



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

PETITION NO. 2 OF 2017

OJILONG'O ISUBA Alias HUMPHREY.....1ST PETITIONER/APPLICANT

LEONARD JOSHUA IKAROT.....2ND PETITIONER/APPLICANT

ANDREW ISUBA OJILONG.....3RD PETITIONER/APPLICANT

VERSUS

GEORGE EMASAITI OMOYO.....RESPONDENT

RULING

OJILONG'O ISUBA alias HUMPHREY, LEONARD JOSHUA IKAROT and ANDREW ISUBA OJILONG (the 1st, 2nd and 3rd Petitioners herein) moved to this Court on 25th August 2017 through this Constitutional Petition which is also titled as an Originating Summons in which they sought the following orders against **GEORGE EMASAITI OMOYO** (the Respondent sued as the representative of the Estate of **MUTORO IRARU alias SIMON**) with respect to land parcel No. **SOUTH MALAKISI/MWALIYE/300**:

(a) A declaratory order that the 1st Petitioner's ownership of land reference number SOUTH MALAKISI/MWALIYE/300 measuring approximately 5 acres where objections were not lodged immediately on adjudication and registration cannot be challenged.

(b) A declaratory order that the Respondent's deceased father and by extension the Respondent had no good title to pass over, register, transfer and vest in the names of the Respondent at the time of his demise.

(c) A declaratory order that the Petitioners herein still have beneficial interest and ownership in land reference number SOUTH MALAKISI/MWALIYE/300 being a share of their family land in which they have developed and been residing on it for over 5 decades.

(d) A declaratory order that the 5 acres comprised in land reference number SOUTH MALAKISI/MWALIYE/300 be registered in the names of the Petitioners to hold the same in their trust and in trust of their family members.

(e) A declaratory order that the Respondent's father who was the brother to the 1st Petitioner's father and by extension the Respondent has no interest in the suit property which is now registered in the names of the Respondent given that his father had his own rightful inheritance and share in the ancestral or family land which he also acquired as first registration comprised in title number SOUTH MALAKISI/MWALIYE/81 measuring approximately 2.4 Hectares as SOUTH MALAKISI/MWALIYE/121 measuring approximately 0.6. Hectares etc.

(f) A declaratory order that the Petitioners and their family members having beneficial ownership in the suit land and cannot be evicted.

(g) A declaratory order in the foregoing that the registration and transfer of land reference number SOUTH MALAKISI/MWALIYE/300 in the names of the Respondent be revoked and cancelled so that it reverts in the names of the Petitioners in their trust and of their family members.

(h) A declaratory order that the Respondent be restrained by way of a permanent injunction from demolishing, evicting the Petitioners from their houses and in any way interfering with their occupation in land reference number SOUTH MALAKISI/MWALIYE/300.

(i) A declaratory order that the Petitioners are entitled to the costs of this Petition.

The Petition / originating summons is supported by the 1st Petitioner's affidavit in which he has deponed, inter alia, that he was the original registered proprietor of the land parcel number **SOUTH MALAKISI/MWALIYE/300** (hereinafter the suit land) before it was irregularly registered in the names of the Respondent. That the suit land was a share of his late father who was the brother to the Respondent's father who had his own share being land parcel number **SOUTH MALAKISI/MWALIYE/81 and 121**. That after the demise of his late father, the Respondent's father inherited the 1st Petitioner's mother but through his youth, the Petitioners have been using the suit land where they have their homes and at no time did the Respondent's late father utilize the suit land which has always been used by the 1st Petitioner and his sons the 2nd and 3rd Petitioners together with their families. That the Respondent's father had filed at **KAKAMEGA HIGH COURT** an Originating Summons No. 48 of 1994 and obtained a judgement on 3rd June 1998 ordering that the suit land be registered in his names. However, that judgement was never implemented by the Respondent's father who said he had no interest in the suit land. That the Petitioners and their families have settled and lived all their lives on the suit land to the exclusion of the Respondent. That the registration of the suit land in the names of the Respondent was in violation of the Petitioners rights as provided in the Constitution and also against Natural Justice hence this Petition.

In opposing the Petition / Originating Summons, the Respondent filed a 126 paragraph affidavit and annexed thereto annexures running to 117 pages. I shall not refer to all the averments for reasons that will be clear later in this ruling. Suffice it to state that the Respondent averred, inter alia, that the Petition which is also brought as an Originating Summons is frivolous, scandalous, a sham and an abuse of the Court process and also a waste of the Court's Judicial time. The Respondent then goes on to give a lengthy narrative of the protracted suits over the suit land which also involved Criminal Cases. These are:

- 1. KAKAMEGA HIGH COURT CIVIL CASE NO.48 of 1994(O.S).**
- 2. KAKAMEGA HIGH COURT SUCCESSION CAUSE NO.309 of 2000.**
- 3. BUNGOMA CHIEF MAGISTRATE'S CRIMINAL CASE NO.8 of 2009.**
- 4. BUNGOMA HIGH COURT CIVIL CASE NO.10 of 2009.**
- 5. BUNGOMA CHIEF MAGISTRATE'S COURT MISCELLANEOUS CIVIL APPLICATION NO.20 of 2009.**
- 6. BUNGOMA HIGH COURT CRIMINAL APPEAL NO.55 of 2011.**

What is important for purposes of this ruling is the averment in paragraph 14 of the replying affidavit that this suit is res judicata by virtue of the judgement in **KAKAMEGA HIGH COURT CIVIL CASE NO.48 of 1994 (OS)**. In that case (**the KAKAMEGA CASE**), the Respondent's late father **SIMON MUTORO IRARU** had filed an Originating Summons against the 1st Petitioner seeking that he had acquired ownership of the suit land by adverse possession. The Court found in his favour.

When the parties appeared before me on 22nd May 2018, it was agreed that the Preliminary Objection on **res – judicata** be canvassed first by way of written submissions.

Submissions have now been filed both by the Petitioners who are acting in person and by **MR. ELUNG'ATA ADVOCATE** for the Respondent.

In his submissions, **MR. ELUNGATA** has referred this Court to the **KAKAMEGA Case** which was also an Originating Summons and in which judgement was entered in favour of the Respondent's late father **SIMON MUTOTO IRARU** against the 1st Petitioner with regard to the suit land. The 2nd and 3rd Petitioners who are the sons to the 1st Petitioner were subsequently enjoined in the suit after it was discovered that the suit land had been transferred into their names by the 1st Petitioner in order to defeat the execution of the judgement in the **KAKAMEGA CASE**. That the said judgement was never challenged and this suit is therefore an exercise in futility and should be dismissed with costs.

The Petitioners in their submissions took me through the history of this dispute which again is not really necessary for purposes of the Preliminary Objection. They added however that this Petition is not **res judicata** and implored this Court to give them a chance to be heard in keeping with Article 50 of the Constitution. That terminating this Petition at this early stage will be a further denial of their Constitutional rights which have already been continuously violated by the Respondent.

I have considered the Preliminary Objection on **res judicata**, the submissions filed as well as the pleadings and annexures.

Res judicata is provided for under section 7 of the Civil Procedure Act in the following terms:

“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.”

As indicated at the commencement of this judgement, the Petitioners have framed their pleading both as a Constitutional Petition and a claim for adverse possession. It reads thus:

“IN THE MATTER OF ALLEGED CONTRAVENTION ALLEGED (sic) OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1,3,27,28 and 40 OF THE CONSTITUTION”

AND

“IN THE MATTER OF THE ALLEGED ADVERSE POSSESSION AND REGISTRATION AND TRANSFER OF LAND PARCEL NUMBER S. MALAKISI/MWALIYE/300”

The matter has however been registered as a Constitutional Petition No.2 of 2017 and I will treat it as such.

It is common ground that the suit land in this Petition was also the subject matter in the **KAKAMEGA CASE**. It is also not in dispute that the **KAKAMEGA CASE** was an Originating Summons in which the Plaintiff (**SIMON MUTORO IRARU**) was the Respondent's father while the defendant therein was the 1st Petitioner. Judgement was entered in favour of the Respondent's father on 3rd June 1998 by **JUSTICE B.A. TANUI**. All this is conceded by the 1st Petitioner who in his supporting affidavit dated 25th August 2017 has deponed as follows in paragraphs 16 and 17 thereof:

16: “That by an Originating Summons filed by the Respondent's father in KAKAMEGA HIGH COURT CIVIL CASE NO.48 of 1994 the Respondent's father sought to have my title herein registered in his names.

17: “That the said case succeeded with a judgment dated 3rd June 1998 on a technicality.”

It is also not in dispute that the 2nd and 3rd Petitioners who are sons of the 1st Petitioner were subsequently enjoined in the **KAKAMEGA CASE** after the 1st Petitioner had transferred the suit land to them. Similarly, the Respondent herein substituted his late father who had died after the judgment had been delivered in the **KAKAMEGA CASE**. Essentially therefore, all the parties herein were parties in the **KAKAMEGA CASE** where the issue in dispute was the ownership of the suit land. The dispute was heard and determined by a competent Court and from the records herein, no appeal appears to have been filed. There can be no doubt therefore that his Petition is clearly *res judicata*. For *res judicata* to be established, the following must be proved:

- 1. The issue in dispute in the former suit between the parties must be directly and substantially in dispute between the parties in the suit where the doctrine of res judicata is raised.**
- 2. The former suit must be between the same parties or those under whom they or any of their claims litigating under the same title.**
- 3. The former suit must have been heard and finally determined.**
- 4. The Court or Tribunal which determined the former suit must have been competent.**

See **KARIA V. A.G. 2005 IEA 83.**

The Respondent has, in my view, properly pleaded and established that this Petition is *res judicata* by establishing all the above ingredients. And since the doctrine of *res judicata* is based on public interest that there should be an end to litigation, a successful plea of *res judicata* takes away the jurisdiction of the Court to move any further. The Court would therefore be required to down its tools as was held in **OWNERS OF THE MOTOR VESSEL ‘LILIANS’ V. CALTEX OIL (K) LTD 1989 KLR 1.**

What I need to consider and which the parties did not address me on is whether *res judicata* applies in Constitutional Petitions. That issue was considered by the Court of Appeal in the case of **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER V. CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & OTHERS C.A. CIVIL APPEAL NO.42 of 2014 (2015 eKLR)** where the Court said:

“In a nutshell, res judicata being a fundamental principle of Law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are Constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of Law that relates to the jurisdiction of the Court, may be raised as a valid defence to a Constitutional claim even on the basis of the Court's inherent power to prevent abuse of its process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental) Practice and Procedure Rules 2013”.

The Court however added the following caveat:

“However, we must hasten to add that it should only be invoked in Constitutional litigation in the clearest of cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating and assuming multifaceted dimensions”.

The next question that I must therefore answer is whether or not this Petition is one of those “*clearest of Cases*” in which I should up-hold the plea of *res judicata*.

In doing so, I caution myself that I am not considering the merits or otherwise of the Petition itself at this stage. But I am also alive to what the Court of Appeal said in the Case of **JOHN FLORENCE MARITIME SERVICES LTD** (supra), that “*rights keep on evolving,*

mutating and assuming multifaceted dimensions.” Looking at this Petition, it is clearly a re-agitation of the same issues that were raised in the **KAKAMEGA CASE**. That is abundantly clear from the declaration orders sought by the Petitioners and which I have summarized at the commencement of this judgement. I do not see the evolution or mutation of any rights that were not adequately considered and answered in the **KAKAMEGA CASE**. In their submissions, the Petitioners, in an attempt to save this Petition have invoked Article 50 of the Constitution and stated that:

“Your Lordship, after we filed this Petition we had the desire for this Honourable Court to invoke the doctrine of articles quoted above and Article 50 of the Constitution which provides that every person has the right to have any dispute that can be resolved by the application of Law decided in a fair hearing before a Court or if appropriate another independent impartial tribunal or body.”

From what I have already summarized above, the parties herein were all accorded a hearing by the Judges who handled the main dispute and the subsequent applications in the **KAKAMEGA CASE**. The record in that case speaks for itself.

Secondly, although this Petition cites Articles 1, 3 19, 20, 21, 22 and 23, 27, 28 and 40 of the Constitution, there is no mention in the body of the Petition itself how the above Constitutional Provisions were violated by the Respondent. The Petition therefore offends the principles laid down in the case of **ANARITA KARIMI NJERU V R 1976-1980 eKLR 1272** where it was held that a party seeking redress on account of a violation of a Constitutional provision should set out with a reasonable degree of precision that of which he complains and the manner in which the Law was infringed. That was followed in **MUMO MATEMU V TRUSTED SOCIETY OF HUMAN RIGHTS 2013 eKLR.**

Finally, whereas there is no limitation as to when a Constitutional Petition can be filed alleging a violation of Constitutional rights under the Bill of Rights, nonetheless the length of the delay is a material consideration. This Petition does not seek redress from the Government and it cannot therefore be claimed, as is common with many Constitutional Petitions in which a violation of the Bill of Rights is alleged as against the Government, that it was not possible before the change of Government, to bring such Petitions as the atmosphere was not conducive. This Petition is against an individual. The circumstances giving rise to this Petition, according to the judgement of **JUSTICE B.A. TANUI** (now retired) occurred in 1973 when the 1st Petitioner secretly registered himself as the owner of the suit land. This Petition was filed on 25th August 2017 some 44 years later.

There is already a judgement delivered in the **KAKAMEGA CASE** on 3rd June 1998 some 19 years before this Petition was filed. That is quite a while ago and bearing in mind that the subject matter is land where rights can mutate rapidly, I would consider this Petition to be among those ***“clearest of cases”*** in which I can make a finding that the plea of ***res judicata*** is properly invoked. The view I take of this Petition is that it is an appeal filed under the guise of a Constitutional Petition and an abuse of the Court process.

The up-shot of the above is that I up-hold the Respondent’s Preliminary Objection that this Petition is ***res judicata***. Accordingly, I make the following Orders:

- 1. This Petition is res judicata**
- 2. It is struck out with costs to the Respondent.**

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018

Ruling dated, delivered and signed in open Court this 18th day of October 2018 at Bungoma.

Petitioners all present

Mr. Elungata for the Respondent Absent

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018