



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 44 OF 2012

IN THE MATTER OF ARTICLES 22 AND 23, 62, 65, 165(6), 7 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS

AND FREEDOMS GUARANTEED UNDER ARTICLES 27(5) AND 40(1) (A) AND (B) OF 62 OF THE CONSTITUTION

BETWEEN

VITALIS LUMITI & 54 OTHERS.....PETITIONERS

VERSUS

THE REVEREND OLAF KONNERUP & 2 OTHERS.....RESPONDENTS

JUDGMENT

1. This is a dispute between former fellowshippers in the same church which has refused to die. Each resolution of the dispute, it seems, only animates the next rendition of the dispute.
2. At the centre of the dispute is a parcel of land – LR No. Nakuru Municipality Block 20/52 (“Suit Property”). On the Suit Property stands a church building. The ownership of the church building is the main question in the controversy.
3. The controversy is long-standing. The short version is the following. The 1st Respondent was a pastor to a congregation in Nakuru town for much of the 80s and 90s. Tensions arose in the church leading to the ouster of the 1st Respondent as the pastor of the congregation. As it often happens, the spiritual divorce was messy. Questions arose about the ownership of the Suit Property on which the church in which the 1st Respondent had ministered to the congregation for years stood.
4. Some members of the congregation – represented by the Petitioners here – felt very strongly that the Suit Property – and the church building on it – belonged to the congregation (and an entity called the Bible Baptist Church – Nakuru – which was the technical name of their church). They, therefore, sought occupation of the Suit Property. The 1st and 2nd Respondents would have none of that. A cold war conflagrated into open hostilities.
5. Each party had its narrative. The Petitioner’s story was that the Suit Property was allocated to the Bible Baptist Church – Nakuru (“BBC-Nakuru”) – by the Commissioner for Lands at the behest of Retired President Daniel Arap Moi and following the request of the BBC-Nakuru. Their narrative is further that they spent many years making contributions and conducting fundraisers here and abroad in order to construct the church building. They are therefore unequivocal that the Suit Property belonged to BBC-Nakuru and the congregation.
6. The Respondent’s version is entirely different. The Suit Property, they maintain, belongs to the 2nd Respondent – and the Certificate of Title is unequivocal on that. They further maintain that the church building was never constructed using contributions of the Petitioners and their colleagues – but using the assets of the 2nd Respondent. Upon the spiritual divorce of the Respondents from the Petitioners, it was only fair that the Petitioners leave the premises and find alternative spaces to worship. In any event, the Respondents point out that the Suit Premises could not belong to BBC-Nakuru because BBC-Nakuru did not become a legal entity until 2012 yet the land was allocated way before then: the allotment letter was issued on 11/09/1992 to the Bible Baptist Mission of East Africa.
7. Unable to come to terms quickly with each other’s accusers in brotherly fashion as counselled in the Good Book at Matthew 5:25-26, the two protagonists soon found themselves in Court. It would appear that the Respondents drew the first blood. They filed Nakuru High Court Civil Case No. 337 of 2008. The Plaintiff in that case was the Bible Baptist Mission of East Africa. The gist of the case was an action for a

declaration that the Suit Property belongs to Bible Baptist Mission of East Africa and an order for perpetual injunction against the Defendants in the suit and all others claiming by, under or on their behalf injuncting them from dealing with the Suit Property in any manner adverse to the ownership rights of the Bible Baptist Mission of East Africa.

8. The Defendants countered with a counter-claim seeking an order for cancellation of the title to the Suit Property and, in the alternative, an declaration that the Bible Baptist Mission of East Africa held the Suit Property in trust for the BBC-Nakuru.

9. On 16/02/2011, the High Court rendered itself on the suit: it struck out the defence and counter-claim and entered judgment for the Bible Baptist Mission of East Africa in terms of the Plaint that is:

I. A declaration that the Plaintiffs (Bible Baptist Mission of East Africa) are the lawful proprietor of [the Suit Property].

II. An eviction order be and is hereby issued as against the defendants by themselves, their servants, agents, assigns and/or any other person acting on their behalf.

III. An order of perpetual injunction be and is hereby issued to restrain the defendants, their agents, servants, employees or any other person acting on their behalf from dealing with [the Suit Property] and the church therein in a manner adverse to the Plaintiff's interests therein.

10. No appeal was filed against this decision by the High Court.

11. A new set of representatives of BBC- Nakuru, then, brought a new suit to wit Nakuru High Court Suit No. 117 of 2001 (OS). The suit sought determination whether the Suit Property was owned by the Bible Baptist Mission of East Africa and if so, whether the Bible Baptist Mission of East Africa was merely registered as a trustee thereof to hold on behalf of the Plaintiffs and others.

12. This suit was equally unsuccessful. Again, no appeal was preferred against the decision.

13. This should have brought the matter to a close. Unfortunately, it did not. The Petitioners and other congregants were aggrieved by the two decisions of the Court. They strongly felt that the two cases had gone against them for extraneous reasons other than the merits of the case. In particular, they felt that the 1st Respondent, who is of the Caucasian race had somehow. Consequently, they responded, not by filing an appeal against either of the two decisions – but bringing the present Petition. They are persuaded that they suffered an injustice in the way their two cases were handled. They further contend that the injustice they suffered rises to a level of demonstrable constitutional violation.

14. In a Petition filed on 28/09/2012, the Petitioners herein seek the following prayers

I. A declaration that acts of the 1st Respondent vowing to use his skin and colour to evict the Petitioners herein from the suit land is an act of discrimination contrary to the provisions of Article 27(4) and (5) of the Constitution of the Republic of Kenya.

II. A declaration that the trust deed procured by the 2nd Respondent is null and void and inconsistent with the provisions of Article 65(3) of the Constitution of the Republic of Kenya and should therefore be cancelled.

III. A declaration that the acts of the 1st and 2nd Respondents herein to evict the Petitioners from the Suit land is in violation of Articles 3(1); 10(1)(a), 27, 29(c), 40(1)(a) and (b) and 65(3) of the Constitution of the Republic of Kenya hence are unconstitutional, null and void.

IV. An order of prohibition prohibiting the Respondents from evicting the Petitioners from the Church premises and or in any way from selling, transferring or interfering with the parcel of land in any way whatsoever.

V. An order that the registration of the parcel of land in the name of Bible Baptist Mission of East Africa was illegal and fraudulent.

VI. An order directing the Commissioner of lands to register the Petitioners as owners of the parcel of land.

VII. Costs.

15. A moment's reflection would reveal that the gravamen of this suit is the same grievance that animated the previous two suits: HCCC No. 337 of 2008 and HCCC No. 117 of 2011 (OS). In all three suits the real issue is the ownership of the Suit Property and the consequences of the ownership – whether, for example, the Petitioners have any overriding interests in the Suit Property or not. The only distinction between the present suit and the previous two is that in this one the Petitioners have added two constitutional claims. As I understand the case, the constitutional claim is really one: that the 1st Respondent used his "privileged" position as a Caucasian to manipulate the system and dispossess the Petitioners of the Suit Property.

16. Indeed, this was the essence of the testimony of the only witness who testified. He felt strongly that the 1st Respondent had his way around the Courts, and that he had somewhat influenced the outcome of the cases.

17. As the Respondents argue, the first question that recommends itself is whether the present case is *res judicata* the two previous.

18. 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 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.

19. The section codifies the doctrine of *res judicata* in Kenya. Our case law has now distilled the essential ingredients of the doctrine – see, for example, *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] eKLR; *Kamunye & others v Pioneer General Assurance Society Ltd* [1971] E.A. 263 and *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR. There are, restated, four ingredients:

I. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?

II. Are the parties in the present suit the same as those who litigated the original claim?

III. Did the Court which determined the original claim have jurisdiction to determine the claim?

IV. Did the original action receive a final judgment on the merits?

20. Asking these four questions makes the instant task quite straightforward:

I. It seems clear that there was previous litigation in which identical claims were raised, to wit, the HCCC No. 337 of 2008 and HCCC No. 117 of 2011 (OS). The only question is whether the addition of the constitutional violation claim changes the nature of the suit at all. One may, tentatively claim that it does if one considers the entirety of the claim in this suit to be that it is a suit against the Court for facilitating the violation of the rights of the Petitioners. However, this is not, in truth, the claim here. The claim here is, in essence, that the Court should re-open the earlier litigation because the earlier cases were decided under a cloud of suspicion. In my view, this does not suffice to save the suit from the application of the doctrine of *res judicata*. The claim about bias by the Court could only be raised on appeal against the earlier decisions by the Court and cannot form a self-standing cause of action by the Petitioners against the Respondents.

II. It is also not denied by the Petitioners that they have brought this suit on behalf of themselves and the other congregants of BBC – Nakuru.

III. It is also not denied that the High Court had jurisdiction to try the two cases since this was brought before 2012 i.e. before the establishment of the Environment and Land Court under the Kenya Constitution, 2010.

IV. Finally, there is no question that in both the previous suits a final judgment on merits were issued.

21. The irresistible conclusion, then, is that this suit is *res judicata* is for dismissing on that score alone.

22. However, even if the suit were not *res judicata*, as the Respondents argue, it would be one for dismissing for two separate and additional reasons.

23. First, as I have demonstrated above, this is a suit which, in essence is a controversy about land ownership. Indeed, the primary objective of the Petitioners is to impeach the title held by the 2nd Respondent to the Suit Property. By dint of Article 162(2) of the Constitution and section 13 of the Environment and Land Court Act, this suit should, then, have been filed in the Environment and Land Court which has exclusive jurisdiction over the use and occupation of, and title to land.

24. Second, this suit is an abuse of the process of the Court. As pleaded, the suit is imprecise and verges on the sensational. It would appear that the real claim is that the Petitioners suffered injustice in the hands of Court officers who favoured the Respondents because of the 1st Respondent's race. If this is the pivotal claim the Petitioners wanted to advance, then it should have been a claim against the Judiciary and/or the State (to the extent that the Judges enjoy judicial immunity). It cannot possibly be a claim against the Respondents who simply enjoyed the fruits of their valid Court judgments. It is surely stretches logic to claim that a person who has obtained a valid Court practices invidious discrimination simply by enforcing that valid Court order. The Respondents in this case had valid Court orders which they simply enforced. A suit alleging discrimination cannot be founded on the fact that they obtained those orders. Such a suit could, conceivably, only be brought against those who allegedly propagated the discrimination. As pointed out earlier, anyway, the correct procedure for a litigant who alleges bias in the determination of their case is to file an appeal – not to bring a suit against the judgment-creditors years later.

25. When all is said and done, this suit deserves to be quickly put out of its misery. It is hereby dismissed in its entirety with costs.

Delivered at Nakuru this 18th day of July, 2019

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JOEL NGUGI

JUDGE