



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 2 OF 2021

KURIA KIARIE KIROMO.....PETITIONER

VERSUS

SETTLEMENT FUND TRUSTEES1ST RESPONDENT

COMMISSIONER OF LANDS2ND RESPONDENT

SARAH MUGACHA3RD RESPONDENT

SAMMY MAGERA4TH RESPONDENT

RULING

Case for the 3rd and 4th Respondents

1. Coming up for determination is a Preliminary Objection dated 28th October 2020 filed by the 3rd and 4th respondents on grounds that this petition is *Res Judicata* as the issues herein were determined on **ELC No. 405 of 2002** and Court of Appeal **Civil Application No. 326 of 2017**. In their Replying Affidavits dated 29.10.2020, the 3rd and 4th respondents aver that the 3rd Respondent was allocated parcel No. **NYANDARUA/SOUTH KINANGOP/586** which was subdivided into plots **NYANDARUA/SOUTH KINANGOP/6058** and **6059**. The 3rd Respondent then sold parcel **6058** to the 4th Respondent.

2. The 4th respondent deponed that he is the registered owner of **NYANDARUA/ SOUTH KINANGOP/ 6058** and has a title to that effect. He stated that he instituted the suit **ELC No. 405 of 2002** against the Petitioner and his children as they had occupied his land. The court delivered a decision in his favour, and the said decision was upheld by the Court of Appeal in **Civil Appeal No. 326 of 2017** delivered on 13th July 2018.

3. The 3rd and 4th Respondents contend that this matter has already been adjudicated upon and the decision of a superior court stands.

4. In their submissions dated 4th December 2020, the 3rd and 4th Respondents stated that the petitioner had been moving from court to court since 1983 and the current suit was an abuse of the court process since the decision of the Court of Appeal in **Civil Appeal No. 326 of 2017** was in effect. They submitted that if the petitioner had been aggrieved by that decision, he ought to have appealed the same at the Supreme Court and not file a fresh suit for similar orders that have been adjudged upon. They thus prayed for the petition to be dismissed with costs.

Case for the Petitioner

5. The petitioner filed his submissions dated 12th January 2021 in opposition to the Preliminary Objection. He avers that the current suit is not *res judicata* because the suit **ELC No. 405 of 2002** was between different parties (**Sammy Magera vs. Kuria Kiarie & 2 others**), for parcel of land **NYANDARUA/ SOUTH KINANGOP/ 6058** and was on eviction and trespass. On the other hand, this petition is based on infringement of rights which have never been litigated upon and for parcel of land **NYANDARUA/ SOUTH KINANGOP/586**. It was further submitted that this court lacks the jurisdiction to determine Constitutional issues raised herein. The petitioner relied on the case of **IEBC VS. Maina Kiai & 5 Others (2017)eKLR**.

Analysis and determination

6. This court has considered the Preliminary Objection, the affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence. The court finds that the question of Jurisdiction was raised before the High court culminating in the ruling by Judge Makau dated **10.6.2021** of which the matter was transferred to this court. This is a court of equal status as the High court, hence, the court

will not belabour on this point all-over again. It follows that the only issue for determination is *whether this suit is res judicata to ELC 405 OF 2002*.

7. The principle of *res judicata* is anchored on **Section 7 of the Civil Procedure Act** which provides that:

“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.”

8. This court has to determine whether the question of *res judicata* has been properly raised. This is because a preliminary objection should be raised on a point of law as has been held severally and also restated by the Supreme Court in **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR**:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”

9. Again the Supreme Court in **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR** stated that:

“The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

*... Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in **Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR**, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”*

10. Additionally, in **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, the Supreme Court while still considering the issue of *res judicata* held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

a) The suit or issue was directly and

substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

11. The petitioner argues that this petition is not *res judicata* because **ELC No. 405 of 2002** which was appealed in **Civil Appeal 326 of 2017** was between different parties (Sammy Magera vs. Kuria Kiarie & 2 others), for parcel of land **NYANDARUA/ SOUTH KINANGOP/ 6058** and the claim was for eviction and trespass. That on the other hand, , this petition is based on infringement of rights which have never been litigated upon for parcel of land **NYANDARUA/ SOUTH KINANGOP/586**.

12. This court has taken time to peruse and analyse the aforementioned two suits. In the case **ELC 405 OF 2002**, the current 4th Respondent had sued the current Petitioner along with his two adult sons for eviction in relation to parcel **6058**. In that suit the Petitioner was claiming that land **parcel 586** had been amalgamated with his **parcel No 587**. The court had allowed the claim of the current 4th defendant noting that parcel **6058** was a resultant subdivision of **parcel 586**. The current petitioner was dissatisfied with the aforementioned decision and lodged an appeal at the Court of Appeal **Civil Appeal 326 of 2017**.

13. In paragraph 3 of the Court of Appeal case, it was observed that;

“ The facts are fairly straight forward. On 8th August 1991, one Sarah Njoki Mugachia (Sarah), was registered as the absolute proprietor of Land Title Number Nyandarua/South Kinangop/586 (Plot 586) measuring approximately 15 hectares (37 Acres) and a Title Deed was issued to her. Before registration, the land was part of the bigger South Kinangop Settlement Scheme under the Settlement Fund Trustees (SFT). Ten years later in April 2001, Sarah applied to the Kinangop Land Control Board for

subdivision of plot 586 into two parcels, i.e. Nyandarua/South Kinangop/6059 (Plot 6059) measuring 12.95 hectares (32 Acres) and Nyandarua/South Kinangop/6058 (Plot 6058) measuring 2.023 hectares (5 Acres), and the subdivision was completed accordingly.”

14. The Court of Appeal dismissed the appeal therefore upholding the decision by Justice Eboso in ELC No. 405 of 2002 whereby the disposal orders in that matter were:

(a) *“A permanent injunction shall issue against the defendants, jointly and severally, their servants and or agents, restraining them against remaining on, entering upon, trespassing upon or doing any acts and/or continuing to occupy that piece of land known as Nyandarua/South Kinangop/6058 which belongs to the plaintiff.*

(b) *Should the Defendants fails to voluntarily comply with order (a) above within thirty (30) days from today, an eviction order shall issue and the same shall be executed under the supervision of the police officer in charge of the sub county within which the suit property is situated.*

(c) *There shall be no order as to mesne profits.*

(d) *The Plaintiff shall have costs of this suit against the defendants jointly and severally.”*

15. From the foregoing analysis, it is clear that the doctrine of *resjudica* is clearly applicable in this matter. In the case of **Daniel Mesiri Kasoo & 7 others v Fredrick Nkonge Mutwiri & another [2020] eKLR**, the Petitioners (who were claiming land with S.F.T. history) averred that their suit was not *resjudicata* as they were not parties in the previous suits, contending that they were entitled to litigate in their own right to invoke the provisions of the Constitution to address the issues of infringement of their rights. I held thus;

“ In the present matter, there is nothing to hear as the issue of entitlement of Silonga Master Ole Kaso’s family in respect of the suit parcel No. Timau S.F.T Scheme plot no. 016 had been determined by courts of competent jurisdiction”

16. Likewise in the current matter, it matters not that the Petitioner has severally tried to metamorphose the dispute into various claims ranging from adverse possession to constitutional platform, the fact remains that the issue of ownership of parcel 586 subdivided thereafter into parcels 6059 and 6058 has already been adjudicated upon by courts of competent jurisdiction. The Petitioner cannot claim for infringement of rights over property that courts have adjudged belongs to another person.

17. In the end, I find that the Preliminary Objection dated 28.10.2020 is merited. This suit is hereby dismissed with costs to the 3rd and 4th Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

..... **FOR THE PETITIONER**

..... **FOR THE RESPONDENTS**

COURT ASSISTANT: EDEL BARASA