



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC PETITION NO. 8 OF 2017

(FORMERLY KISII ELC PETITION NO. 33 OF 2014)

FRANCIS DAWO KAWA.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MIGORI.....RESPONDENT

AND

TOBIAS OBILO ANDURU.....INTERESTED PARTY

JUDGMENT

A) INTRODUCTION

1. The present petition concerns alleged violation of the constitutional rights of the petitioner, Francis Dawo Kawa, by the respondent namely, the County Government of Migori in respect of the parcel of land known as Plot Number 83B situate within Migori town in Migori County (hereinafter referred to as the suit property). The area of the suit plot is 50 feet by 100 feet.
2. The petitioner is represented by learned counsel, Mr. Bruce Odeny of Bruce Odeny and Company Advocates.
3. The respondent is represented by learned counsel, Mr. Agure Odero of Agure Odero and Company Advocates further to a notice of appointment dated 19th November 2014 filed in court on 20th November 2014.
4. The interested party, Tobias Obilo Anduru is represented by learned counsel, Mr. Jeremiah Soire of J.O Soire and Company Advocates pursuant to notice of appointment dated 2nd December 2014 duly filed in court on 3rd December 2014.
5. Originally, the petition was instituted at Kisii Environment and Land Court. On 22nd March 2017, J M Onyango, J sitting at the said court directed and ordered the petition to be transferred to this court for hearing and determination.

B) THE GIST OF PETITIONER'S CASE

6. By a petition dated 25th July 2014 and lodged in court on 4th August 2014, the petitioner has sought the following reliefs:
 - a. A declaration that the petitioner is the rightful allottee of the entire suit property.
 - b. A declaration that the repossession of the suit property by the council and subsequent reallocation to the interested party herein was unlawful, discriminatory and out-rightly unconstitutional.
 - c. A declaration that the petitioner's fundamental right to life, human dignity, economic and social development as protected and envisaged by Article 26, 28 and 43 of the Constitution of Kenya 2010, consists, comprises and translates to the right and entitlement to means of livelihood and social economic wellbeing and ultimate human life.
 - d. A restraining order do issue directed at the respondent, their employees, workers, agents and/or whomsoever jointly and severally restraining them from repossessing, allocating to whomsoever, trespassing, encroaching, forceful entry, fencing, selling, disposing, transferring, alienating, charging, stepping on, advertising, dealing and/or interfering whatsoever with the petitioner's land being the suit property situated within Migori Town of Migori County.

- e. An order compelling the respondent to rectify its records by including the name of M/S Ramji as an earlier owner and that of the petitioner herein as the current *bona fide* owner.
- f. In the alternative to “D” above, an order compelling the respondent and the interested party to compensate the petitioner at current market rate with the loss of the suit property.
- g. The petitioner be awarded general and exemplary damages for violation of his fundamental rights.
- h. Any other reliefs do issue to protect the petitioner’s constitutional rights.
- i. The costs of this petition be paid to the petitioner.

7. The petitioner complains that he is the *bona fide* proprietor of the suit property that was duly allocated to him by the defunct Municipal Council of Migori (the defunct council) on 25th September 2001. That he acquired the same through one M/S Ramji, the original allottee of the suit property and transfer effected accordingly. That the petitioner has met all the conditions including payment of rates, rent and fee set down by the defunct council and has spent an excess of Ksh 10,000,000/= to develop the suit property.

8. The petitioner further claims that upon completion of construction of his building on the suit property, the respondent did claim ownership of the same. That the respondent’s complaint had been settled with the original allottee whereby it was resolved that the latter was allocated the suit property which was subsequently transferred to the petitioner. That officers of the defunct council, now the respondent, made a controversial about turn to the effect that the allocation of the suit property in favour of the petitioner, was by mistake. The action of the respondent has occasioned loss and damage to the petitioner. That the acquisition of the suit property by the petitioner was legal, constitutional and that he has been discriminated against. Thus, it precipitated the instant petition.

9. The petition is anchored on a supporting affidavit of nine (9) paragraphs, sworn by the petitioner and documents annexed thereto marked as FDK1 to FDK4 which include a copy of the petitioner’s plot card (FDK1), a copy of approved building plans (FDK3) and a copy of the interested party’s plot card dated 31st May 2005 (FDK4). The petitioner, deposed, inter alia, that he acquired the suit property legally and constitutionally as revealed in documents marked as FDK1 to FDK3. That by double allocation of the suit property, he has been denied livelihood and discriminated against hence he is entitled to the orders sought in the instant petition.

10. To reinforce his petition, the petitioner filed a further list of documents dated 10th April 2017. These documents include, minutes of Special Planning, Works and Housing Committee meeting held on 5th November 1997 in the defunct council’s chambers, Migori.

11. Learned counsel for the petition filed submissions dated 16th July 2018 wherein reference was made to the orders sought in the petition and urged this court to award them. That Kshs. 10,000,000/= being compensation for amount the petitioner invested in the suit property as well as Ksh 2,000,000/= being general and exemplary damages for violation of his fundamental rights, be awarded to the petitioner.

C) THE RESPONDENT’S CASE IN BRIEF

12. In his answer to the petitioner dated 19th November 2014 and filed in court on 20th November 2014, the respondent denied the petition, termed the orders sought therein misplaced and that the same be dismissed. The respondent therefore, sought twin orders;

- a. That in the alternative prayers (a-i) by the petitioner herein be visited upon one Tobias Obilo Anduru and not the respondent.
- b. Cost of the counterclaim herein be borne by the petitioner to the respondent.

13. The respondent stated that the petition is non suited as the allegations therein ought to have been addressed to the interested party who had a dispute with the petitioner in Migori PMCC No. 239 of 2004 whereby the latter filed an appeal and the matter is before the Court of Appeal at Kisumu. That the petitioner cannot purport to sue the respondent in exclusion of the interested party and there was no double allocation of the suit land.

14. The respondent’s answer to the petition is fortified by a list of documents of even date. The principal document thereof is a copy of proceedings of Migori PMCC No. 239 of 2004; The Interested Party –vs- the Petitioner herein.

15. On 22nd January 2020, learned counsel for the respondent filed four (4) paged submissions dated 22nd January, 2020 whereby the petition was termed as a misjoinder of parties pursuant to Sections 10 (2) and 100 of the Civil Procedure Act Chapter 21 Laws of Kenya. That the petitioner did not notify the respondent of the allegations in this petition. That prayer number two (2) sought herein cannot be granted as M/S Ramji is not a party in the instant petition. That the court should take judicial notice that the interested party is not an agent of the respondent.

16. Counsel submitted, too, that this petition is *res judicata* in view of the final determination of Migori PMCC No. 239 of 2004 which was challenged on appeal by the petitioner, and determined accordingly. That the allegations in the present petition are not established or proved. Counsel termed the petition want of merit and substance thus sought its dismissal with costs to the respondent.

D) THE GIST OF THE INTERESTED PARTY’S CASE

17. The interested party denied the petition and sought dismissal of the same by his 7-paragraphed answer to the petition dated 7th December 2014 and filed in court on 9th December 2014. He stated inter alia, that the petition is *res judicata* as the issues raised by the petitioner in

Migori PMCC NO. 239 of 2004 culminating in Kisii HCCA No. 307 of 2006, were determined. That the petitioner was neither the bona fide allottee of the suit property nor developed it. That the petitioner attempted to acquire ownership of the suit property unlawfully.

18. Learned counsel for the interested party filed submissions dated 19th March 2020, making reference to orders sought in the petition and his answer thereto. He submitted that the petition is res judicata in light of Migori PMCC no. 239 of 2004 which culminated in Kisii HCCC No. 37 of 2006 which was determined. Counsel cited **section 7 of the Civil Procedure Act (supra)**, to buttress his submission.

E) **ISSUES FOR DETERMINATION**

19. I have carefully considered the entire petition, the answers thereto by the respondent and the interested party alongside the rival submissions and agreed issues (the respondent's version) dated 24th April 2018 and filed on 26th April 2018 herein. In that regard, what are the issues for determination in this petition?

20. It is trite law that issues for determination in a suit, (the term **"suit"** is defined in section 2 of the Civil Procedure Rules, 2010), flow from either pleadings or as framed by the parties for the court's decision; see the Court of Appeal decision in **Great Lakes Transport Company (U) Ltd -vs Kenya Revenue Authority (2009) KLR 720**.

21. In view of the foregone, the issues for determination in this petition are condensed thus:

a) Has the respondent violated the petitioner's constitutional rights as alleged in this matter?

and,

b) Is the petitioner entitled to the orders sought in the instant petition?

F) **ANALYSIS AND DETERMINATION**

22. On the first issue, the petitioner stated that he was allocated the suit property in 1997 as shown in the plot card marked as "FDK1". I note the size of the suit property, all the conditions and the signature of the petitioner shown therein.

23. The petitioner deposed at paragraphs 5 and 7 of his supporting affidavit that he paid the requisite charges to the respondent as shown in the receipts marked as "FDK2". That the construction of his structure on the suit property was duly approved by the respondent as revealed in the approved plans marked as "FDK3".

24. The petitioner deposed further that after he developed the suit property, the interested party laid claim of ownership thereto as disclosed in plot card marked as "FDK4". That he then drew the attention of the respondent to the allegations made by the interested party. That later the respondent made an about turn and claimed that "FDK1" was issued to the petitioner by mistake.

25. It is noted that by a copy of minutes of the respondent annexed to the petitioner's further list of documents dated 10th April 2017 and lodged in court on 18th April, 2017, it was resolved that Mr. Ramji who allegedly sold the suit property to the petitioner;

"...would take front phase (developed part) which was Plot No. 83 while Mr. Nyanganyi and Mr. Obilo would remain with the behind phase, undeveloped part."

26. The respondent asserted that this petition is non-suited as it ought to have been addressed to the interested party. That the same is *res judicata* in view of Migori PMCC No. 239 of 2004 which was determined and that the appeal preferred therefrom, was dismissed.

27. Notably, the answer to the petition by the interested party is a denial and he stated that the suit property was mistakenly allocated to the petitioner by the respondent. As such, is the petitioner the *bona fide* allottee of the suit property whatever may be the guilty of others?

28. In the case of *Fletcher -vs- Peck 10 U.S 87 (1810)*, it was observed, inter alia;

"...but the rights of third persons who are purchasers without notice cannot be disregarded...he had no notice.....concealed defect cannot be set up against him..."

29. Besides, I note the respondent's resolution concerning the suit property as noted in paragraph 25 hereinabove. The parties including the petitioner through Mr. Ramji, from whom he purportedly bought the suit property, were aware of the resolution.

30. Moreover, the respondent's answer to the petition and his submissions indicate that there existed Migori PMCC No. 239 of 2004; *the interested party v the petitioner* herein. The said suit concerned the suit property. It is evident that judgment in that suit was delivered on 24th May 2006 in favour of the interested party and decree issued on 15th September 2006 accordingly.

31. The petitioner was aggrieved by the decision of the magistrate's court. Thus, he preferred an appeal namely Kisii High Court Civil Appeal Number 307 of 2006 whereby the court (R.N. Sitati, J) in paragraph 1 of the judgment observed that:-

“The appellant herein was the defendant in Migori PMCC No. 239 of 2004. The respondent sued the applicant in connection with a plot known as Plot No. 83B situate at Migori Township alleging that he was the owner of the said plot...”

32. Upon carefully analyzing all the submissions made in the appeal, the High Court reached the conclusion that the appeal was incompetent. That furthermore, the same was an abuse of the court process.

33. The said court further held;-

“It is also my considered view that the appellant is in abuse of the due process of the court. In the case of *Commercial Exchange Ltd & another -vs- Barclays Bank of Kenya Ltd (1966)LLR 2194 (CAK)*, it was held that it is an abuse of the court process to try to obtain orders similar to those sought in an earlier case. In the instant case, it is clear that Civil Appeal No. 160 of 2006 was still alive and kicking when this appeal was filed, and even after this appeal was heard. The appellant did not exhibit an order withdrawing the said appeal; and in my view therefore, he is in abuse of the due process of the court. It is the duty of the court to protect itself against such abuse, and it is also incumbent upon counsel and litigants to take all necessary steps to safeguard the integrity of the courts by ensuring that they do not take actions that are likely to abuse court process. See *Caneland Ltd & others v Delphis Bank Ltd – Civil application No. Nai 344 of 1999-Court of Appeal at Nairobi.*” (Emphasis added)

34. In the result, the appeal was dismissed with costs to the respondent who is the interested party herein. On that score, is the instant petition tenable?

35. In the case of **Ngoni Matengo Cooperative Marketing Union Limited -vs- Ali Mohammed Osman (1959) EA 577**, it was held that an appeal struck out and not dismissed, can be reinstated through an application for time extension. In the instant case, the dismissed appeal cannot be resurrected through any other method including the present petition in the obtaining circumstances.

36. The question that arises thereby is whether this petition is *res judicata*. By dint of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya and the respondent’s submissions, the answer is pointedly in the positive.

37. The Black’s Law Dictionary 10th Edition at page 1504 defines the term “*res judicata*” as an issue definitively settled by judicial decision. It then sets out the three (3) essential elements of the term as follows:-

- a. An earlier decision on the issue.
- b. A final judgment on merits.
- c. The involvement of the same party or parties in privity with the original parties.

38. Similarly, in the Concise Oxford English Dictionary, 12th Edition at page 1224, “**res judicata**” means:

“ A matter that has been adjudicated by a competent court and may not be pursued further by the same parties.”

39. Admittedly, the interested party was made aware of the existence of the instant petition. He had the right to appear and file his answer to the petition and indeed, he did so as observed by the Court of Appeal in **Ogada -vs- Mollin (2009)KLR 620**. By the said answer, he vehemently denied the allegations in the petition.

40. In summary, the cardinal principle is that litigation has to come to an end; see **Halsbury’s Laws of England, 4th Edition volume 22 at page 273**.

41. It is thus, the finding of this court that by virtue of the judgment in Kisii HCC Appeal No. 607 of 2006, the instant petition is *res judicata*. The same is a clear abuse of the process of the court. In the premises, the petitioner is not entitled to the orders sought therein as the petition lacks merit.

42. Accordingly, the instant petition dated 25th July 2014 and lodged in court on 4th August 2014 is hereby dismissed with costs to the respondent and interested party.

Delivered, Signed and Dated at Migori through email pursuant to, inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 8TH day of JULY , 2020.

G. M.A. ONGONDO

JUDGE

In presence of :-

Mr. Migele holding brief for Agure Odero learned counsel for the respondent

Mr. Sam Onyango holding brief for J.O. Soire, learned counsel for the interested party

Court Clerk – Tom Maurice