



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

PETITION 3 OF 2020

DELMONTE (K) LIMITED.....PETITIONER

VS

NATIONAL LAND COMMISSION .....1<sup>ST</sup> RESPONDENT

HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

KANDARA RESIDENTS ASSOCIATION .....1<sup>ST</sup> INTERESTED PARTY

CANNARIES ENVIRON RESIDENCE

ASSOCIATION.....2<sup>ND</sup> INTERESTED PARTY

COUNTY GOVERNMENT- MURANGA.....3<sup>RD</sup> INTERESTED PARTY

COUNTY GOVERNMENT - KIAMBU .....4<sup>TH</sup> INTERESTED PARTY

RULING

1. This Ruling is in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties' Preliminary Objection dated 25<sup>th</sup> September 2020. The Preliminary Objection is premised on grounds inter alia that the matter is sub judice and res judicata and offends sections 6 and 7 of the Civil Procedure Act vide **Malindi ELC Petition No. 16 of 2016** consolidated with **ELC Petition 291 of 2016** (hereinafter referred to as the Malindi Petition) and **Thika ELC Petition No. 3 of 2019** (hereinafter referred to as the Thika case) respectively.
2. The Petitioner filed its amended petition dated 4/04/2019 which relates to *inter alia* the contravention of the Petitioner's fundamental rights under the Constitution in the conduct of proceedings before the National Land Commission's Committee on Historical Land Injustices, in relation to the **Amended Complaint Number NLC/HLI/004/2017 dated 20<sup>th</sup> April, 2018 Kandara Residents Association –vs- Del Monte Kenya Limited** (hereinafter referred to as the amended complaint). The said complaint was lodged by the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties herein on 20/04/2018. The 1<sup>st</sup> Respondent determined the amended complaint on 07/02/2019 to the dissatisfaction of the Petitioner who then filed the amended petition.
3. The Preliminary Objection is opposed by the Petitioner and 3<sup>rd</sup> Interested party whereas the 1<sup>st</sup> Respondent supports the Preliminary Objection. The 2<sup>nd</sup> Respondent and 4<sup>th</sup> interested party have not contested the Preliminary Objection.
4. On 13/10/2020, directions were taken and parties agreed to canvass the Preliminary Objection by way of written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties and 1<sup>st</sup> Respondent filed their submissions dated 26/10/2020 and 8/12/2020 respectively.
5. The Petitioner filed its submissions dated 26/11/2020 while the 3<sup>rd</sup> Respondent filed its grounds of opposition dated 8/10/2020 and written submissions dated 30/10/2020.
6. In support of the grounds contained in the Preliminary Objection, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed a further affidavit sworn by Jackson Ikua, Advocate on 02/11/2020 and annexed copies of Court proceedings in **Malindi ELC Petition No. 16 of 2016**. According to them, the instant petition is *sub judice* in so far as the prayers sought in the Malindi case are largely the same as the Petitioner's prayers herein particularly on the constitutionality of Section 15 National Land Commission Act (*referred to as the NLC Act*).
7. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties added that in as much as the Petitioner was not a party to the Malindi case, the cause of action in

the two matters is similar and in any event the Petitioner's application for joinder in Malindi case was dismissed. In highlighting the rationale behind the Chief Justice's power to empanel a 3-Judge bench, the Interested parties argued that it is necessary for this Court to stay the present proceedings pending the determination of the Malindi case. Reliance was placed on the case Supreme Court **Advisory Opinion Reference 1 of 2017; Kenya National Human Rights Commission v Attorney General; Independent Electoral & Boundaries Commission & 16 others** and **Evans Odhiambo Kidero v Ethics and Anti-Corruption Commission & 3 others [2020] eKLR**.

8. On the issue of *res judicata*, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties enumerated the parameters laid out in the case of **Lotta vs Tanaki (2003) 2 EA 556** to demonstrate that an issue is *res judicata*. Citing the supreme Court Advisory Reference No. 1 of 2017, they argued that in a matter challenging the constitutionality of a certain law, parties need not be the same in the impugned suits for *res judicata* to suffice. That the decision of the learned judge in the Thika case fundamentally determined section 15 of the National Land Commission(NLC) Act as constitutional and was enacted in furtherance of Article 67(3) of the Constitution.

9. Supporting the Preliminary Objection, the 1<sup>st</sup> Respondent concisely submitted that the matter herein i.e. constitutionality of section 15 of NLC Act is directly and substantially in issue as the one in the Malindi case. Accordingly, that a determination in Malindi case will automatically bar the instant Petitioner from litigation his case by virtue of the doctrine of collateral or issue estoppel. On the ground of **res judicata**, the 1<sup>st</sup> Respondent adopted the 1<sup>st</sup> and 2<sup>nd</sup> interested parties' submissions and added that the impugned section 15 of NLC Act was adequately determined in the Thika case of **Gathoni Park Farm Limited v National Land Commission & 7 others [2019] eKLR**.

10. In their lengthy written submissions, the Petitioner opposed the Preliminary Objection and begun by highlighting the genesis of their petition. The Petitioner contends that the key dispute before this Court is the legality of the impugned 1<sup>st</sup> Respondent determination already mentioned above which according to them, was delivered without hearing the Petitioner resulting in the prejudicial recommendations touching on the Petitioner's parcels of land. That the constitutionality of section 15 (3)(b)(i) & (ii) of NLC Act is a peripheral issue hence the Preliminary Objection.

11. On the doctrines of *sub judice* and *res judicata*, the Petitioner argued that they should not be raised in the instant manner because they involve investigation of facts. The Petitioner cited the case of **George Kamau Kimani & 4 others –vs- County Government of Trans Nzoia & Anor. [2014] eKLR** where the Court held that the best way to raise a ground on *res judicata* was by Notice of Motion and pleadings are accordingly annexed for Court's consideration. Further, the Petitioner pointed out the case of **Kandara Residence Association & another v Ananas Holdings Limited & 4 others; Director of Survey & 3 others (Interested Parties) [2020] Eklr** (the Kandara case) whereby the Court dismissed a preliminary objection that challenged the suit for being *sub judice* and which required ascertainment of facts and probing evidence. That indeed, the 1<sup>st</sup> interested party herein is the 1<sup>st</sup> Plaintiff in the *Kandara case* and having opposed the said Preliminary Objection for the foregoing reason, the same party cannot be allowed to prosecute a Preliminary Objection now as that amounts to approbating and reprobating.

12. Moreover, the Petitioner was firm that the principles of *sub judice* and *res judicata* should rarely be raised in constitutional petitions because such petitions are governed by Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as opposed to the Civil Procedure Act. The Court was urged to find the objection improper in light of the Court of Appeal decision in **John Florence Maritime Services Limited & another v Cabinet Secretary of Transport and Infrastructure & 3 others [2015] eKLR**.

13. The Petitioner also faulted the time of filing the Preliminary Objection 18 months since filing the Petition as unreasonable and only meant to delay the determination of the main Petition. That the interested parties' conduct amounted to abuse of Court process and urged the Court to dismiss the Preliminary Objection and pave way for conclusion of the main suit. In the same breath, the Petitioner opposed the striking out and/or stay of proceedings noting that the Preliminary Objection touched on a marginal issue which if need be, call for its removal. That the substantive issue in the petition would still crave for this Court's determination. A number of cases were cited in support including **Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR** and **Kenya Wildlife Service v James Mutembei [2019] eKLR**.

14. In conclusion, the Petitioner denied that their petition is neither *sub judice* nor *res judicata* and pointed out whereas the interested parties quoted the Malindi case in the preliminary objection, they went ahead to attach proceeding for Mombasa ELC Petition 291 of 2016 in their Further Affidavit. Regardless, the Petitioner maintained the issues in Mombasa case are distinct from their issues herein. About the Malindi case being before a 3-Judge bench, the Petitioner submitted its precedential value is not any more than that of a single Judge. That the Thika case pleadings were not adduced in this Court for the Court to certainly decide that the instant dispute is *res judicata*. The Petitioner prayed for dismissal of the Preliminary Objection with costs.

15. In their brief submissions, the 3<sup>rd</sup> interested party termed the Preliminary Objection as a non-starter with the sole intent of stifling the due process of law. The 3<sup>rd</sup> interested party submitted that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties have failed to prove that the issues in the Malindi case are directly and substantially in issue in the instant petition. However, the 3<sup>rd</sup> interested party described the Petitioner as malicious for filing a similar case namely Thika ELC Petition no. 3 of 2019 during the pendency of this suit.

16. From the pleadings and rival submissions, the main issue for determination is whether the preliminary objection is merited.

17. The starting point is to evaluate what constitutes a Preliminary Objection. The Petitioner cited the celebrated case of **Mukisa Biscuits supra** which defined a Preliminary Objection as; -

“...a Preliminary Objection consists of a point of law which has 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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It 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.”

18. This decision has been affirmed and reiterated severally in our Courts including the Supreme Court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR** that a Preliminary Objection should be founded upon a settled and crisp point of law.

19. Having analysed the objection, the rival affidavits, the grounds of opposition and the written submissions the Court makes the following observations; the Court is being called upon to peruse the Malindi Petition and determine whether or not there is similarity of subject matter; staying the current suit will not dispose of the matter; there are disputed facts being presented before the Court, for example the Petitioner holds the ground that though the constitutionality of section 15 of the NLC is in issue, its angle is different from that pleaded in the Malindi Petition.

20. The totality of the above observations leads the Court to conclude that the Objection is not a pure point of law. Courts have stated time without a number that such objections should be brought through a formal application as filing it as a Preliminary objection is restrictive.

21. On the second ground in the preliminary objection, the interested parties claim that this suit is *res judicata* and an affront of Section 7 of the Civil Procedure Act.

22. 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**.

23. For the Court to determine the issue of whether the Thika case is *resjudicata* or not, it calls the Court to look at the evidence which ousts the matter from being a preliminary point of law.

24. In the end I find that this is not one of the clearest cases that a Preliminary Objection is founded.

25. The application is dismissed with costs.

26. **It is so ordered.**

**DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2021**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Thuo for the Petitioner

1<sup>st</sup> & 2<sup>nd</sup> Respondents – Absent

Wamukaya HB for Okatch for the 1<sup>st</sup> & 2<sup>nd</sup> Interested parties

3<sup>rd</sup> Interested party: Absent

Ms Muchiri for the 4<sup>th</sup> Interested party

Court Assistant: Kuiyaki/Alex