



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**NAROK ELC PETITION NO. 12 OF 2018**

**JOSEPH KIMETO OLE MAPELU & 12 OTHERS.....PETITIONERS**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT & 10 OTHERS.....RESPONDENTS**

**CONSOLIDATED WITH**

**NAROK ELC PETITION NO. 13 OF 2018**

**PROF. PAUL KIPRONO CHEPKWONY..... PETITIONER**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT & 7 OTHERS.....RESPONDENTS**

**AND**

**NYAYO TEA ZONES DEVELOPMENT CORPORATION..... 1<sup>ST</sup> INTERESTED PARTY**

**FRIENDS OF MASAI MAU COMPLEX AND MARA CONSERVATION.....2<sup>ND</sup> INTERESTED PARTY**

**TRUSTED SOCIETY OF HUMAN RIGHTS.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

*(Application seeking conservatory/injunctive orders; case of petitioners being that they are being forcefully evicted from parcels of land that they own; case of the respondents being that the titles held by the petitioners are illegal as they were unlawfully carved out of the Mau Forest; petitioners having filed an application for injunction when the petition was originally filed; application dismissed; parties later amending the petition; whether a fresh application for conservatory orders may be filed; whether fresh application is res judicata; held that the petitioners had filed a similar application for injunction and cannot file another application for the same orders; application dismissed as being res judicata)*

Before this court is an application dated 27 August 2019 by the petitioners and respondents in the cross-petition herein. The principal order sought is an injunction to inter alia prevent the respondents from intimidating, threatening, harassing, provoking, or demolishing and/or destroying the applicants' properties in the several parcels of land constituting what was formerly known as Enakishomi, Enkasoni, Sisiyian, Enosokon and Reiyo Group Ranches. The application is opposed.

By way of background, this suit is a consolidation of two constitutional petitions filed originally in the Environment and Land Court at Narok. The first of these petitions is dated 18 July 2019 and was filed by Joseph Ole Mapelu and 12 Others. In the petition, they averred that they own these parcels of land and have titles to them and that the Government and the other respondents are infringing on their constitutional rights by evicting them from their land. They sought orders for various declarations that their rights under the Constitution have been violated and further asked for orders to prohibit the respondents from any interference and compensation. Together with the petition, the petitioners filed an application for conservatory orders inter alia to stop the respondents from evicting them from their parcels of land.

The second petition was filed soon after on 25 July 2018, by Prof. Paul Kiprono Chepkwony, the Governor of Kericho County. He filed the petition in his private capacity as a citizen and on behalf of various private land owners. These land owners are members of the former group ranches of Reiyo, Enakishomi Sisiyan, Enoosokon and Nkaroni Group Ranches. It was his case that sometimes in the month of July 2018, the Government embarked on a forceful eviction exercise of the occupants of these parcels of land. It was his view that this is illegal and he sought more or less the same orders sought in the first petition. Similarly, alongside his petition he filed an application under Rule 24 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, again seeking similar orders to that which the applicants sought in the first petition.

The petitions and the applications were placed before Kullow J, sitting in the Narok Environment and Land Court, and given the fact that the petitions and the applications raised similar issues, directions were taken that the applications be consolidated and heard together. The application was heard and a ruling delivered on 17 September 2018. The applications were found to be without merit and were dismissed.

Later, the matter was referred to The Honourable Chief Justice, for purposes of constituting a three judge bench as the matter raised significant legal issues and was of great public importance. The Honourable Chief Justice did oblige and constituted a bench of three judges (Munyao J presiding, Kullow J, and On'gondo J) and directed that the matter be heard at the Nakuru Environment and Land Court.

On 20 March 2019, the petitioners filed an amended petition. The State on its part filed an amended cross-petition on 24 June 2019. In the cross-petition, they asserted that the titles that the petitioners claim to hold, were fraudulent titles. They asserted that these titles are for land that is located within the Mau Forest Complex. They argued that when the petitioners sub-divided the Group Ranches in issue, they went beyond the boundaries of the Group Ranches and proceeded to demarcate land that formed part of the Mau Forest Complex. They listed various titles which they asserted were illegally carved out of the forest and in the cross-petition, they sought orders of cancellation of these titles.

This application was then filed on 28 August 2019. We have already set out that the orders sought in the application at the beginning of this ruling and the application is inter alia founded upon Rule 23 (1) (2) (3) and Rule 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Practice and Procedures) and Article 22 of the Constitution. The application is supported by an affidavit of Johnstone Kipketer arap Talam, one of the respondents in the cross-petition. He has deposed that he, the petitioners and the other respondents in the cross-petition hold valid titles and he has given a history of how these titles were acquired from the Group Ranches.

The application is opposed principally on two grounds. Firstly, that the application is res judicata, and secondly, that the application is not merited. We directed the parties to file their submissions to the application and we have taken note of the submissions filed. We have also taken note of the oral submissions of counsel for the applicants and the respondents and 2<sup>nd</sup> and 3<sup>rd</sup> interested parties who addressed the court.

The issue of res judicata has been raised and we opt to start with this point, for if we are to decide that the application is res judicata, then it will not be necessary to delve into the substance of the application.

The principle of res judicata is a principle of law which prevents parties from re-litigating a matter that has already been determined by a court of competent jurisdiction. In our civil procedure, this principle is anchored in Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya. It is a principle that also applies to matters that have been commenced by way of other procedure including by way of a constitutional petition. The principle of res judicata does not only apply to judgments after a full hearing of a suit, but also applies to rulings in respect of applications. This was affirmed by the Supreme Court of Kenya in the case of **George Kihara Mbiyu vs Margaret Njeri Mbiyu & 15 Others, Civil Application No. 10 of 2018 (2018) eKLR** where the Court stated as follows :-

*[17] We also find no fault in the Court of Appeal's application of the doctrine of res judicata. As was stated in **Kanorero River Farm & Others ---Vs---National Bank of Kenya Ltd [1986] KLR**, the doctrine of res judicata applies equally to decisions on applications as it does to final decisions on a matter. At any rate and more importantly, the Court of Appeal reached its conclusions on the unique facts of this matter which will have no bearing whatsoever on any other case.*

It is thus settled that res judicata applies in respect of both applications and substantive suits.

In the instant application, it will be noted that the applicants wish to have conservatory and/or injunctive orders. There was a similar application that sought similar orders which was presented when the petitions herein were filed as we have described above. The applications were heard and determined by Kullow J. In our view, what is raised in the application before us is similar to what was raised in the applications that were heard by Kullow J. The land is the same; the persons affected are the same; and the orders sought are the same. In fact we see no difference between this application and the two applications that were heard by Kullow J. It matters not that this application has been brought after an amendment of the petition for nothing much has changed in the amended petition. Neither can it be argued that anything new has been brought forth in the amended cross-petition for the substance of the case remains the same. When the first applications for injunction were filed, they would have benefited all persons including the person who swore the affidavit herein. It cannot therefore be argued that the first application left out other parties. If we proceed to hear this application, then it will be akin to sitting on appeal on the decision of Kullow J, of which we do not have jurisdiction.

It is therefore our considered view that the application herein is res judicata. Given that position, it is not necessary for us to delve into the substance of the application and not necessary for us to go into details on the arguments that were raised on the merits or otherwise of the application.

For the above reasons, this application is hereby dismissed with costs.

Orders accordingly.

**DATED AT NAKURU THIS 21ST DAY OF JANUARY 2020**

.....

**MUNYAO SILA J**

.....

**MOHAMED KULLOW J**

.....

**GEORGE M.A ON'GONDO J**