this petition was ever made in that suit. The court notes that one of the rulings related to instructions given to a law firm to represent one of the parties while the second application related to joinder of parties to the suit. The 4<sup>th</sup> Respondent has not demonstrated that this suit is *res judicata*.

The court dismisses the preliminary objection raised by the 4<sup>th</sup> Respondent with costs to the Petitioners.

**DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF JUNE 2021**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Stephen Mwenesi for the Petitioners

Mr. Motari Matunda holding brief for Ms. Elizabeth Mwalozi for the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents

Mr. V. Owuor- Court Assistant

No appearance for the other Respondents