



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C PETITION NO. 9 OF 2019

IN THE MATTER OF ARTICLE 20(2), 21(1) AND (2), 23(1) AND 40(3) OF THE CONSTITUTION OF KENYA 2020

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PROPERTY RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF L.R NO.MAJOGE/KANYIMBO/1010

AND

IN THE MATTER OF THE ADJUDICATION REGISTER AND THE LAND ADUDICATION ACT CAP 283

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES 2013)

BETWEEN

NELSON MACHOKA KERARO (Suing as the

administrator of the estate of Kenyanya Keraro).....PETITIONER

AND

ABEL ONTWEKA KIAGE (Administrator of the

estate of Yuvenalis Kiage Omwega (Deceased).....1ST RESPONDENT

JUMA OMUGA.....2ND RESPONDENT

ONGANGI OGWOKA.....3RD RESPONDENT

THE LAND REGISTRAR, KISII.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

INTRODUCTION

1. The Petitioner filed this Petition in his capacity as the administrator of the estate of Kenya Keraro deceased. The deceased was the registered owner of land parcel number MAJOGE/KANYIMBO/1010. The Petitioner claims that said parcel of land was unlawfully transferred to Peter Okemwa who in turn sub-divided it into two portions of land known as LR No. MAJOGE/ KANYIMBO/11390 and 1391. The said Peter Okemwa then colluded with the 4th Defendant and sold the two parcels of land to the 1st, 2nd and 3rd Respondents. The Petitioner therefore claims that by their actions the Respondents have deprived him of his rights to the suit property thus infringing on his Constitutional and fundamental rights under articles 21(1), 22(1) and 40(3) of the Constitution of Kenya 2010. He prays for a declaration that he is entitled to protection under the Constitution and a cancellation of title No. MAJOGE/KANYIMBO 1390 and MAJOGE/KANYIMBO/1391.

2. In his Response to the Petition dated 10th February 2020, the 1st Respondent denies the allegations raised in the Petition and intimates that he will raise a Preliminary Objection on points of law. In particular, he states that the Petitioner lacks locus standi to institute the suit as the grant he relies on has since been revoked. He further states that the suit property is non-existent. He states that the suit is res judicata as the issues raised therein have been adjudicated upon by this honourable court in Kisii ELC Case No. 188 of 2017. He denies the allegations of fraud levelled against him and states that the suit is fatally defective, misconceived, incompetent and vexatious and is an abuse of the process of the court.

PRELIMINARY OBJECTION

3. The 1st Respondent filed a Notice of Preliminary Objection dated 6th December 2019 in which he raises the following points:

- i. That this matter is *res judicata* on account of the determination in KISII HC ELC CASE NO. 188 of 2017.
- ii. That the Petitioner's claim is time-barred as per the provisions of section 7 of the Limitation of Actions Act Cap 22 of the Laws of Kenya
- iii. That the Petitioner's letters of Administration obtained vide Kisii CM Succession Cause No. 101 of 2019 are tainted and were corruptly, questionably and/or controversially ill-gotten, same having been obtained on the basis and/or strength of a Certificate of death which has since been cancelled and a letter from the Chief, Kanyimbo location, which he has since revoked by a subsequent letter to court.
- iv. That the suit herein is misconceived, bad in law, incompetent, lacks merit, is brought in bad faith, is frivolous, scandalous and an abuse of this Honourable Court's process.
- v. That the Petitioner's suit raises no reasonable cause of action against the 1st Defendant considering that the suit property is non-existent and/or imaginary.
- vi. That the Petitioner's suit is not sustainable and/or entertainable.
- vii. That the Petitioner has come to court with tainted hands, is mean with the truth and is guilty of conscious concealment of material particulars, tendering conscious falsehoods, distortions and misrepresentation of facts.
- viii. That the Petitioner has mounted the suit herein without *locus standi* as he irregularly and wrongfully moved court though distantly related to Kenya Keraro- deceased instead of Peter Okemwa Keraro –deceased , who was at all material times to this suit the duly registered owner of the so called suit property.
- ix. That the Petitioner's suit is fatally defective, the petitioner having failed to take out Letters of Administration in respect of the estate of Peter Okemwa Keraro deceased and/or in suing a legal representative of his estate.

4. The Preliminary Objection was canvassed by way of written submissions and both parties filed their submissions.

5. In his submissions, counsel for the 1st Respondent expounded on the Preliminary points. In urging the point that this suit is res judicata, he submitted that the issues raised in this Petition were determined satisfactorily on 31.5.2019 in Kisii ELC Case No. 188 of 2017 with no appeal being preferred by the Petitioner. He further submitted that the Petitioner has camouflaged this suit as a Constitutional Petition and not simply a land matter capable of being resolved as a land matter which had been determined in Kisii ELC Case No. 188 of 2017.

6. Counsel also submitted that the Petitioner has no locus standi as the *Ad litem* grant that he obtained for purposes of filing this suit was revoked on 30th January 2020.

7. In his submissions counsel for the Petitioner argues that the Petition is not res judicata as the previous suit was not heard on merits. He counters the argument that the suit is time barred by submitting that Constitutional Petitions do not have a time limit. On the issue of locus standi, he submits that the Petitioner is a brother to the late Kenya Keraro deceased and since the deceased did not have a wife or children, the Petitioner has a right to claim his estate. He further refutes the claim that the Petition is fatally defective as it is concerned with the illegality of the titles acquired by the Respondents which are in violation of the Petitioner's fundamental rights.

ISSUES FOR DETERMINATION

8. Having considered the Notice of Preliminary Objection and the rival submissions the following points emerge for determination:

1. Whether the Petition is res judicata.
2. Whether the Petitioner has locus standi.
3. Whether the Petition is statute barred.
4. Whether the Petition is misconceived, incompetent and bad in law and whether it ought to be struck out.

ANALYSIS AND DETERMINATION

9. The starting point is to define what a Preliminary Objection is.

In the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd 1969 EA 696** the court held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

Justice Newbold in the said suit argues that:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

10. Viewed against the above definition, the grounds in the Notice of Preliminary Objection qualify as preliminary objections as they raise pure points of law. I will therefore examine each of them in relation to the Petition.

11. The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act CAP 21. This section provides as follows:-

“Section 7. Res judicata

“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.”

12. It is not in dispute that the Petitioner filed a Plaint in Kisii ELC Case No. 188 of 2017 against the Respondents herein over the same subject matter. In the said suit he claimed that the Respondents had unlawfully acquired title to the suit property from Peter Okemwa who had no capacity to transfer it to them. He sought inter alia an order for cancellation of title No. MAJOGE/CHACHE/KANYIMBO/1390 and 1391 so that the parcel reverts back to the original owner that is land parcel No. MAJOGE/CHACHE/KANYIMBO/1010 in the name of Kenyana Keraro (Deceased). The said suit was struck out on account of being statute barred on 31st May 2019.

13. In the instant suit the Petitioner has sued the Respondents claiming that they fraudulently caused the suit property to be registered in the names of the 1st, 2nd and 3rd Defendants thereby infringing on the Petitioner’s fundamental rights. He therefore seeks a declaration that the transfer and registration of the titles in respect of L.R No MAJOGE/CHACHE/KANYIMBO/1390 and 1391 be cancelled.

14. In the case of **Charles Mwangi Ringuru v Nancy Wangare Mathenge (2014) eKLR** the court held that:

*“The doctrine of res judicata, which has been severally stated as a bar to the many proceedings in the suits related to this claim, is of the effect that no proceedings can be continued upon a cause of action once a decision has been pronounced. It then means the judgment upon which the pronouncement was based on stands, unless it’s appealed upon. The 2 judgments of the court culminating to the pronouncement of the res judicata are the SRMCC 36/1970 and the HCCC 3/1973. The magistrate court found that the suit was time barred and dismissed the suit with the right of appeal. In that suit the Defendant was represented by an advocate. The claim of time limitation is a jurisdictional issue as was held in case of **Peter Nyamai & 7 Others V M. J. Clarke Limited [2013] eKLR**. The judgment was never appealed, so it stood. Thus it meant the land belonged to the Defendant as it meant that the Plaintiff had no case abinitio.*

The defendant instead of extracting and executing that decree that found in his favour went ahead and filed a H.C.C.C No. 3 of 1973 for eviction of the Plaintiff. In this new matter the Plaintiff filed a counter claim for adverse possession which were all dismissed for want of prosecution. Since doctrine of res judicata rests on matter that have been adjudicated on merit, the Plaintiff based on that knowledge went ahead and filed the 1988 suit to pursue the same cause of action that had been dismissed as time barred and that of adverse possession.

However, the court found that both issues were res judicata based on the two previous suits and dismissed that suit. The Plaintiff did not appeal against this ruling, but instead went ahead to defend in court why the suit should not be struck out when the Defendant filed such an application. The court heard and reserved the matter which had already been ruled to be res judicata”.

15. In the case of *Edwin Thuo v Attorney General and Anor* **Petition No. 212 of 2012**, it was stated that the Court must be vigilant and guard against evading the doctrine of res judicata by introducing new causes of action. It was stated as follows;

“The Courts must always be vigilant to guard against 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 is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction”

16. In the instant suit, the question that looms large is whether the Petitioner has tried to evade the doctrine of res judicata as well as limitation by filing this Petition. The courts have repeatedly held that where an infringement can be redressed within legislative framework, the course to follow is to take out proceedings under the framework and not under the Constitution unless that framework does not provide an efficacious and satisfactory answer to the litigant’s grievance. See the cases of **Isaac Ngugi v Nairobi Hospital & Another [2013] eKLR** and **Rich Productions Ltd v Kenya Pipeline Ltd & Public Procurement Oversight Authority [2014] eKLR**. In **C.A No. 84 of 2004 Damian Belafonte v The Attorney General of Trinidad and Tobago** the court set the approach to be followed in examining whether the invocation of a constitutional relief, where a parallel remedy exists, amounts to an abuse of the Court process. The court held that:

“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it inappropriate to take that course. As a general rule, there must be some feature which, at least arguably, indicates that means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a nuisance, or abuse, of the court’s process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power.”

17. It is clear that the Petitioner’s suit was capable of being determined by way of Plaint and that is why he filed ELC Case No. 188 of 2017. It is only when the said suit was struck out for being statute-barred that he instituted the instant suit by way of a Constitutional Petition so as to circumvent the hurdle imposed by the Limitation of Actions Act. The court having held that the suit was statute-barred, reviving it as a Constitutional Petition does not augur well for the Petitioner.

18. To make matters worse, the *Ad Litem* Grant that had been issued to the Petitioner in Kisii CM Succession Cause No. 101 of 2017 was revoked on 30th January 2020 thus depriving him of locus standi.

19. The upshot is that the Petition is incompetent, misconceived and an abuse of the court process and it is hereby struck out with costs to the 1st Respondent.

Dated signed and delivered via video conference this 13th day of October 2020.

J.M ONYANGO

JUDGE