



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 4 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 159, 162 (2), 165 (3), 258 AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEDGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28, 39(3), 40 (1) AND 43 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LAND PARCEL KNOWN AS TIMAU S.F.T SCHEME PLOT NO. 016

BETWEEN

DANIEL MESIRI KASOO1ST PETITIONER

STEPHEN MESSY KASOO2ND PETITIONER

ROBERT LORINYU KASOO3RD PETITIONER

DUNCAN KOITAI KASOO4TH PETITIONER

RICHARD MAKIN5TH PETITIONER

LIKAS KASOO6TH PETITIONER

SEKET KASOO7TH PETITIONER

MARIA KIPISE8TH PETITIONER

VERSUS

FREDRICK NKONGE MUTWIRI1ST RESPONDENT

SETTLEMENT FUND TRUSTEE TIMAU.....2ND RESPONDENT

RULING

1. This ruling is in respect of the **NOTICE OF PRELIMINARY OBJECTION** filed on **19.6.2019** by the 1ST respondent where the following grounds have been raised:

(i) That the petitioners claim if any over the subject matter herein has been previously declared as Res Judicata and it is RESJUDICATA, the previous cases being: **CMCC no. 147 of 1997, HCCA 53 of 1999, HCCC No. 25 of 2010 and HC SUCC No. 124 of 2012.**

(ii) That this petition is pre-judice since the same issue involving the same parties litigating under the same title is subject to **C.A No. 96 of 2018** pending for hearing in the court of Appeal.

(iii) That the petition herein offends section 6, 7 and 8 of the civil procedure Act despite the fact that the same is disguised as a constitutional petition when indeed it is a claim for land between the petitioners and the 1st respondent.

(iv) That the 2nd respondent is wrongly enjoined in the petition when it has nothing to do with the petitioners claim and the same amounts to mis-joinder of a party.

(v) That the petition is otherwise an abuse of the court process, is scandalous, wrong and bad in law.

2. The petitioners have opposed the preliminary objection via the grounds of opposition filed in court on 30.7.2019. The 2nd respondent has so far not participated in these proceedings. On 30.7.2019, the court gave directions for the Preliminary Objection to be canvassed by way of written submissions of which the 1st respondent and the petitioners have duly complied,

Case for 1st respondent

3. It was submitted for the 1st respondent that the petitioners are descendants of one **Silonga Maser Ole Kasoo** who passed on and his son **Joseph Kibithe Sironga** filed the initial case in **Meru CMCC No. 147 of 1997**. In that case Joseph was claiming the land No. **Timau Settlement Scheme/16** (herein after the suit land), which was the property of one **Elias Kiruja** (also deceased) who was father of 1st respondent.

4. The case **CMCC No. 147 of 1997** culminated in **Meru HCA No. 53 of 1999** where the petitioners lost the case. A brother of the initial claimant, one **Masia Sironga Lekasoo** then filed another suit at **Nyeri**, the same being **HCCC No. 125 of 2010 (OS)** against the 1st respondent, which suit too was dismissed.

5. The 1st respondent then filed a probate cause at **Meru HC Succ no. 124 of 2012** to administer the estate of their father but **Masia Sironga Lekasoo** filed an objection which objection was dismissed, but objector filed an appeal at **Nyeri court of appeal case no. 49 of 2018** which matter is now pending before the court of appeal.

6. The 1st respondent contends that the petitioners are siblings and children of Silonga Moses Ole Kaso. However, the petitioners have left out their brother Masia Saronka Lekasoo in this suit in order to disguise themselves as independent parties.

7. The 1st respondent has availed copies of documents in the aforementioned suits. He has also cited the case of **Christopher Orina Kenyariri t/a Kenyariri and associates vs Salama Beach Hotel Limited & 3 others (2017) eKLR** to emphasize the point that this suit is res-judicata.

Case for the petitioners

8. The petitioners contend that the suit is not res-judicata since they have never been parties to any previous suits. They contend that they are entitled to litigate in their own right to invoke the provisions of the constitution to address the issue of infringement of their rights. They contend that the suit does not offend the provisions of section 6 - 8 of the civil procedure Act.

9. In support of their arguments, the petitioners have relied on the following authorities:

(i) **Saleh Kombo Bin Faki vs Administrator General, Zanzibar (1957) EA 191.**

(ii) **Francis Osoro Marko vs Nyagwoka Ogora (2012) eKLR**

(iii) **Leonard Indazi vs Fimsta Omukama Kami Atingo, Civil Appeal No. 169 of 1996.**

(iv) **Joseph Rotich Kipkones vs Jackson Kimatia Kumare & 11 others (2013).**

(v) **Samuel Kiiru Gitau vs John Kamau Gitau, Nairobi High Court Civil Case Number 1249 of 1998 LLR 7669 HCK.**

(vi) **Loise Mumbi Gachinga & another vs Stephen Kiiru Mugo & another (2014) eKLR.**

Determination

10. The question for determination is **“Whether this petition is res judicata to the previous cited suits”**.

11. **Section 6 of the Civil Procedure Act** provides that:

“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”.

12. Section 7 of Civil Procedure Act provides that:

“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”.

13. Section 8 of the Civil Procedure Act provides that:

“Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action”.

14. From the submissions of the petitioners, it is apparent that the existence of the previous suits is not denied. What the petitioners contend is that they were never parties to those suits. In their submissions, they claim to be the children of one Silonga Maser Ole Kaso, who had allegedly bought the suit land from the father of 1st respondent, but these parties died before the completion of the land sale transaction.

15. In the case of Michael Gachoki Gicheru vs Joseph Karobia Gicheru Kerugoya ELC No. 783/2013, Judge Olao laid out the five essential elements that must exist before the claim of res judicata can successfully be raised and which elements are captured in section 7 of the civil procedure Act. These are:

(i) **“The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue before the former suit (emphasize added).**

(ii) **The former suit must have been between the same parties or parties under whom they claim.**

(iii) **The parties must have litigated under the same title.**

(iv) **The court which decided the former suit must have been competent and lastly,**

(v) **The former suit must have been heard and finally decided by the court”.**

16. A perusal of the petition particularly paragraph 24 to 29 reveals that the petitioners are claiming the suit land as family members of one **Silonga Maser Ole Kaso** who had allegedly purchased the suit land from **Elias Kiruja** way back in 1982. The issue of the sale agreement of the suit land was what constituted the subject of litigation in both **Meru CMCC No. 147 of 1997** and **Meru HCCC No. 53 of 1999** where the family of Silonga lost in the judgment of Judge Kasango delivered on 30.10.2009.

17. It appears that few months later, one **Masia Sironga Lekasoo** filed another suit, the same being **Nyeri HCCC No. 25 of 2010** against **Fredrick Nkonge (the 1st respondent herein)**. A preliminary objection was raised in that suit, that the matter was res judicata. While dismissing that suit, Judge Wakiaga stated thus;

“Having confirmed that the issues herein were the subject matter which were litigated and finally determined in HCCCA no. 53 of 1999 at Meru and which is a court of competent jurisdiction the applicant herein cannot now again institute this suit seeking the same relief though now by way of an adverse possession. It is clear that both suits are dealing with the similar issues between the same parties or parties claiming under the same parties”.

18. **Masia Sironga Lekasoo** was certainly not a party in **Meru HCCC No. 53 of 1999** but the judge in the Nyeri case **No. 25 of 2010** still recognized that both suits were dealing with similar issues between same parties or parties claiming under the same parties.

19. In the case of ET vs Attorney General & another (2012) eKLR, it was held that;

*“The courts must always be vigilant to guard litigants evading the doctrine of res- judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: *If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”.**

20. Thus the fact that the present petitioners were not parties in the previous suit is not a ground for them to institute this petition. I find that indeed this suit is an abuse of the court’s process.

21. In the case of Safaris unlimited (Africa) Limited vs Muchanga investments Limited (2009) eKLR, the court while quoting Civil Appeal no. 25 of 2002 stated as follows:

“In our view, the often quoted principle that a party should have a day in court should not be taken literally. It should have its day only when there is something to hear. No party should have a right to squander judicial time.....”.

22. In the present matter, there is nothing to hear as the issue of entitlement of Silonga Master Ole Kaso’s family in respect of the suit **parcel No. Timau S.F.T Scheme plot no. 016** had been determined by courts of competent jurisdiction.

23. The upshot of my findings are that the **notice of Preliminary Objection** is found to have merits. This petition is hereby struck out with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE