



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

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

**AMBROSIAH NDITI MULI.....PETITIONER**

**VERSUS**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....4<sup>TH</sup> RESPONDENT**

**MATUNGULU YATTA RANCHING COMPANY..5<sup>TH</sup> RESPONDENT**

**PHILIP MULWA NZIOKA.....6<sup>TH</sup> RESPONDENT**

**PATRICK KALELI MUTISO.....7<sup>TH</sup> RESPONDENT**

**JOHNSTONE MWAKA LUMBI.....8<sup>TH</sup> RESPONDENT**

**DAVID KIMEU KILONZO.....9<sup>TH</sup> RESPONDENT**

**DAMARIS NDUKU JOSEPH .....10<sup>TH</sup> RESPONDENT**

**THOMAS MUTUKU NTHUVA.....11<sup>TH</sup> RESPONDENT**

**ROSE WAYUA MAINGI.....12<sup>TH</sup> RESPONDENT**

**PAUL MUINDI MUTULI.....13<sup>TH</sup> RESPONDENT**

**HENRY WAMBUA KINYONGE.....14<sup>TH</sup> RESPONDENT**

**CHRISTINA NTAAMBA WAMBUA.....15<sup>TH</sup> RESPONDENT**

**LEONARD KIMEU NDAMBUKI.....16<sup>TH</sup> RESPONDENT**

**RULING**

1. In the Notice of Preliminary Objection dated 10<sup>th</sup> September, 2018, by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> Respondents, the Respondents have averred as follows:

*a. The Petition is res judicata the same having been settled in various suits including HCCC No. 2346 of 1978 (Nairobi) between Matungulu vs. Ambrose Muli Kathuli & Joseph Kasia Mwiti, HCCC No. 2347 of 1978 (Nairobi) between Matungulu vs. Ambrose Muli, HCCC No. 72 of 1986 (Nairobi) – Ambrose Muli vs. Matungulu Yatta Ranching Company, HCCC No. 134 of 1978 (Nairobi) – Ambrose Muli vs. Matungulu Yatta Ranching Company, Criminal Case No. 32 of 1990 - Republic vs. Ambrose Muli (CMCC), HCCC No. 78 of 2009 (Machakos) Ambrose Muli vs. Mutinda Kisoi, Leonard Kimeu Ndambuki, Philip Mulwa*

*Nzioka and Others between the same parties the matters raised being substantially in issue in the 2009 matter.*

***b. In the alternative, the matter is sub judice as the same is pending before court in HCCC No. 2346 of 1978 (Nairobi) between Matungulu vs. Ambrose Muli Kathuli and Joseph Kasia Mwitii, HCCC No. 2347 of 1978 (Nairobi) between Matungulu vs Ambrose Muli, HCCC No. 72 of 1986 (Nairobi) – Ambrose Muli vs. Matungulu Yatta Ranching Company, HCCC No. 134 of 1978 (Nairobi) – Ambrose Muli vs. Matungulu Yatta Ranching Company, Criminal Case No. 32 of 1990 – Republic vs. Ambrose Muli (CMCC), HCCC No. 78 of 2009 (Machakos) Ambrose Muli vs. Mutinda Kisoi, Leonard Kimeu Ndambuki, Philip Mulwa Nzioka and Others.***

***c. The Petition is a backdoor appeal or review of various decisions of court of similar/concurrent jurisdiction the same being in issue or having been in issue HCCC No. 2346 of 1978 (Nairobi) between Matungulu vs. Ambrose Muli Kathuli & Joseph Kasia Mwitii, HCCC No. 2347 of 1978 (Nairobi) between Matungulu vs. Ambrose Muli, HCCC No. 72 of 1986(Nairobi) - Ambrose Muli vs. Matungulu Yatta Ranching Company, HCCC No. 134 of 1978 (Nairobi) - Ambrose Muli vs. Matungulu Yatta Ranching Company, Criminal Case No. 32 of 1990 - Republic vs. Ambrose Muli (CMCC ), HCCC No. 78 of 2009 (Machakos) Ambrose Muli vs. Mutinda Kisoi, Leonard Kimeu Ndambuki, Philip Mulwa Nzioka and Others. The Petitioner has never appealed or applied for the Orders/Rulings in the above matters to be set aside.***

***d. The Respondents stated that the Petitioner herein has not exhausted all avenues available to her before presenting his Petition before this Honourable Court. The Petitioner has never lodged a complaint at the National Land Commission. It is therefore preposterous for the Claimant to enjoin the National Land commission.***

***e. The Petition is an abuse of process of court, malicious and mischievous, and bad for want of form the same having been filed cunningly as a matter of violation of rights for the Petitioner when in essence the same is a claim for adverse possession that ought to have been brought under the Limitation of Actions Act and Originating Summons pursuant to Order 37 Rule 7 of the Civil Procedure Rules.***

***f. The Petitioner herein cannot claim the suit lands (parcels) in her own name since the same parcels of land have over the years been illegally and unjustly claimed by Ambrose Muli Wambua and thereafter the Estate of Ambrose Muli through the Petitioner as a holder of Grant of Letters of Administration Ad Litem in HCCC No. 78 of 2009. The Petitioner was represented by the same firm of Muma & Kanjama Advocates which firm has drawn and filed the present Petition. The Petitioner has no capacity to bring the present Petition as the same is claimed by the Estate of Ambrose Muli.***

2. The Notice of Preliminary Objection proceeded by way of written submissions. The Respondents' counsel submitted that in 1978, the 5<sup>th</sup> Respondent instituted a suit for eviction against Ambrose Muli, the Petitioner's husband and Joseph Kasia Muli in HCCC No. 2346 of 1978 and 2347 of 1978 (Nairobi) and that while the two suits were ongoing, the Petitioner's husband instituted Nairobi HCCC No. 72 of 1986 seeking for adverse possession in respect of 7 acres of the suit property.

3. According to the Respondents, all the three suits were consolidated, with the lead file being HCCC No. 2346 of 1978; that HCCC No. 2346 of 1978 involves the same parties herein and that the said suit raised the same issues that have been raised in the current Petition.

4. While relying on the Court of Appeal decision in the case of *Njue Ngai vs. Ephantus Njiru Ngai & Another (2016) eKLR*, the Respondents' counsel submitted that once a suit involving the same parties and raising the same issues has been dismissed, a fresh suit cannot be instituted; that HCCC No. 2346 of 1978 having been dismissed and reinstated, the Petitioner cannot file a fresh suit involving the same parties and raising the same issues and that the only avenue available to the Petitioner is to continue with HCCC No. 2346 of 1978.

5. The Respondents' counsel submitted that *res judicata* is a principle of general application; that the principle of *res judicata* applies to Constitutional matters and that in the alternative, the present suit relates to previous suits. The Respondents' counsel submitted that this suit being *sub judice*, the same should be stayed so as to pave way for the determination of the previously filed suits.

6. The Respondents' counsel submitted that HCCC No. 78 of 2009 was dismissed by the court on 29<sup>th</sup> March, 2017; that by filing the present suit, the Petitioner is trying through the backdoor to appeal or review the various decisions of courts with concurrent jurisdiction on the same issue and that the Petitioner has not exhausted all avenues available to her before prosecuting the present Appeal.

7. The Respondents' counsel submitted that by virtue of the provision of Section 15 of the National Land Commission Act, the National Land Commission is empowered to receive all complaints relating to historical land injustices; that the present Petition relates to the alleged historical land injustices and that this Petition is premature and should be dismissed with costs.

8. The Respondents' counsel submitted that the claim by the Petitioner is for adverse possession which should have been filed pursuant to Order 37 Rule 7 of the Civil Procedure Rules and that the filing of a Petition instead of an Originating Summons is an abuse of the court process.

9. The Respondents' advocate finally submitted that the Petitioner cannot claim the suit land in her name and that the Petitioner has no capacity to bring the present Petition because the same land is being claimed by the Estate of Ambrose Muli.

10. In his submissions, the Petitioner's advocate submitted that some of the issues raised in each of the cases cited by the Respondents in the Notice of Preliminary Objection were never determined on merit by the respective courts. Counsel submitted that Nairobi HCCC No. 2346 of 1978 and Machakos HCCC No. 78 of 2009 (OS) were dismissed for want of prosecution; that the Petitioner is not aware of the existence of the suits in Nairobi HCCC No. 134 of 1978 and Nairobi HCCC No. 72 of 1986 and that the Respondents did not annex the pleadings, Judgments and orders emanating from the said matters.

11. Counsel submitted that the existing circumstances portends the existence of a difference of account of events as regards the various cases and that this calls for the tendering of evidence to ascertain the actual position, a fact that cannot be properly entertained within the context of a Preliminary Objection. Counsel submitted that any plea of *res judicata* by the Respondents ought to have been raised by way of an Application that would be argued in the normal manner.

12. In any event, it was submitted, Nairobi HCCC No. 2346 of 1978 and Machakos HCCC No. 78 of 2009 (OS) were never heard and finally determined on their merits; that the Petitioner is not aware of Nairobi HCCC No. 72 of 1986 and Nairobi HCCC No. 134 of 1978 and that the present Preliminary Objection is couched in wide and loose terms which would require copious explanations and probing to unravel.

13. Counsel for the Petitioner submitted that a reading of Section 15 of the National Land Commission Act does not detail any appeal or review system; that the instant Petition is an affirmation of the Petitioner's property rights over the land forming the subject of the dispute between the parties and that the Petitioner has outlined her legitimate expectation, adverse possession and occupancy of the property as the basis of her claim to the suit property.

14. The Petitioner's counsel finally submitted that adverse possession claims can be raised through various pleadings including Plaints, Statements of Defence, Counter-claims and even Constitutional Petitions; that the challenge that the Petitioner was jointly allocated the suit land together with her husband is a subject to be addressed through the adducing of evidence and that under Article 22 of the Constitution, any person can institute a Constitutional Petition on violation of rights on their own behalf or on behalf of others.

15. In her Supplementary submissions, the Petitioner's advocate submitted that HCCC No. 2346 of 1978 and the present Petition relate to the same subject matter and that the present Petition is *sub-judice*.

16. This suit was commenced by way of a Petition dated 31<sup>st</sup> July, 2018. In the Petition, the Petitioner stated that she brings the Petition "*on her own behalf and on behalf of the Estate of Ambrose Muli (deceased)*".

17. According to the Petitioner, her, together with the deceased, were allocated the suit land measuring 8.2 Ha by a Colonial District Officer in the year 1952; that jointly with her late husband, they took up the allocated suit land; that they have remained on the said land since 1952 and that they buried the deceased together with his father on the suit property.

18. The Petitioner's case is that the presence of new neighbours disrupted the Petitioner's family's erstwhile peaceful enjoyment of their land; that the 6<sup>th</sup> Respondent started altering the pre-existing boundaries, including the sand beacons, and that the 6<sup>th</sup> Respondent has over the years forcibly displaced the Petitioner and her family from a significant portion of the 8.2 Ha suit land allocated to them in 1952.

19. The Petitioner has listed a total of 40 parcels of land within the Ndalani/Ndalani Block 1 registration section which she claims were hived from the land they were allocated in 1952.

20. The Petitioner has averred that the 6<sup>th</sup> Respondent moved the court in Nairobi HCCC No. 2346 of 1978 seeking to evict the Petitioner from the suit land but the suit was dismissed on 21<sup>st</sup> May, 2002 for want of prosecution; that the suit that her husband filed in court Suit No. 78 of 2009(OS) was dismissed on 29<sup>th</sup> March, 2017 for want of prosecution and that the dismissal of the two suits was on account of mistake of the Petitioner's counsels.

21. According to the Petitioner, she has an accrued claim of adverse possession in respect of the 2.88 Ha and 5.32 Ha of the suit land having occupied the land for 66 years; that she has a legitimate expectation to be recognized as the legal owner of the 2.88 Ha of occupied land and that her rights to property have been violated.

22. In her prayers, the Petitioner is seeking for a declaration that the 6<sup>th</sup> to 16<sup>th</sup> Respondents' titles to parcels of land Ndalani/Ndalani Block 1/158, 1518, 1519, 160, 159, 1114, 1116 and 157, 156, 1115, 1113, 1110, 1109 and 1112 have been extinguished by her adverse possession thereof.

23. The Petitioner has also prayed for a declaration to issue that the Respondents' dispossession of her land has violated her right to property as guaranteed under Article 40 of the Constitution and for compensation to the tune of Kshs. 66,320,000 for general damages for the loss suffered in respect of dispossession of 5.32 Ha and for violation of her constitutional rights.

24. The Respondents filed a detailed Replying Affidavit together with the Notice of Preliminary Objection. The only issue that I am supposed to deal with is whether this Petition is *res judicata*; *sub-judice*, and or an abuse of the court process.

25. It is the Respondents' position that this Petition is *res judicata* because the issues therein have been settled in various suits, including HCCC No. 2346 of 1978 (Nairobi); Nairobi HCCC No. 134 of 1978; Criminal Case No. 32 of 1990 and Machakos 78 of 2009(OS).

26. The doctrine of *res judicata* has been codified under Section 7 of the Civil Procedure Rules 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."***

27. The Court of Appeal in *Kenya Hotel Properties Limited vs. Willisden Investments Limited & 6 Others (2013) eKLR*, outlined the essentials of the doctrine of *res judicata* as follows:

**“16. This doctrine has been explained by the Court of Appeal in a number of cases. See the case of James Katabazi and 21 Others v The Attorney General of the Republic Of Uganda EACJ where the Court stated that for the doctrine to apply: -**

- **the matter must be ‘directly and substantially’ in issue in the two suits,**
- **the parties must be the same or parties under whom any of them claim, litigating under the same title; and**
- **The matter must have been finally decided in the previous suit (See also the case of Wille Versus Michuki & 2 others (2004) KLR 357 wherein the court reiterated the afore set out principles and stressed that for the doctrine of Res judicata to apply three basic conditions must be satisfied namely that there was a former or proceeding in which the same parties as in the subsequent suit; litigated the matter in issue in the latter suit must have been directly and substantially in issue in the former suit and lastly that a court competent to try it had heard and finally decided the matter in controversy between the parties in the former suit.”**

28. Although the Respondents have argued that this Petition is *res judicata*, the issues herein having been settled in various suits, they did not exhibit any pleadings in respect of the previous suits to enable the court ascertain if indeed this Petition is *res judicata*. Indeed, as was held by Obaga J. in the case of **George Kamau Kimani & 4 Others vs. County Government of Trans-Nzoia & Another (2014) eKLR**, one cannot raise a ground of *res judicata* by way of Preliminary Objection. The best way to raise a ground of *res judicata* is by way of a Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*.

29. Indeed, that is the ideal position. However, in a situation where the previous suit can be availed, either by the court calling for the file on its own Motion or by way of an Application, and the said court file is availed, the court can still determine if the suit is *res judicata* by way of a Preliminary Objection.

30. I say so because whether a suit is *res judicata* or not is a pure point of law. All that the court requires are the pleadings and the decision in the previous suit, which can be availed by either a party annexing the same on an Application, or by the court calling for the file(s).

31. The record shows that on 12<sup>th</sup> September, 2018, this court directed that all the files indicated in the Notice of Preliminary Objection be forwarded to this court. The following files have since been availed: Nairobi HCCC No. 2346 of 1978; Nairobi HCCC No. 2347 of 1978; Nairobi HCCC No. 720 of 1986 (OS) and Machakos ELC No. 78 of 2009 (OS).

32. The perusal of the Plaintiff in Nairobi HCCC No. 2346 of 1978 shows that the Plaintiff is Matungulu Yatta Ranching Company Limited, while the Defendant is Ngulumbu Magangi Ivili. In the said Plaintiff, the Plaintiff has prayed for vacant possession and a declaration that the Defendant is not entitled to enter the “*Plaintiff’s land*”. The Plaintiff’s land is described in the Plaintiff as “*Land Reference Number 2303*”.

33. In Nairobi HCCC No. 2347 of 1978, Matungulu Yatta Ranching Company Limited sued Ambrose Muli seeking vacant possession of L.R. No. 2303. In his Defence, Ambrose Muli contended that his possession of the suit land has been undisputed, uninterrupted, continuous, open, notorious and adverse to anybody claiming the land.

34. Machakos ELC. No. 78 of 2009 (OS) was filed by Ambrosiah Nditi Muli against four (4) Defendants, Mutinda Kisoi, Leonard Ndambuki, Philip Mulwa Nzioka and David Kimeu Kilonzo. In the said suit, the late Ambrosiah sought for the determination of the following questions:

**a. Whether the Defendants’ title to land parcels of land number Ndalani/Ndalani/139, 151, 158, 161, 155, 544, 1112, 1115 and 1116 have been extinguished by the Plaintiff’s adverse possession and;**

**b. Whether the Plaintiff has acquired title to the said land by his adverse possession thereof for a period of more than twelve (12) years from 1992 to date.**

35. The perusal of the record shows that Nairobi HCCC No. 2346 of 1978 was consolidated with HCCC No. 2347 of 1978. Indeed, the two matters were partly heard by E. Owuor J.

36. The perusal of the file shows that on 21<sup>st</sup> May, 2002, Ransley (CA) (*as he was then*) dismissed the Plaintiff’s suit for want of prosecution. The court directed the Defendant to set down for hearing his Counter-claim. This order was set aside by the consent of the parties on 16<sup>th</sup> October, 2006. The parties were directed to fix the matter for hearing by Oluoch J. on 16<sup>th</sup> October, 2006.

37. The chronology of events shows that Nairobi HCCC No. 2346 of 1978 and 2347 of 1978 have never been heard and determined. On the other hand, Machakos ELC No. 78 of 2009 was dismissed by the court on 29<sup>th</sup> March, 2017 for want of prosecution. The rest of the files indicated in the Notice of Preliminary Objection were not availed to this court. The courts having not decided the matters in controversy between the parties on merit, I find that this suit is not *res judicata*.

38. Furthermore, the Petition by the Petitioner portends the existence of a difference of account of events, and in particular her right as an individual to the suit property and her entitled to the suit land due to effluxion of time.

39. The issues raised in the Petition cannot therefore be said to be the same issues that were raised by the Petitioner’s late husband in the previous suits. Even if the said issues are the same, then it is only after trial, and after the court has taken the evidence of the parties, that this court can arrive at such a finding. Consequently, it is my finding that this suit is not *res judicata* or *sub-judice* Nairobi ELC No. 2345 of 1978; ELC No. 2346 of 1978 and Machakos ELC. No. 78 of 2009.

40. On the issue of whether this Petition was filed prematurely, I find that this court has, alongside the National Land Commission, the original jurisdiction to deal with any dispute relating to historical injustice pertaining land. This is the position that the Court of Appeal took in the case of *Chief Land Registrar & 4 Others vs. Nathan Tirop Koech & 4 Others (2018) eKLR*. In the said case, the Court of Appeal held as follows:

***“On the question whether a court should await investigation and recommendation by the National Land Commission before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the National Land Commission is seized of the matter... If National Land Commission had initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the National Land Commission and not courts of law. This would prima facie render the Environment and Land Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15(3) (b) of the National Land Commission Act which permits the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.”***

41. Consequently, it cannot be argued that the Petitioner should have exhausted all avenues by filing the present claim before the National Land Commission. In any event, the Petitioner’s claim is not a historical injustice claim *per se*.

42. For the reasons I have given above, I find no merit in the Respondents’ Notice of Preliminary Objection dated 10<sup>th</sup> September, 2018. The same is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF APRIL, 2020.**

**O.A. ANGOTE**

**JUDGE**