



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTIONAL PETITION NO. 6 OF 2020

DR. WILLIAM GACANI MBERIA.....PETITIONER

VERSUS

CHARLES KIRIMI MBUI.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR

MERU CENTRAL.....2ND RESPONDENT

THE DISTRICT SURVEYOR MERU CENTRAL.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

RULING

1. On 22/04/2020 the petitioner filed his petition dated 21/04/2020 pursuant to **Articles 40, 64, 67, 162 (2) (B), and 165 (5) (B) of the Constitution of Kenya** where he seeks the following orders:

- a) A Declaration that parcels of land Nos. NTIMIRITI SETTLEMENT SCHEME 417, 484 and 2109 do remain as per the original registry map record without any alteration at all.**
- b) A declaration that the decision of the district land registrar dated 26th July 2016 is null and void.**
- c) An order directed to the 3rd respondent 'surveyor' to set the beacons for the access road on the ground as per the original map.**
- d) A permanent injunction to restrain the 1st respondent from trespassing, occupying, encroaching or in any way infringing on the petitioner's proprietary interest in NTIRIMITI SETTLEMNET SCHEME/417.**
- e) Cost of the petition.**

2. It is the petitioner's case that he is the owner of parcel number NTIRIMITI SETTLEMENT SCHEME/417, while the 1st respondent is the owner of NTIRIMITI SETTLEMENT SCHEME 484 and 2109, which he bought from George Mugambi. In between Parcel No. 417 on the one hand and Nos. 484 and 2109 on the other hand, there is an access road. In 2016 the 1st respondent encroached upon the land of the petitioner. Upon protest, the 1st respondent together with the said George filed a complaint with the 2nd respondent on the ground that there is a boundary dispute. The complaint did not disclose the issue at hand which was trespass and not a boundary dispute. The 2nd respondent was misled to make the finding without the input of the 3rd respondent. The finding of the 2nd respondent occasioned a lot of injustice upon the petitioner.

3. The 1st respondent raised a preliminary objection dated 8/06/2020 on the ground that the petition is *res judicata* in light of the outcome in *Meru ELC Suit No. 151 of 2016*. Thus, the petition offends the provisions of **Section 7 of the Civil Procedure Act, CAP 21 of the Laws of Kenya**. Also, that the petition is vexatious and an abuse of the court process.

4. This preliminary objection was canvassed by way of written submissions.

5. The 1st respondent submitted that the outcome in form of judgment and/or rulings in *Meru ELC Suit No. 151 of 2016* revolves around the same issue as the present suit, hence the petition is *res judicata* and that this is an attempt by the petitioner to forum shop.

6. It is also submitted that this suit does not meet the threshold for a constitutional petition. It is a fabrication of the ordinary suit christened as a petition. What's more, the issue was tackled by the land registrar of which the petitioner had the recourse to challenge the registrar's decision if he so wished. Thus, no constitutional rights have been infringed.

7. The 1st respondent relied on the following cases;

- **Naitore M'Iburi & Another v Attorney General & 2 others; Sebastian Kaaria (Interested Party) [2018] eKLR.**
- **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR.**
- **E.T v Attorney General & Another [2012] eKLR.**
- **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and infrastructure & 3 Others (2015) eKLR.**
- **Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR.**

8. The petitioner submitted that in *Meru ELC Suit No. 151 of 2016*, the court downed its tools on account of lack of jurisdiction at the preliminary stage. Based on the definition of *res judicata* it cannot be said to come to play for the matter was not heard and the court did not pronounce itself on the merits of the case. Therefore, the petition is not an abuse of the court process. The petitioner relied on the following cases;

- **County Government of Migori Ltd v INB Management Consultant Ltd [2019] eKLR,**
- **Dorine Akula v APA Insurance Company Ltd [2016] eKLR**
- **Christopher Orina Kenyariri v Salame Beach Hotel Ltd & 3 others [2017] eKLR.**

9. *Section 7 of the Civil Procedure Act* stipulates 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.”

10. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** the Court of Appeal made the following finding regarding the issue of *res-judicata*:

*“On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.”*

11. The case *Meru ELC Suit No. 151 of 2016* was between the petitioner and respondent. In this petition three other parties have been added. This does not take away the fact that the two matters constitute the same claim. See **George Omondi & another v National Bank of Kenya and 2 others [2001] eKLR, ET v Attorney General & Another (2012) eKLR.**

12. The issue in dispute raised is that the 1st respondent who owns Parcel No. 484 and 2109 has encroached onto the petitioner's land Parcel No. 417. I have perused the file *ELC Suit No. 151 of 2016*, where this court dealt with the issue as to the nature of the dispute. A preliminary Objection had been raised by the 1st respondent herein in the former suit where by the said preliminary Objection was sustained vide a ruling delivered on 11.7.2018. The petitioner filed an application dated 17.9.2018 for review of the earlier orders of dismissal of the case and in a ruling delivered on 13.11.2019, this court dismissed the application for review.

13. It is therefore clear that the court pronounced itself on whether the dispute was a boundary one or a trespass claim. Recourse therefore was in challenging the decisions of this court through the appellate system and not in re opening litigation in the guise of a constitutional petition.

14. In the circumstances, I find that the Preliminary Objection filed on 8.6.2020 is merited. This petition is hereby struck out with costs to the 1st respondent.

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

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given on 13.7.2020. 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