



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CONST. PETITION NO. 10 OF 2018

JULIUS MUTIE MUTUA.....1ST PETITIONER

ALEX KYALO MUTEMI.....2ND PETITIONER

PASCAL KISELI BASILIO MUNGUI (*Suing as the officials of*

AIMI MA LUKENYA SOCIETY).....3RD PETITIONER

VERSUS

EAST AFRICA PORTLAND CEMENT CO. LTD.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

KENYA RAILWAYS CORPORATION.....3RD RESPONDENT

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

RULING

1. When the matter came up for the hearing of the Application dated 14th June, 2018 for conservatory orders, the parties agreed to argue the Preliminary Objection raised by the 1st Respondent in its Grounds of Opposition dated 13th July 2018 and the 3rd Respondent's Preliminary Objection. In the said Grounds of Opposition, the 1st Respondent averred that there are other pending suits on the same subject matter and that the Applications and the Petition herein should be struck out.

2. The 3rd Respondent's Notice of Preliminary Objection raised the same point of law: that the Petition and Application are sub-judice Machakos ELC. No. 74 of 2014; that the parties herein are the same parties in Machakos ELC. No. 74 of 2014 and that the Petition should be struck out.

3. The Preliminary Objection raised by the 1st and 3rd Respondents proceeded by way of written submissions. The 1st Respondent's advocate submitted that the matters in issue herein are also directly and substantially in issue before this court in Machakos ELC No. 74 of 2014; that the parties in the two suits are the same; that the sub-judice rule looks into the substance of the suit and that the sub-judice rule serves the purpose of ensuring that there is no multiplicity of suits over the same subject matter. Counsel relied on several authorities which I have considered.

4. The submissions of the 1st Respondent's advocate are similar in all respects with the 3rd Respondent's advocate's submissions, which I have summarized above.

5. The Petitioners' advocate submitted that in Machakos ELC No. 74 of 2014, the dispute relates to the whole of 4,298 acres; that the current Petition relates to the compulsory acquisition of 900 acres of L.R. No. 10424 and that the Petition has included the 2nd, 3rd and 4th Respondents, which are public entities.

6. In the Petition dated 14th June, 2018, the Petitioners averred that Land Reference number 10424 measuring approximately 4,298 acres is registered in the name of their organization (*Aimi Ma Lukenya Society*); that the Society purchased the land from the 1st Respondent and that the suit land was sub-divided amongst the members of the Society.

7. The Petitioners averred that when the 1st Respondent trespassed on the suit land, they filed Machakos ELC. No. 74 of 2014; that the 2nd Respondent has been engaged in secret negotiations for the compulsory acquisition of 900 acres of the suit land for the purpose of allocating it to the 3rd Respondent for the purposes of constructing a dry port and that the 1st Respondent has no claim over the suit land.

8. According to the Petitioners, the land to be compulsorily acquired shall in part be leased to some transport companies who are to construct warehouses or go-downs and that this exercise should be stopped by the court. The Petitioners are seeking for a perpetual injunction against the Respondents from claiming ownership of L.R. No. 10424 and in any manner interfering with the Petitioners peaceful possession of the same.

9. Indeed, the Petitioners admitted in their Petition that they had sued the 1st Respondent in ELC. No. 74 of 2014 for trespass.

10. Although the Respondents did not produce in evidence copies of pleadings in Machakos ELC. No. 74 of 2014, this court went out of its way to call for the file in Machakos ELC. No. 74 of 2014 which is still pending.

11. The Plaint in Machakos ELC No. 74 of 2014 shows that the Petitioners herein sued the 1st Respondent as the only Defendant. In the said suit, the Petitioners alleged that they are the registered proprietors of L.R. No. 10424; that they have since sub-divided the land amongst their members and that the Defendant, through its agents, is trespassing on the suit land.

12. The Petitioners in Machakos ELC. No. 74 of 2014 are seeking for an injunction restraining the 1st Respondent (*Defendant*) from trespassing on L.R. No. 10424.

13. The law relating to sub-judice was set out by Odunga J. in the case of ***Edward R. Ouko vs. Speaker of the National Assembly & 4 others (2017) eKLR*** as follows:

“This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present.”

1. There must exist two or more suits filed consecutively.

2. The matter in issue in the suits or proceedings must be directly and substantially the same.

3. The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.

4. The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

14. Although the suit property in this Petition is the same as the suit property in Machakos ELC. No. 74 of 2014, the issues raised are not directly and substantially the same. In Machakos ELC No. 74 of 2014, the Plaintiffs (*Petitioners*) herein alleged that the Defendant (*1st Respondent*) had trespassed on the entire parcel of land. However, in the Petition, the Petitioners have alleged that the 2nd Respondent is in the process of compulsorily acquiring a portion of the suit land measuring 900 acres with a view of allocating it to the 3rd Respondent. The Petitioners have therefore sought for an order stopping the exercise by the 2nd Respondent of compulsorily acquiring 900 acres of the suit land.

15. Other than the issues in the two suits being different, the parties in the Petition are different from the parties in Machakos ELC No. 74 of 2014. As mentioned in the preceding paragraph, the Petition has included the 2nd and 3rd Respondents who are not parties in Machakos ELC. No. 74 of 2014.

16. In view of the fact that some of the issues in the Petition are not directly and substantially similar to the issues raised in Machakos ELC No. 74 of 2014, and the parties in the two suits being different, I find that this suit is not sub-judice Machakos ELC No. 74 of 2014. However, considering that the issue of ownership of the suit land is common in both suits, the most appropriate position is to have the two suits heard together to avoid a situation where the court is likely to write conflicting Judgments.

17. For those reasons, I find the Preliminary Objections raised by the 1st and 3rd Respondents to be unmeritorious. The said Preliminary Objections are dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE