



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**PETITION NO. 25 OF 2019**

**IN THE MATTER OF: ARTICLES 10, 22, 23, 40, 50(1), 47**

**AND 232 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**A.A. BAYUSUF & SONS LIMITED.....PETITIONER**

**VERSUS**

**1. COUNTY GOVERNMENT OF TANA RIVER**

**2. FREDRICK JOHN BAHOLA.....RESPONDENTS**

**RULING**

1. By their Notice of Motion dated and filed herein on 15th August 2019, A.A. Bayusuf & Sons Ltd (the Petitioner) prays for an order of temporary injunction to be issued against the two Respondents herein prohibiting them from dealing with, leasing, fencing, surveying, selling, developing or trespassing upon its parcel of land known as Plot No. TRCC/HO.C/470 (PDP No. TRD/312/2004/91) situated in Hola town pending the hearing and determination of this Petition. The Petitioner in addition urges this Court to direct the Officer Commanding Police Station Hola to ensure compliance of the orders sought.

2. The application which is supported by an affidavit sworn by a director of the Petitioner Abdullatif Abdulhakim Ahmed is premised on the grounds inter alia:

- i) That the Petitioner is the proprietor of the said property having been issued with a letter of allotment by the 1st Respondent;**
- ii) That the Petitioner has been in possession of the suitland for over 15 years and has been dutifully paying the required annual land rent without any dispute from anyone;**
- iii) That the Respondent has purported to cancel the Petitioner's Letter of Allotment without any reason or notice;**
- iv) That the Petitioner only stumbled upon the letter of cancellation dated 13th February 2019 sometime in July 2019 while following up on a criminal case it had lodged against the 2nd Respondent;**
- v) That arising from the said letter, the Office of the Director of Public Prosecutions (DPP) has now discontinued the criminal case that was facing the 2nd Respondent;**
- vi) That following the discontinuation of the case, the 2nd Respondent, with the help and collusion of the 1st Respondent, has now without any colour of right or justification started fencing off the Petitioner's land and has erected a structure thereon to operate a car-wash business; and**
- vii) That the said actions constitute a blatant violation of the Petitioner's right to the full enjoyment and satisfaction of its property and unless restrained, the Petitioner will suffer irreparable loss.**

3. The application is opposed. In a Replying Affidavit sworn and filed herein on its behalf by its Director Legal Services and Acting County Attorney Isaiah Ndisi Munje, the County Government of Tana River (the 1st Respondent) avers that the Petition lacks clarity and that the same does not disclose any reasonable cause of action against itself.

4. The 1st Respondent further avers that the Petitioner herein was allocated a portion of land measuring 0.04 Ha by its predecessor now the defunct County Council of Tana River but the allocation was subject to the following mandatory conditions:

- a) **That the Plot should be developed within two years from the date of allocation and that the plan for building thereon be submitted for approval within six months.**
- b) **That payment of fees to be made within 30 days from the date of the issuance of the Allotment letter;**
- c) **Any building or works thereon must be carried out within the confines of the boundaries of the plot;**
- d) **That any rate and/or rates payable be paid timeously and on demand; and**
- e) **That the Petitioner do pay the requisite fees to signify acceptance of the allotment and the terms and conditions contained therein.**

5. The 1st Respondent accuses the Petitioner of failing to adhere to the said terms by in particular failing to develop the suit property to-date. The 1st Respondent avers that the Petitioner's interest in the suit property were extinguished upon expiry of two years after he failed to develop the same.

6. The 1st Respondent further avers that the Petitioner has never been in possession of the suit property and urges this Court to dismiss the claim as he does not stand to suffer any harm or prejudice.

7. The 2nd Respondent- Fredrick John Bahola is equally opposed to the application. In his Replying Affidavit filed herein on 23rd October 2019, the 2nd Respondent avers that the Petitioner failed to develop the suit property within two years as per the terms of his letter of allotment.

8. The 2nd Respondent avers that he is a member of the family of Mkahindi Righo who was the Plaintiff in **Malindi ELC Case No. 168 of 2012**. He further avers that the suit property borders a parcel of land belonging to one Michael Seth Kaseme who is the 1st Defendant in **ELC Case No. 168 of 2012 and the 1st Respondent in Malindi Petition No. 18 of 2012**. He further states that the suit property belongs to the Petitioners in Malindi Petition No. 18 of 2012 and the Plaintiff in **Malindi ELC 168 of 2012** to the exclusion of the 1st Respondent herein.

9. The 2nd Respondent further asserts that in a Judgment delivered on 15th April 2016 in the said two cases which were consolidated, it was decreed that the suit property belongs to the family of the 2nd Respondent. He reiterates that that being the case, the suit property was not available for allocation by the 1st Respondent.

10. The 2nd Respondent further asserts that this matter is res judicata the said **Malindi ELC Case No. 168 of 2012** as consolidated with **Malindi Petition No. 18 of 2012**. Accordingly, the 2nd Respondent contends that the orders sought herein should, in the interest of justice and fairness, be refused and the Petition be dismissed with costs.

11. In addition to the said Reply, the 2nd Respondent has by a Notice of Preliminary Objection dated 18th October 2019 and filed on the same date as the Replying Affidavit objected to the Petition on the grounds that:

**1. The issues canvassed in support of the Petition are res judicata the same having been directly and substantially in issue between, inter alia, the same parties herein in Malindi ELC Case No. 168 of 2012 as consolidated with Malindi Petition No. 18 of 2012 wherein this Honourable Court in its Judgment of 15th April 2016, held inter alia that Plot No. TRCC/HoL/C/470 (PDP No. TRD/312/2004/91) together with PDP No. TRD/312/2004/91 belongs to the Petitioners in Malindi Petition No. 18 of 2012 and the Plaintiff in Malindi ELC Suit No. 168 of 2012 and their family to the exclusion of the defunct County Council of Tana River and now the County Government of Tana River and the other Respondents in Malindi ELC Suit No. 168 of 2012 as consolidated with Malindi Petition No. 18 of 2012.**

**2. This Honourable Court has no jurisdiction to determine this matter the same having been decided by a fellow Judge of concurrent jurisdiction in Malindi Petition No. 18 of 2012.**

12. I have perused and considered the application as well as the response thereto. I have also carefully considered the submissions and authorities pleaded before me by the Learned Advocates for the parties.

13. The essence of a Preliminary Objection was succinctly set out by the East African Court of Appeal in the locus classicus case of Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors (1969) EA 696 at 700 wherein Law, JA stated thus:

**“.....a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

14. In his Preliminary Objection herein, the 2nd Respondent contends that the dispute herein is res judicata as the issues herein have been

directly and substantially in issue in Malindi ELC Case No. 168 of 2012 as consolidated with Malindi ELC Petition No. 18 of 2012. It is accordingly his case that this Court has no jurisdiction to determine the dispute as a decision had already been made thereon by a fellow Judge of concurrent jurisdiction.

15. The doctrine of res judicata is captured under Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya 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.”**

16. The Petitioner herein craves an order of injunction to restrain the Respondents from dealing with the suit property described in their pleadings as a parcel of land situated in Hola town measuring 0.045 Ha and more particularly known as Plot No. TRCC/HO/C/470 (PDP No. TRD/312/2004/91). It is the Petitioner’s case that they were issued with a letter of allotment for the said parcel of land by the 1st Respondent’s predecessor the County Council of Tana River in the year 2004.

17. The Petitioner avers that the 1st Respondent has since, in collusion with the 2nd Respondent purported to cancel the Petitioner’s letter of allotment without any reason or notice.

18. At paragraphs 24 and 25 of the Replying Affidavit sworn on its behalf by its Director Legal Services; the 1st Respondent County Government avers in response to the Petition as follows:

**“24. The 1st Respondent has never colluded with the 2nd Respondent as alleged in Mr. Ahmed’s affidavit. As a matter of fact, the 1st Respondent is aware that the suit property has also been the subject of proceedings before this Honourable Court in Malindi ELC Case No. 168 of 2012 (Consolidated with Petition No. 18 of 2012; Bahola Mkahindi Rhigo & 9 Others –vs- Michael Seth Kaseme & 3 Others).**

**25. The 1st Respondent intends to challenge the decision and has filed an application in that suit, seeking interpretation of the Judgment and orders of Justice Angote.”**

19. In his Replying Affidavit, the 2nd Respondent avers that he is a member of the family of Mkahindi Rhigo who was the Plaintiff in the said Malindi ELC Case No. 168 of 2012. He further avers that the suit property described herein borders a parcel of land which belonged to the 1st Defendant in the cited case.

20. From a perusal of the Judgment of the Honourable Angote J delivered herein on 15th April 2016, it was evident that the family of Bahola Mkahindi Rhigo instituted the said ELC Case No. 168 of 2012, against the 1st Respondent seeking inter alia, a declaration that the parcel of land measuring 15 acres situated near Hola Water Supply Site and Laza Primary School belongs to them. In addition, they sought an order of certiorari quashing the allocation of part of the suit property by the 1st Respondent to some three persons named therein.

21. From the responses of the two protagonists in the said ELC Case No. 168 of 2012, it was clear to me that the suit property herein is part and parcel of the same property that was in dispute in the consolidated suit that was determined on April 2016.

22. While it is true as contended by the Petitioner that he was not party to the dispute in the consolidated suit, the 1st Respondent County Government asserts that he was aware of the litigation surrounding the said piece of land. As it were, the drafters of the Civil Procedure Act provided several explanatory notes explaining the instances that would constitute res judicata under Section 7 of the Act. Under Explanation No. 6 thereof, it is provided that:

**“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this Section, be deemed to claim under the person so litigating.**

23. The Petitioner herein is claiming an interest on the suit property as a beneficiary of an allotment thereon by the 1st Respondent. From the Judgment delivered herein on 15th April 2016, it is apparent that the said allotment was done by the 1st Respondent on the presumption that it owned the land. By the said Judgment, that presumption was found to have no basis as the Court proceeded to decree the suit property to the 2nd Respondent’s family.

24. While the Petitioner may have a claim for compensation against the 1st Respondent, I am persuaded that to proceed with this Petition as filed would be to try and ask this Court to pronounce itself on a subject that has already been authoritatively determined by a Court of competent and equal jurisdiction.

25. I do not imagine myself to have that jurisdiction and I therefore find merit in the Preliminary Objection and proceed to strike out the Petition.

26. Each Party shall bear their own costs.

**Dated, signed and delivered at Malindi this 5th day of November, 2020.**

**J.O. OLOLA**

**JUDGE**