



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC MISC JR CASE NO. 4 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT CRIMINAL INVESTIGATION OFFICER, RONGO THE INSPECTOR GENERAL

THE DIRECTOR OF PUBLIC PROSECUTIONS THE SENIOR RESIDENT

MAGISTRATE'S COURT, RONGO.....RESPONDENTS

AND

PHILIP ODERO MAKABONGO.....INTERESTED PARTY

AND

JOSEPH OKECH NYAMANGA.....EX-PARTE APPLICANT

RULING

1. This ruling is in respect of twin preliminary objections namely;-

a) The interested party's preliminary objection dated 14th May 2018 and filed in court on 15th May 2018 through his counsel, Messrs S.M. Sagwe and Company Advocates (the 1st Preliminary Objection herein) and

b) The Ex-parte applicant's preliminary objection dated 18th May 2018 and duly filed herein on 23rd May 2018 by his counsel, Messrs Oguttu, Ochwal and Partners Advocates formerly, Messrs Oguttu Ochwangi, Ochwal and Company Advocates (the 2nd Preliminary Objection herein).

2. The 1st preliminary objection is anchored on grounds that:

a) The matter is res judicata.

b) The applicant had disqualified himself from being a beneficiary to the estate therein, L.R Kamagambo/Kanyajuok/572 & 1640 (referred to herein as the suit property) and instead introduced his sisters via an affidavit sworn by Rose Auma Odhiambo on the 28th November, 2013 in Kisii High Court Succession Cause No. 13 of 1997 and where applicant purported to be the chief of Kamagambo Kanyajuok location.

c) The interested party never participated in succession process and hence not party to matters succession but a purchaser for value and owns valid title obtained via a sale agreement and transfer by the person of representation as enshrined under Section 93 of Cap 160 Laws of Kenya.

d) Either the Rongo District Tribunal and/or magistrate's court could not case/cancel a registered title and the executive officer of the court declined to execute Order No. 2 dated 27th September, 2011 as decreed and as well, Misc. Application No. 249 of 2012 aimed to legalize his case was dismissed for want of prosecution.

e) Awarding the orders as prayed, may amount to act of interference with investigations with criminal liability.

3. The 2nd preliminary objection is premised on two grounds:-

a) The exhibits and/or annexures attached to the replying affidavit of the interested party offends mandatory provisions of Rule 9 of the Oaths and Statutory Declaration Rules. Hence, the same be expunged from court records and/or struck out.

b) The replying affidavit sworn by the interested party offends the mandatory provisions of Rule 10 of the Oaths and Statutory Declaration Rules and Section 5 of the Oaths and Statutory Declaration Act Chapter 15 Laws of Kenya.

4. It is important to note the brief background of the 1st preliminary objection and the 2nd preliminary objection. On 24th may 2018 ,the ex-parte applicant, Joseph Okech Nyamanga generated an application by way of chamber summons (ex-parte) dated 20th April, 2018 seeking, inter alia, leave to apply for a Judicial Review (JR) order in the nature of the certiorari to issue to remove unto this court and quash the recommendations by or behalf of the 3rd respondent contained vide letter dated 19th March 2018 recommending the arrest and prosecution of the ex-parte applicant on account of trespass onto the suit land, LR NO. KAMAGAMBO/KANYAJUOK/164 now LR Numbers. 1639 and 1640 which lawfully belong to the said applicant and prohibition orders to issue prohibiting the 1st ,2nd and 3rd and 4th respondents and that the leave so granted to operate as stay thereof. The ex-parte application was allowed on 24th April, 2018 and the ex-parte applicant was ordered and directed to file and serve a substantive application within seven (7) days from the date of service.

5. Accordingly, by a notice of motion dated 25th April, 2018 and filed in court on 26th April, 2018 (the JR Application herein), the ex-parte applicant sought an order of Judicial Review in the nature of certiorari and prohibition as well as costs of the application and further and or other orders as the court may deem fit and expedient to grant. The JR Application is based on a statement of facts, the verifying affidavits all dated 20th April, 2018 and the documents annexed thereto alongside grounds (a) to (nn) stated on it's face.

6. Briefly, the ex-parte applicant's lamentation was that he lodged a complaint before the defunct Rongo Land Disputes Tribunal (The Tribunal herein) concerning the suit land and that determination was in his favour. That the Tribunal's decision was adopted by the 4th respondent on 27th September 2011 and the ex parte applicant was issued with a title deed to the suit land on 9th October 2016.

7. The ex-parte applicant further lamented that on 3rd February 2017, the interested party colluded with the Land Registrar, Migori County and purportedly revoked the title deed through unlawful and illegitimate Gazette Notice. That the ex-parte applicant was therefore, constrained to and filed Migori ELCC No. 860 of 2017. That the 1st ,2nd and 3rd respondents are being used by the interested party to convert the Civil claim into Criminal prosecution meant to attract interdiction against the ex-parte applicant who is the Assistant Chief North Kanyajuok sub location, Migori County. It then prompted the JR Application.

8. By a 22-paragraphed replying affidavit sworn on 14th may 2018, and simultaneously filed with the 1st Preliminary Objection, the interested party, Philip Odero Makabong'o urged the court to find it convenient to dismiss the application with costs and with orders to refer to the matter to a criminal registry for determination. He termed the intended criminal proceedings against him an abuse of the court process. That the matter is res judicata and he made reference to the proceedings and a ruling of the Tribunal, a decree in Rongo SRMs court land Misc Application No. 20 of 2011, Kisii HC Succession cause NO. 13 of 1997 as shown in copies of documents marked as "POM -2" POM-5" and "POM-6" respectively, among other document, annexed to the affidavit.

9. On 17th February 2021, this court ordered and directed, inter alia, that the 1st and 2nd preliminary objections be argued by way of written submissions. That a notice of motion dated 3rd August 2020 be held in abeyance to await the outcome of the 1st and 2nd preliminary objections pursuant to the reasoning in **Kakuta Maimai Hamisi –vs-Peris Pesi Tobiko and 2 others (2013) eKLR.**

10. On 15th July 2020, S.M. Sagwe and Company Advocates for the interested party filed submissions in respect of the JR application herein. Counsel submitted that the JR is vexatious, frivolous and intended to defeat justice. That the ex-parte applicant was arrested and charged vide Rongo Law Courts Criminal case number 91 of 2020 hence, the JR Application is overtaken by events.

11. The firm of T.T. Ng'ang'a and Associates Advocates appear, too for the interested party further to a notice of appointment dated 1st March 2020 and filed on 2nd March 2020 when learned counsel, Mr. Ogwe of the above firm informed the court that :-

“Mr Sagwe alongside us are on record for the interested party herein.”

12. On 12th March 2021, T.T. Nga'ng'a and Associates Advocates for the interested party filed submissions dated 10th March 2021 to the effect that the ex-parte applicants case is res judicata and abuse of the court process. That the same should be dismissed with costs to interested party.

13. By a memorandum of appearance dated 1st March 2021 and duly filed herein on 18th March 2021, Ms. E. Opiyo, learned counsel is on record for 1st ,2nd ,3rd and 4th respondents. On 18th March 2021 and 16th June 2021 she was given latitude to submissions and she did so as shown infra.

14. Learned counsel for the ex-parte applicant filed a five (5) paged submissions dated 4th June 2021 on 9th June 2021 giving a brief background of the matter and framed twin issues for determination, inter alia, whether the instant suit is res judicata. In the analysis of the issues, counsel made reference to section 5 of the Oaths and Statutory Declaration Act Chapter 15 Laws of Kenya, Rule 9 of the Oaths and Statutory Declaration Rules, Article 159 (2) (d) of the Constitution of Kenya, 2010 (The Constitution herein) and relied on authorities,

among them, the case of **Kakuta Maimai Hamisi (supra) and IEBC =vs= Maina Kiai and 5 other (2012) eKLR** , to fortify the submissions.

15. Counsel submitted that the annexures to the interested party's replying affidavit are offensive and incurably defective. That the cited cases by the interested party are or were matters that were not or are not direct in substance, parties and issues hence, this case is not Res judicata. The ex-parte applicant thus, prayed that the 1st Preliminary Objection and the 2nd Preliminary Objection, be dismissed with costs and allowed respectively.

16. In her seven (7) paged submission dated 16th June 2021 and filed on 21st July 2021, learned counsel for the 1st ,2nd ,3rd , and 4th respondents gave a brief background of the matter and framed four (4) issues for determination inter alia, whether the interested party's replying affidavit offends rules 9 and 10 and section 5 (supra) and whether granting the prayers sought may amount to interference with investigations. Counsel submitted that whereas the interested party's replying affidavit is offensive, it is curable under **Article 159** of the Constitution to ensure that justice is done to all parties. That the matter is not res judicata and that Migori ELCC No. 860 of 2017 ought to be heard and concluded to determine the issues of ownership of the suit land which is the genesis of the instant matter.

17. To buttress the submissions, counsel for the 1st , 2nd ,3rd and 4th respondents made reference to the threshold set out in the case of **Mukisa Biscuits Manufacturers Co. Ltd =vs= West End Distributors (1969) EA 696** as regards a preliminary objection. Counsel further relied on the case of **Kenya Commercial Finance Company Ltd =vs= Richard Akwesera Onditi Nairobi Civil Application No. 329 of 2009 (COA), section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya, Section 28 of the Environment and Lan Court Act (deleted by Act No. 12 of 2012.Sch), IEBC case (supra)**, among other authorities.

18. I have anxiously studied the 1st and 2nd Preliminary objections, the JR application, interested party's replying affidavit and the rival submissions inclusive of all authorities cited therein. On that score, are the said Preliminary objections merited?

19. In the 1st preliminary objection it is claimed that the matter is Res judicata. I take into account the provision of **section 7 (supra)** on the essentials of the res judicata doctrine .

20. Similarly, I bear in mind the definition of the term "**Res judicata**" in the **Blacks's Law Dictionary 10th Edition**. The elements of the doctrine are stated thereunder.

21. It is settled law that a preliminary objection consists of points law including re judicata. The same may dispose of a suit; see **Mukisa Biscuits case (supra)**.

22. In **Oraro =vs= Mbaja (2005) KLR 141** which applied the **Mukisa Biscuits case (supra)**, it was noted that a preliminary objection must be on a point law. That it be on a point of law which must not be blurred by factual details liable to be contested.

23. I also approve the reasoning of Obaga ,J in **Eunice Wangui Muturi =vs= Francis Kamande and another (2017) eKLR** that:-

" Public policy demands that litigation has to come to an end..."

24. It is a cardinal principle in that litigation has to come to an end; see **Halsbury's Laws of England 4th Edition volume 22 at page 273**.

25. It is common ground from the pleadings and submissions herein that the previous proceedings referred to in the 1st preliminary objection concerned proprietorship of LR No. Kamagambo/Kanyajuok/1640. As submitted by the respondents' counsel, it is clear that the respondents herein were not parties in the Tribunal's Case and in Kisii HC Succession Cause No. 13 of 1997. Furthermore, the respondents did not feature in Kisii HC Misc Civil Application No. 249 of 2012 which was dismissed for want of prosecution under Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 hence, the elements of Res Judicata in Section 7 and the Black's Law Dictionary (supra) are not attained in this matter.

26. The present proceedings were brought under Order 53(supra), among other provisions of the law, set out on the face of the Notice of Motion dated 25th April 2018. This court is also aware of the relief of JR as captured under Article 23(3)(f) of the **Constitution of Kenya, 2010**.

27. Taking into account all the authorities cited in the rival submissions on res judicata principle, I am of the considered view that the first Preliminary Objection touches on matters which are contested and liable to be ascertained at the trial herein. Therefore, the first Preliminary Objection lacks merits as it does not meet the threshold in **Mukisa Biscuits case(supra)**.

28. As regards the second Preliminary Objection, I bear in mind Section 9 as well as Rule 9 and 10 (supra) contained in the grounds on which it is premised. I note that attachments to the replying affidavit of the interested party are marked but not sealed accordingly. On that score, is the said replying affidavit offensive of the legal provisions stated on the grounds of the 2nd Preliminary Objection?

29. **Section 19(1) of the Environment and Land Court Act No. 19 of 2011 (Rev. 2015)** reads;

"In any proceedings to which this Act applies, the court shall act expeditiously, without undue regard to technicalities of procedure."

30. Under **Sections 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya** as read with section 19 (2) of the same Act, this court has special and inherent jurisdiction respectively. The bottom line is to attain the ends of justice as stated under Sections 1A and 1B of the same Act and **Section 3 of the Environment and Land Court Act** (supra) in respect of overriding objective.

31. More fundamentally, all the parties herein are entitled to access to justice, fair hearing and expeditious delivery of justice as anchored in **Articles 48, 50(1) and 159(2)(b) of the Constitution**. I am in agreement with the submissions of the respondents' counsel and interested party's counsel that the replying affidavit, owing to its nature, has the breath of life pursuant to **Article 159(2)(d) and (e) of the same Constitution** in order to meet the ends of justice.

32. I subscribe to the Court of Appeal decision in *Macharia Mwangi Maina and 87 others-vs-Davidson Mwangi Kagiri (2014) eKLR*, at paragraph 26 where the Court referred to Article 159(2)(a)(b) and (d) and stated that:

“...This is a court of law and a court of equity...This court is bound to deliver substantive rather than technical and procedural justice...aimed at delivery of substantive justice...”

33. Additionally, I am guided by the Court of Appeal decision in *Philip K Chemwolo and Mumias Sugar Co. Ltd-vs-Augustine Kubende (1986)eKLR*, that a party is entitled to hearing of his or her case on merits and should not be shut out of the proceedings. In the obtaining scenario, it would be unjust and wrong to lock out the ex parte applicant out of the instant proceedings.

34. The matters raised in the 1st preliminary objection and the 2nd Preliminary objection are to be ascertained at the trial. Therefore, the present JR application calls for its hearing on merits.

35. Accordingly, the 1st preliminary objection and the 2nd preliminary objection are devoid of merits. I Proceed to disallow both of them with costs in the cause.

DELIVERED, DATED and SIGNED via EMAIL as notice was issued to the parties, this 29th day of JULY 2021

G.M.A. ONGONDO

JUDGE