REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

PETITION NO. 9 AS CONSOLIDATED WITH NO 8 AND 12 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 163, 165, 258, AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTERS OF THE ALLEGED CONTRAVENTION OF

FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 21, 40

AND 69 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

MUINDI KIMEU AND 3285 OTHERS.....PETITIONERS

AND

KENYA PIPELINE COMPANY.....1ST RESPONDENT

NATIONAL MANAGEMENT ENVIRONMENT AUTHORITY.... 2ND RESPONDENT

RULING

1. The 1st Respondent herein filed a Notice of Motion application dated 15th of October 2021 brought Order 2 Rule 15 of the Civil Procedure Rules and Section 1A, 1B, 3A of the Civil Procedure Act and all enabling provisions of the law and sought for the following orders: -

1. Spent

2. That the pleadings and claims filed by the 2nd to 3285th Petitioners against the 1st Respondent be struck out and or dismissed with costs.

3. That in the alternative, some of the claims filed by the 2nd to the 3285th Petitioners be struck out and or dismissed with costs.

4. That the court to issue necessary directions in the matter.

5. That the costs of the application be provided for.

2. The application was filed before the hearing of the main Petition. Before the said application could be heard, the Petitioners herein filed a Notice of a Preliminary Objection dated the 29th of October 2021 seeking to strike out the 1st Respondent's application dated 15th of October, 2021 on the grounds that**: -**

1. The application is frivolous, vexatious, bad in law and an abuse of the court process and offends Article 22 and Article 159(2) of the constitution and the objectives under rule 3 of the Constitution of Kenya Practice and Procedure rules.

2. That the issues raised in the application had been decided in the application dated 16th of March 2021 and a ruling

delivered thereof on the 3rd of June 2021 and in the oral application made on the 1st of July 2021 whose decision was rendered on the 31st of July 2021.

3. That the court had no jurisdiction to entertain the present application

4. That the application is a gross abuse of the court process and ought to be struck out.

3. Before the hearing of the application, the Court proceeded to hear the Petitioners preliminary objection.

4. It was agreed between the parties that the preliminary objection be canvassed by way of oral submissions.

5. Mr. Ndolo for the Petitioners submitted that the 1st Respondent's application was incompetent, vexatious and abuse of the court process. He submitted that the provisions of the Civil Procedure Act do not apply to ELC Petitions and that the applicable law and procedure was to be found in Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013) which provided for the proper procedure for striking out pleadings. He contends that the application is incompetent as the court has no jurisdiction to strike out the names of the Petitioners unless they are improperly joined. He contends that there was no evidence that the Petitioners herein were improperly joined.

6. He further submitted that the application was in breach of the provisions of Article 22 of the Constitution which gives every Kenyan the right to access the court whenever their rights have been violated. He argued that a Petition could be instituted by an individual or through a representative or an organised group or association and that no authority was required to do so.

7. He stated that in the 1st Respondent's application, one of the grounds why the names should be removed from the Petition was that some of the Petitioners had signed authority while others had not which is a technical issue. He contends that under article 159 of the Constitution, procedural technicalities were removed.

8. He further submitted that prayer No. 3 in the 1stt Respondent's application did not specify the names of the Petitioners whose claims should be dismissed. He submitted that in the original file, all the Petitioners had filed their authority while annexure (D) was a signed authority to Kimeu to sue on behalf of the minors. That as for the deceased parties, they had filed letters of administration in annexure (C) of the consolidated petition. That apart from suing as individual persons they were also suing through Kimeu Muindi.

9. He stated that on the issue that the Petition should be dismissed because the Petitioners had not filed affidavits to prove their case, he argued that the Petition having been declared to be of public interest, there was no requirement that each petitioner should file an affidavit in support of their respective claims. He relied on the ruling delivered on the 3/6/2021 to support of his submissions.

10. He argued that the court was *functus officio* as the matter had already been decided. That being dissatisfied with the ruling, the respondent filed an appeal which is pending before the Court of Appeal

11. Mr. Muthanwa who was also appearing together with Mr. Ndolo for the Petitioners submitted that the 1st Respondent in the Notice of Appeal dated 16/7/2021 was contesting the order made on the 15/7/2021. He argued that the issues contained in the application dated 15th of October 2021 had been determined by the court vide the order made on the 15th of July 2021 and therefore, the court has no jurisdiction to determine the same. He further argued that the application was res judicata and sub judice and urged the court to dismiss it. He relied on **ELC Petition no 7 of 2015 Kenya Planters Co-operative Union Ltd v Kenya Co-operative Coffee Millers & Another (2016) e KLR and Owners of the Motor Vessel "Lillian "S" V Caltex oil Kenya Ltd (1989) e KLR** to buttress his submissions on jurisdiction.

12. He contends that despite there being no rule to sign authority, the Petitioners had signed authority as evidenced in annexure"A" He urged the court to uphold the preliminary objection.

13. Mr. Onindo for the 1st Respondent opposing the preliminary objection relied on the replying affidavit of Elizabeth Rop sworn on the 8th of October 2021. He submitted that the Constitution of Kenya 2010, does not expressly state that the Civil Procedure Act cannot apply to petitions nor does the Civil Procedure Act state so.

14. He further submitted that preliminary objections should be on points law and not facts. He contends that item number 2 of the Petitioner's notice of Preliminary Objection was based on facts and not on the law. He relied on **Misc Application No. 33 of 2018 Timothy Munda Mbiti vs Regional Commissioner Nyanza and 10 Others** to buttress his submissions.

15. He argued that in their Memorandum of Appeal, they were appealing against Honourable Justice Mbogo's direction that the suit should proceed by way of oral evidence and affidavits and the decision against the request that all the Petitioners should testify. That in the present application they were seeking to have the claims by the 2nd to 3285 Petitioners struck out or dismissed with costs. He asserts that the issues in the application dated 15th of October 2021 were not canvassed in the application dated 15th of July 2021.

16. He contends that the Petitioners had miscomprehended the provisions of Section 6 and Section 7 of the Civil Procedure Act as there was no other suit that had been determined. He argued that Section 7 was applicable where a suit had been determined. He stated that the instant Petition was yet to be heard and determined. On the principles of *res judicata*, He relied in the case of **Mwangi Stephen Murithi v Hon. Daniel Arap Moi & Another**.

17. He submitted that they were not against the Petitioners filing any petition against the 1st respondent but they were against frivolous

claims

18. He contends that the Petitioners were responding to the affidavit as signing authority is an issue of fact that ought to be canvassed in their replying affidavit. He further stated that the Petitioners had not given any reason as to why they are saying that it is an abuse of the court process

19. He further submitted that the claims by the Petitioners were frivolous vexatious and could be proved if the court allows them to proceed with the application. He relied in the case of **Madison Insurance Co Ltd vs Augustine Kamanda Civil Appeal No 123/18**.

20. He further argued that in their application the 1st Respondent would demonstrate why some Petitioners had signed the authority while others had not. Mr. Migun appearing together with Mr Onindo for the 1st Respondent submitted that the Appeal by the 1st Respondent was against issues other than what is before court. He further submitted that the Judicature Act had not ousted the Civil Procedure Act whose provisions applied in ELC Petitions.

21. In response Mr Ndolo submitted that the issues pending before the court were res judicata as the previous applications were based on the same facts, same parties and the court had already rendered a ruling on the same hence an abuse of the court process.

ANALYSIS AND DETERMINATION

22. The law on Preliminary Objection is settled. A Preliminary Objection must be on a pure point of law.

23. In **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696,** Law JA stated;

> **"So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

24. Further on **Sir Charlse Newbold JA** stated;

> **"The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."**

25. In **Oraro Vs Mbaja 2005 *eKLR* Ojwang J (*as he then was*)** described it as follows;

> **"I think the principle is abundantly clear. "A Preliminary Objection" correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed."**

26. I have considered the Preliminary Objection, the oral submissions and response thereto by the parties, the cited authorities by the parties herein and I find that the issues for determination are: -

> **a. Whether the provisions of the Civil Procedure Act are applicable in ELC Petitions.**
>
> **b. Whether the application before the court offends the provisions of Article 22 and 159 of the Constitution**
>
> **c. Whether the application is res judicata or sub judice**
>
> **d. Whether the court has jurisdiction to entertain the 1st Respondent's application.**

27. The first issue for determination issue is whether the provisions of the Civil Procedure Act are applicable in Constitutional Petitions. Mr. Ndolo argued that Constitutional Petitions are governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013). He submitted that the application was brought under the Civil Procedure Rules was fatal as the same is governed by the constitution of Kenya (Protection and Fundamental Freedoms Practice Rules) 2013.

28. The 1st Respondent's application is brought pursuant to Order 2 Rule 15 of the Civil Procedure Rules and Section 1A, 1B, 3A of the Civil Procedure Act and all enabling provisions of the law. The 1st Respondent has not cited any single provision from the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013). Under Article 159(d) and (e) of the Constitution, this court is enjoined to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution.

29. In **Nicholas Hendrick Classen Vs Commissioner of Lands & 4 Others (2016) eKLR** the court held that;

> **"…….I don't think that an application can be defeated just because it has cited the wrong provisions of the law. The main concern of the court is to do substantive justice as opposed to technical justice. This is why even the Mutunga Rules provide that the courts should give an interpretation of the rules in a manner which furthers the overriding of the court with regard to Article 259(1) of the Constitution. I therefore find that there is nothing wrong in the applicant citing the provisions of the Civil Procedure Rules and Act."**

30. Similarly, in the case of **Kitty Njiru Vs Nature & Style Fun Day Events & Another, Rebecca Muriuki t/a Kahaari (Proposed third Party) (2020) eKLR** the court held that;

> **"….I find that the provisions of the Civil Procedure Rules are applicable to constitutional petitions where such provisions gives the court power to make such orders as may be necessary for ends of justice."**

31. I therefore find that failure to cite the correct provisions of the law cannot by itself defeat the 1st Respondent's application.

32. The next issue for determination is whether the 1st Respondent's application offends the provisions of Article 22 and 159 of the Constitution. Article 22 of the Constitution deals with the enforcement of the Bill of Rights. It provides that :-

> **Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.**

33. The Petitioner contends that the 1st Respondent's application offends the provision of the Constitution aforesaid. The application is seeking to strike out the names of Petitioners on the grounds that they have not signed authority. Those are matters of fact which cannot be raised via a Preliminary Objection. As rightly submitted by the 1st Respondents, Preliminary Objections should strictly be on points of law. On the issue whether the application offends the provisions of Article 159 of the Constitution, Mr. Ndolo submitted that the issue of not signing the authority is a technical issue which Article 159 of the Constitution has done away with. Indeed, Article 159 2 (d) of the Constitution provides that courts and tribunals in exercise of judicial authority shall ensure that justice shall be administered without undue regard to procedural technicalities. Again the issue of whether or not the Petitioners signed the authority is an issue of fact which in my view can properly be ventilated by way of a replying affidavit and not a preliminary objection.

34. The final issue for determination is whether the 1st Respondent's application offends the provisions of Section 6 and 7 the Civil Procedure Act.

35. Section 6 of the Civil Procedure Act provides as follows:-

> **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 other court having jurisdiction in Kenya to grant the relief claimed.**

36. It is obvious that the *sub judice* rule applies where another suit or proceeding is pending in another court relating to the same parties or their privies over the same subject matter. In the present case, I find that there is no evidence in the form of a plaint, proceedings or copies of pleadings to demonstrate that the parties herein and the subject matter are similar or litigate under the same title and in this case in another Petition

37. Section 7 of the Civil Procedure Act provides for Res Judicata and provides as follows:-

> **No court shall by any suitor 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 that court**.

38. For *res judicata* to apply, there must have been a previous suit in which the same matter was in issue, the parties in both matters must be the same or litigating under the same title, the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit.

39. The Supreme Court of India explained the essence of the principle of *res judicata* in **M. Nagabhushana v State of Karnataka & Orsa (2011) INSC 88** as follows: -

> **The principles of res judicata are of universal application as it is based on two age old principle namely "interest reipublicae ut sit finis litim" which means that it is in the interest of the state that there should be an end to litigation and the other principle is "nemo detet nis veari si constet curiae quod sit pro un et eademn cause" meaning that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause.**
>
> **This doctrine of res judicata is common to all civilized system of jurisdiction to the extent that a judgment after a proper trial in a court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated**

and should forever set the controversy at rest.

That principle of finality of litigation is based on high principle of public policy.

In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end to litigation and rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anomaly.

That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties.

40. In the case of **Okiya Omutatah Okoiti v Communication Authority of Kenya & 4 Others Petition NO 9 of 2015** the court reiterated the rationale and underlying principles of *res judicata* to applying the following principles

"For res judicata to be invoked in a civil matter therefore, the issue in a current suit must haven previously decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine pleaded as a bar

41. I have carefully read the proceedings dated the 15th of July 2021 before Honourable Justice C. G. Mbogo and I find that he issued directions on the hearing of the Petition. The directions were

1. The 1st Respondents application to call all the 3285 Petitioners in this matter is rejected

2. This matter to be heard partly by via voce evidence and affidavit evidence.

3. No enjoining of the water resources authority as an interested party since they have indicated their willingness to come to court to produce documents that will be required in this petition.

42. I find that the issues raised in the application dated 15th of October 2021 were not canvassed or determined in the oral application made in court on the 15th of July 2021. The principle of res judicata is there not applicable. Being dissatisfied with the directions issued, the 1st Respondent filed an Appeal before the Court of Appeal.

43. Accordingly, I find that this court has jurisdiction to hear and determine the application dated 15th of October 2021.

44. The upshot of the foregoing is that the preliminary objection lacks merit and the same is dismissed with costs to the 1st Respondent.

RULING DATED, READ AND DELIVERED IN OPEN COURT AT MAKUENI THIS 8TH DAY OF DECEMBER, 2021

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HON. T. MURIGI

JUDGE