



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CONSTITUTION PETITION CASE NO. E002 OF 2020

IN THE MATTER OF MARIMANTI MAGISTRATES COURT

CRIMINAL CASE NO. 540 OF 2020

AND

IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 48, 50, 157,

165(6) AND 245 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLES 50(2) (C) AND 40 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

BETWEEN

WILLIAM MUTUURA KAIRIBIA.....1ST PETITIONER

FELIX GITONGA NTHIGA MUTUURA.....2ND PETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIOS.....2ND RESPONDENT

SENIOR PRINCIPAL MAGISTRATE, MARIMANTI..3RD RESPONDENT

THE COUNTY LAND REGISTRAR THARAKA

NITHI COUNTY.....4TH RESPONDENT

THE COUNTY SURVEYOR THARAKA

NITHI COUNTY.....5TH RESPONDENT

COUNTY GOVERNMENT OF THARAKA NITHI.....6TH RESPONDENT

THE DIRECTOR OF SURVEYS.....7TH RESPONDENT

ELIJAH MUTHURI MURIUNGI.....8TH RESPONDENT

DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER.....9TH RESPONDENT

RULING

1. Before me for determination is the notice of Preliminary Objection dated **15th December, 2020** by the 8th Respondent seeking to have the entire suit dismissed on the grounds that:

1. The Honourable Court lacks jurisdiction to hear this case for being res judicata both Chuka High Court ELC Case No. 8 of 2018 (**WILLIAM MUTUURA KAIRIBA –VS- SAMUEL NKARI, SAMUEL KATHIGA & DANIEL MUGAO) AND CHUKA ELC SUIT NO. 13 OF 2019 WILLIAM MUTUURA KAIRIBA –VERSUS- SAMUEL NKARI, SAMUEL KATHIGA, DANIEL MUGAO, FRANCIS RUTEERE & THE COUNTY GOVERNMENT OF THARAKA NITHI**).

2. The Honourable Court lacks jurisdiction to hear this case for lack of the mandatory statutory consent to file this case by dint of section 8 of the Land Consolidation Act, Cap 283 and Section 30 of the Land Adjudication Act, Cap 284 Laws of Kenya.

3. The Plaintiff did not exhaust the remedies set out at Section 13, 14 and 26 of the Land Consolidation Act, Cap 283 and Section 26 and 29 of the Land Adjudication Act, Cap 284, Laws of Kenya.

4. The application dated **25.11.2020** is fatally defective.

2. The 8th Respondent submitted that the subject matter of this suit is Land Parcel No. 150 Mukothima “A” Land Adjudication Section which was the same subject matter in CHUKA HIGH COURT ELC CASE NO. 8 of 2018 that involved the same 1st Petitioner as Plaintiff and the same 1st, 2nd and 3rd Defendants as the then owners of the suit property. The 8th Respondent has exhibited a copy of ruling delivered on **12.11.2018** indicating that the 1st Defendant in that suit had sold the plot in contention to the 8th Respondent herein. The 8th Respondent further submitted that the same parcel of land was again the subject matter in **CHUKA ELC SUIT NO 13 OF 2019** between the same 1st Petitioner and the same Defendants as in case No. **8 of 2018**, save that the **6th Respondent** herein was added as **5th Defendant**. A Ruling delivered on **31.7.2019** by this court dismissing the suit for being res judicata **CHUKA ELC CASE NO. 8 OF 2018** has also been exhibited. The **8th Respondent’s** advocate cited section 7 of the Civil Procedure Act and urged the court to take judicial notice of those two previous cases decided by this same court.

3. Counsel for the **8th Respondent** relied on the case of *John Michael Wanjao –vs- George Kimetto & 2 Others [2017] eKLR* in which it was held:-

“There is no question that, the issue of whether or not the Plaintiff could enforce a verbal contract was actually determined albeit through an interlocutory application. It is not a must for a case to have gone for full trial for the issues therein to be determined. It can happen that the issues being raised in the case are determined through an application. If a determination is made, then the issue is settled, and it matters not that the issues were settled through an interlocutory application. The issue of contract was settled in the previous suit and cannot be raised in this suit.”

4. It is the **8th Respondent’s** submissions that the same parcel of land is yet again the subject matter in this Petition. That the **2nd Petitioner** is said to be the son of the **1st Petitioner** and therefore derives his ownership of the land from the father as the alleged owner of the land. That the **2nd Petitioner** who alleges he was arrested after fencing his father’s land has no rights that are distinct from those of the **1st Petitioner**. It is the **8th Respondent’s** submissions that the addition of parties was cheekily done to confuse the issues, adding that the issues are the same in all the three suits and revolve around the alleged ownership by the 1st Petitioner over the suit plot and does not matter that the previous suits were instituted by way of plaint while instant suit is a constitutional petition. Counsel for the **8th Respondent** relied on the case of *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 Others –vs- Permanent Secretary Ministry of Energy & 17 Others [2016] eKLR* where the Court of Appeal cited with approval its own authority in *John Florence Maritime Services Ltd – vs – Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR* and argued that litigation cannot be allowed to be in installments and that it is a cardinal principle of law that litigation must come to an end. That if the Petitioners felt aggrieved by the Rulings in the previous suits, they ought to have appealed and not file other suits. The advocate for the **8th Respondent** also relied on the case of *John Michael Wanjao –vs- George Kimetto & 2 Others [2017]eKLR*.

5. It was further submitted that the court lacks jurisdiction to hear this case for want of the mandatory statutory consent to file the case as required under **Section 8 of the Land Consolidation Act** and **Section 30 of the Land Adjudication Act**. Counsel for the **8th Respondent** relied on the case of *Stanley Lezen Mliwa –vs- Leonard Kapala Makangalu & 2 Others [2007] eKLR; Nthiga Nkanga –vs- Charles Nyaga [2008] eKLR*; and The Owners of *Motor Vessel ‘Lilian S’ –vs- Caltex Oil Kenya Ltd [1989], KLR 1* and argued that the aforesaid provisions of the law are couched in mandatory terms and therefore the court should proceed to dismiss the suit with costs.

6. The 8th Respondent further submitted that the suit must fail because the Petitioners did not exhaust all the remedies set out at **Sections 13,14 and 26** of the **Land Consolidation Act** and **Sections 26 and 29** of the **Land Adjudication Act**. Counsel for the **8th Respondent** relied on the case of *Rausa Co. Ltd & 2 Others –vs- Mauca Francesco [2015] eKLR* and *Hunker Trading Company Limited –vs- Elf Oil Kenya Limited [2010] eKLR*. The **8th Respondent** urged the court to uphold the Preliminary Objection herein and proceed to dismiss the

suit and the application dated **25.11.2020** with costs to the **8th Respondent**. The Respondent further urged the court to make an order vacating the consent order dated **16.12.2020**.

7. The Petitioners opposed the Preliminary Objection and submitted that this matter is not res judicata for the main reason that the cause of action and reliefs sought in the present suit are not entirely identical to the ones in the previous matters. That the issues of a Criminal Case of two conflicting maps were never issues, causes of action and/or reliefs sought in the previous suits. Counsel for the Petitioners argued that parties be allowed their day in court and give evidence and relied on the case of **Beatrice Wairimu Kiiru –vs- Director of Surveys & 2 Others [2011] eKLR**.

8. It was further submitted by the Petitioner that the **2nd Petitioner** and all the Respondents herein were not parties to the previous suit **ELC Case No. 8 of 2018**, and that the **2nd Petitioner** and the **1st – 5th and 7th – 9th Respondents** were not parties in ELC Suit No. **13 of 2019**. Counsel relied on the case of **Abdualhalm Mohammed Shallo & another –vs- Pandya Memorial Hospital [2009] eKLR**.

9. The Petitioners further submitted that the issue of ownership of the suit land has never been heard and determined on merit. That the previous matters were never heard and determined on merit, and instead, were dismissed on technicalities. That the first matter was dismissed because the Plaintiff had not obtained a consent before filing the suit while the second matter was dismissed for being res judicata. Counsel for the Petitioners relied on the case of **Cosmas Mrombo Moka –vs- Co-operative Bank of Kenya Limited & Another [2018] eKLR** which cited with authority the case of **State of Maharashtra And Another –vs- National Construction Company, Bombay, Supreme Court Civil Appeal No. 1497 of 1996; Thomas Opiyo & 13 Others –vs- Teleposta Pension Scheme Registered Trustees [2017] eKLR; Michael Bett Siror –vs- Jackson Koech [2019] eKLR; Rose Wangui Wanderi (suing as the personal representative to the Estate of Hezron Gatheru Kuria) –vs- Samwel Mwangi Githamaro [2019]eKLR; and Hariris Kamiti Kihara –vs- John Gachoka & 2 Others [2017] eKLR** and urged the court to dismiss the Preliminary Objection with costs to the Petitioners.

10. I have considered the submissions made as well as the authorities cited. The Preliminary Objection by the **8th Respondent** is on the grounds that the suit is res judicata; that the court lacks jurisdiction to hear the matter because of lack of mandatory statutory consent to file the same by dint of section 8 of the Land Consolidation Act and Section **30** of the **Land Adjudication Act**, and that the Petitioners did not exhaust the remedies set out in section 13, 14 and 26 of the Land Consolidation Act and **Sections 26 and 29** and of the **Land Adjudication Act**.

11. In the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA 696**, it was held that:

“A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary Objection 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.”

12. At the outset, I find that this Preliminary Objection raises important points of law. As already stated, the first ground is that the suit is res judicata. The second ground concerns filing of suits without the consent of the Adjudication Officer as required by law. The third ground concerns the non-exhaustion of legal stipulations.

13. Section 7 of the Civil Procedure Act provides as follows:

“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 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.”

14. The subject matter in this suit is **Land Parcel No. 150 Mukothima “A” Land Adjudication Section**. In the Petition dated **25th November, 2020**, the Petitioners pray for the following orders:

- i. A declaration that the acts of the **4th, 5th and 6th Respondents** purportedly encroaching Plot No. 150, curving out and allocating a section of it to the **5th Respondent** are unconstitutional.
- ii. A declaration that the creation of a new map by the **4th, 5th and 6th Respondents** was done in breach of the rules of natural justice, procedural fairness, national values and principles of governance.
- iii. A permanent injunction restraining the **8th Respondent** from entering, alienating or in any other way whatsoever interfering with the Petitioners’ quiet possession of Plot No. 150.
- iv. An order compelling the District Land Adjudication and Settlement Officer – Tharaka and the Director of Surveys determine and or reinstate the boundaries separating Plot No. 150 and 138 in Mukothima “A” Adjudication in accordance with the Ministry of Lands and Settlement Map.
- v. An order removing to this Honourable Court and quashing the charge sheet and proceedings in Marimanti Magistrate’s Court Criminal Court Criminal Case Number 540 of 2020 (Republic versus Felix Gitonga Nthiga Mutuura).

vi. Any other relief this Honourable Court may deem fit.

vii. Costs of the petition.

15. I have also perused the pleadings in both Chuka **ELC Case No. 8 of 2018** and **CHUKA ELC Suit No. 13 of 2019**. In both cases, the 1st Petitioner herein was the Plaintiff and he sought orders of a declaration that he was the rightful owner of **Parcel No. MUKOTHIMA "A" ADJUDICATION SECTION GIKINGO LOCATION PLOT NO. 150** as well as permanent and mandatory injunction. The **6th Respondent** herein was also a defendant in **ELC Case No. 13 of 2019**. **ELC Case No. 8 of 2018** was dismissed by the court on **12th November, 2018** while **ELC Case no. 13 of 2019** was also dismissed on **31st July, 2019** for being res judicata **ELC Case No. 8 of 2018**.

16. There is no dispute that the issues in **ELC Case No. 8 of 2018** and **ELC Case No. 13 of 2019** and the present suit revolve around the alleged ownership by the 1st Petitioner of the said plot **No. 150 Mukothima "A" Land Adjudication Section**. The primary party in the three suits is the 1st Petitioner. It has been held that the plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time. The reasoning behind this law is so that parties can litigate all their issues once, and not in piecemeal. It has also been held that a party cannot be allowed to argue that his subsequent case is not res judicata merely by addition of parties. See the *Case of Africa Oil Turkan Limited* (previously known as *Turkana Drilling Consortium Ltd*) & 3 Others –vs – *Permanent Secretary, Ministry of Energy & 17 Others (supra)* and *John Michael Wanjao –vs- George Kimetto & 2 Others (supra)*.

17. In this case, it is quite clear that there were two previous suits over the same subject matter and involving same parties. The issue in all the cases were also basically the same. Indeed the court in **ELC Suit No. 13 of 2019** dismissed the suit for being res judicata **ELC No. 8 of 2018**. There is no new issue which could not have been raised in the former suits. This suit in my view is clearly caught up by the doctrine of res judicata and I do not hesitate to declare it as res judicata, but also an abuse of the process of the court. The inclusion of additional parties and other issues in the present suit does not alter this position.

18. The other grounds in the objection herein concern the filing of suit without the consent of the Adjudication Officer as required by law and the non-exhaustion of legal stipulation. Section 8 of the Land Consolidation Act states as follows:

(1) Subject to the provisions of this section, no person shall institute and no court whatever shall take cognisance of, or proceed with or continue to hear and determine, any proceedings in which the ownership of the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given.

(2) No officer of any court whatever shall issue any plaint or other legal process for the institution or continuance of any proceedings which by virtue of the provisions of subsection (1) of this section is for the time being prohibited, except upon being satisfied that the consent required by those provisions has been given.

19. Section 30(1) of the Land Adjudication Act provides that:

(1) Except with the consent in writing of the Adjudication Officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

20. The effect of the above provisions of the law is that unless the register has become final under the Act, all courts are mandatorily prohibited from entertaining disputes concerning land falling within adjudication areas, unless there is a consent in writing of the Adjudication Officer. In paragraph 5 of the petition herein, the Petitioners have pleaded that **"the adjudication process with respect to the above mentioned Mukothima "A" Adjudication Section" is incomplete since the Adjudication Register has not been completed as per Section 25 of the Land Adjudication Act.**" (Emphasis mine). In addition, the Petitioners have pleaded in paragraph 15 thereof that **"the adjudication process is still pending completion and as such no court has jurisdiction to try and/or entertain any matter touching on the disputed land."** These averments are also repeated by the Petitioners in their supporting Affidavit.

21. From the above averments, it is clear that the Petitioners admit that the adjudication process in respect of the suit land is still incomplete. Accordingly, consent was required under the provisions of Section 30 of the Land Adjudication Act as well as Section 8 of the Land Consolidation Act. There is no consent that has been exhibited by the Petitioners. It is therefore clear that the Petitioners did not exhaust all procedures laid down in the relevant law and are improperly before this court.

22. In the circumstances, I uphold the Preliminary Objection filed by the **8th Respondent**.

23. The upshot is that the Petition is dismissed with costs to the Respondents.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF DECEMBER, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Gachuki h/b for Kabathi for Applicant

Ms. Kijaru h/b for Atheru for 8th Respondent

N/A for A.G. for 1st, 2nd, 3rd, 4th, 5th, 7th & 9th Respondents

N/A for Saluny for 6th Respondent

C. K. YANO,

JUDGE.