



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 13 OF 2020**

**REMMY MWANZO MWANDZOMARI.....PETITIONER**

**AND**

**RISHARD HELA MKUVA & 4 OTHERS.....RESPONDENTS**

**RULING**

*(Petitioner filing this petition claiming a violation of various of his constitutional rights including the right to property; petitioner claiming land which is registered in name of the 1<sup>st</sup> respondent; there being a previous suit where the 1<sup>st</sup> respondent sued the petitioner for land which suit is still pending; court finding that the issues in this petition can as well be articulated in the previous suit; breach of the res sub judice principle; petition struck out)*

1. This court issued notice to the petitioner to show cause why this suit should not be dismissed for reason that there had been filed an earlier suit, being *Mombasa CMCC No. 2243 of 2008, Rishard Hela Mkuva vs Uchri Charo Chaleo & 5 Others*, and this ruling is in respect of that notice.

2. The petition itself was filed on 5 June 2020. In the petition, the petitioner pleaded that he resided on the plot Mombasa/Majaoni Scheme/909, and is beneficial owner of the same. He averred that the 1<sup>st</sup> respondent bought a portion of 50 X 100 feet of this land. He pleaded that in the year 2008, the 1<sup>st</sup> respondent moved into the land and started developing it. He averred that this led him (petitioner) to file the suit *Mombasa CMCC No. 2343 of 2008*, which is pending, as admitted by the petitioner himself in this petition. He has stated that at the time of purchase of the land, and the filing of the said case, the property had not been adjudicated and was part of Plot No. 384/II/MN. He has pleaded that adjudication was done in the year 2018. He complains that despite being indicated that there was a pending matter in court, title was issued to the 1<sup>st</sup> respondent, whereas it was expected that title would only issue after the adjudication of the case. He is further aggrieved that title to the whole land was issued to the 1<sup>st</sup> respondent yet her entitlement is only 50 X 100 feet of the land. He seeks various declarations in violation of the constitution and cancellation of the 1<sup>st</sup> respondent's title, so that it is his name which is noted in the register as proprietor.

3. Alongside the petition, the petitioner filed an application for injunction which was resisted by the 1<sup>st</sup> respondent who filed a replying affidavit. She averred to have purchased the land, and that after land adjudication was done, she was issued with title on 5 July 2018. She was aware of the suit *Mombasa CMCC No. 2343 of 2008* wherein she sued the petitioner as 2<sup>nd</sup> defendant, and she pleaded that the matter is in abeyance though the court file has been missing.

4. When the application for injunction was canvassed, it struck me that this suit may very well be a duplication of *Mombasa CMCC No. 2343 of 2008* and that is the reason I asked counsel to make submissions on why this case should not be dismissed.

5. In her submissions, counsel for the petitioner inter alia submitted that this case is not *res judicata* the suit *Mombasa CMCC No. 2343 of 2008* for the following reasons :-

(a) That *Mombasa CMCC No. 2343 of 2008* was on the issue of injunction and the same is still pending before Court. It has not been heard and determined.

(b) That as at the time of instituting *Mombasa CMCC No. 2343 of 2008*, the 1<sup>st</sup> respondent had not obtained title to the entire suit property which was issued on 5 July 2018.

(c) That the petitioner herein seeks to challenge the validity of the said title over the entire suit property yet the 1<sup>st</sup> respondent only owns a portion of the same.

(d) That the issue of the title was not and cannot be heard and determined in *Mombasa CMCC No. 2343 of 2008*.

(e) That the issue of the title is thus a new issue which ought to be heard and determined on merit.

(f) That the suit is thus not *res judicata* as the issues raised by the petitioner have not been addressed in any other court to conclusion.

6. I have considered the above submissions. It is common ground that there exists a dispute over the ownership of this land which is the subject matter in the case *Mombasa CMCC No. 2343 of 2008*. It is also common ground that the said case is yet to be finalized. The petitioner attempts to argue that because the said case was filed before formal title had issued to the 1<sup>st</sup> respondent, then this entitles him to file a fresh suit through this petition. I am afraid that it does not. What is in issue in both suits is who is entitled to ownership of the land. If there is a change in circumstances, in this instance, the issuance of title to the 1<sup>st</sup> respondent, then what the petitioner needs to do is amend his pleadings so as to reflect the change in circumstances; the avenue is not to file another suit. The filing of another suit presents a potential of having two conflicting decisions over the same subject matter and to me is an abuse of the process of court.

7. The previous case may not have been decided, thus technically, not *res judicata*. But that case is pending, meaning that this suit offends the *res sub judice* principle enunciated by Section 6 of the Civil Procedure Act which is 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.*

8. Although the sub-note to Section 6, states “*stay of suit*”, I do not see anywhere in the body of Section 6, which states that the latter suit needs to be stayed. What I can see is a clear direction, that the court shall not proceed with the trying the latter suit. I see no purpose of staying a suit which the law precludes from proceeding and indeed there is great danger of the process of court being abused if we are to encourage, the staying only, of such latter suits. If we are not to strike out such suits, then parties will continuously file several suits, for purposes of vexing parties, and seek only to have such suits stayed, yet they serve no purpose, because once the earlier suit is heard, then *res judicata* will automatically apply.

9. I think it will also be remiss of me not to point out that I see nothing constitutional about this case. If the position of the petitioner is that another person has fraudulently been issued with title, that is a matter that ought to be canvassed through the ordinary civil process. But this is not why I strike out this suit. I strike it ought for being in contravention of the *res sub judice* principle and is an abuse of the process of court. The petitioner will also bear the costs of this suit.

10. Orders accordingly.

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF FEBRUARY 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**