



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC PETITION NO. 1 OF 2018**

**JULIUS NGULI LOLI.....1<sup>ST</sup> PETITIONER**

**PETER MUTUA MWISA.....2<sup>ND</sup> PETITIONER**

**JAMES MAITHYA MWISA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**MUOKA YULU.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. What is before this Court for ruling is the 1<sup>st</sup> Respondent's Notice of Preliminary Objection on points of law dated 09<sup>th</sup> July, 2018 and filed in court on even date. The grounds raised by the 1<sup>st</sup> Respondent are that:-

**(1) A petition cannot be used to get orders or remedies that can be given by a Judicial Application process and therefore, the Petition has no merits.**

**(2) The Petition is re judicata since the subject matter is the same and the parties who are in this matter now were represented by their fathers or relatives and what the Petitioners fathers or relatives that they had failed to get when the matters were before competent Courts cannot be given now.**

**(3) The New Constitution 2010 did not give parties who litigated in Court before 2010 and lost, a new lease of life to file fresh cases through the parties themselves or their relatives or agents.**

**(4) The Petitioners cannot revive what was properly done in Court and what was also done by the land adjudication officers up to the minister's level under the provisions of Land Adjudication Act Cap 289 Laws of Kenya.**

**(5) The Petitioners, their father had exhausted all the Court processes that were there when they filed in cases in Court which they lost and they also exhausted the provisions of the land adjudication process up to the minister's level and cannot use a Third process of filing a Petition to address what was not obtained by the Court process and Land Adjudication Process and Litigation cannot be forever.**

**(6) The Petition is an abuse of the Court process and should be dismissed without a hearing since the Law does not support their Petition.**

2. On the 03<sup>rd</sup> March, 2018 the Court directed that the Preliminary Objection be disposed off by way of written submissions.

3. The 1<sup>st</sup> Respondent and the Petitioners filed their respective written submissions dated 09<sup>th</sup> and 08<sup>th</sup> November, 2018 on the 12<sup>th</sup> of the same month.

4. In his submissions Mr. Masika pointed out the order of certiorari, prohibition and mandamus can only be granted in a judicial review whose procedure is provided for under Order 53 while the substantive law is Section 8 of the Law Reform Act.

5. The Counsel cited **Order 53 Rule 1 of the Civil Procedure Rules** which states:-

*“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.”*

In addition, the Counsel cited **Section 8 of the Law Reform Act** which provides that:-

*“Orders of mandamus, prohibition and certiorari substituted for writs*

*1. The High Court shall not, whether in exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.”*

6. The counsel went on to submit that for one to challenge judgments made earlier by subordinate court or any Tribunal whether private or public, the same can only be by way of judicial review and not by a petition and therefore the petition herein is not competent and should be struck out. The counsel pointed out in order for the prayers sought to be entertained, the application can only be made within a period of 6 months from the date when the decision challenged was made. The counsel was of the view that to do otherwise, this would defeat the provisions of the substantive law as the prayers sought are time barred.

7. It was further submitted by the counsel for the 1<sup>st</sup> Respondent that the petition is res judicata since the subject matter and the parties are the same or their relatives. That what the Petitioners fathers or relatives failed to get in court in 1973, their sons or relatives cannot get now after the new constitution came into force in 2010. The counsel added that if this was to be the case, then all cases litigated in court before 2010 would start afresh.

8. The counsel submitted that the constitution could only operate from 2010 and not backwards where the disputes had been settled or finalized by a competent court of law. The counsel pointed out that the issues in the petition cannot be litigated afresh and should be held to be res judicata. The counsel submitted that the court has no jurisdiction to entertain this suit as provided by **Section 7 of the Civil Procedure Act** which states 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.”*

He pointed out that the aforementioned section talks of between the same parties or between parties under whom they or any of them claim and added that this means that the petitioners were represented by their fathers or grandfathers when the cases referred by the Petitioners were heard and a decision was given by a competent court.

9. The counsel further submitted that the Petitioners should exhaust the provisions provided by the Land Adjudication Act Cap 289 of the Laws of Kenya since in paragraph 4 of the Petition, it is stated that plots Nos. 923 and 925 are located at Ikalyoni Land Adjudication Section within Makueni County. The Counsel pointed out that the Petitioners have not stated when the land adjudication exercise began nor have they shown the stage at which the process is at. He submitted that the petitioner have also not attached consent from the Land Adjudication Officer, allowing them to file this petition in court as is required by the provisions of Section 30(1), (2), (3) and (4) of the Land Adjudication Act which provides as follows:-

*“30. Staying of land suits*

*(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.*

*(2) Where any such proceedings were begun before the publication of the notice under Section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.*

*(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.*

*(4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceeding's concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.”*

10. On the other hand, the Counsel for the Petitioners submitted that in order for this Court to establish if the matter is res judicata, it was imperative for the party that alleges to prove that point as required by Section 107 of the Evidence Act.

11. The counsel went on to submit that no factual evidence had been placed before this court to show that the parties herein litigated before under the same names involving the subject matter and that the matter was heard and determined with finality. He referred to the case of **Mukisa Biscuits Manufacturing Company Ltd. Vs. West End Distributors Ltd. (1969) EA 696** where Sir Charles Newbold P had this to say regarding what constitutes a Preliminary Objection;

*“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 has to be ascertained...”*

The counsel was of the view that the Preliminary Objection is not on a pure point of law and therefore it must fail since to prove that the matter is res judicata, evidence must be provided.

12. Having read the Notice of Preliminary Objection, as well as the submissions filed by the Counsel on record for the 1<sup>st</sup> Respondent and the Petitioners respectively, I do note that this is a constitutional petition that seeks amongst other prayers, judicial review orders. The petitioners have grounded their petition under Article 23 of the Constitution amongst other articles. Contrary to the assertions by the Counsel for the 1<sup>st</sup> Respondents that the prayers sought can only be entertained if brought within a period of six months as provided for under Order 53 of the Civil Procedure Rules. Article 23 of the Constitution does not provide the time limit within which a party can file a petition or suit to seek for such prayers as the Petitioners have done. Unlike an ordinary statute, the constitution is forward and backward looking. It was perfectly within their rights for the petitioners to file this petition. However, by their own admission in paragraphs 7 and 8 of their petition, it is clear that there was civil case number 167/1973 at Kilungu District Magistrate’s Court which was decided in favour of the 1<sup>st</sup> Respondent, Loli Mangao Nthuku (*now deceased*) as well as one Kithakye Lau filed Civil Appeal No.119/1976 at the Resident Magistrate’s Court Machakos. The appeal was dismissed resulting in High Court Civil Appeal No.186 of 1981 which was marked as abated on 09<sup>th</sup> July, 1997 on account of the appellants’ death. The Petitioners have stated that attempts to revive the appeal were futile.

13. Given the above circumstances, I would agree with the Counsel for the 1<sup>st</sup> Respondent that this petition is res judicata. The Petitioners are trying to get that which their fathers or relatives failed to get in the aforementioned three suits. This petition is caught up by the provisions of Section 7 of the Civil Procedure Act. In the circumstances, I hereby proceed to strike out the petition with costs to the 1<sup>st</sup> Respondent.

**Signed, dated and delivered at Makueni this 03<sup>rd</sup> day of May, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of:-**

Mr. Hassan holding brief for Mr. Masika for the 1<sup>st</sup> Respondent

Mr. Langananga holding brief for Mr. D. M. Mutinda for the Petitioners

Ms. Nzioka - Court Assistant

**MBOGO C.G., JUDGE,**

**03/05/2019.**