



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION NO. 1 OF 2019

BEATRICE AVIONA

CALEB OMARI MBALANYA.....PETITIONERS

VERSUS

THE PRINCIPAL MAGISTRATE – VIHIGA

FRANCIS MBALANYA OMARI

THE LAND REGISTRAR - VIHIGA COUNTY

THE ATTORNER GENERAL.....RESPONDENTS

JUDGEMENT

The petition is dated 29th January 2019 and the submissions are that, 1st and 2nd petitioners are the joint registered owners of land parcel No. Kakamega/Lugovo/1775. The petitioners jointly aver that the 2nd respondent filed a claim in Vihiga Land Disputes Tribunal claiming that Land Parcel No. Kakamega/Lugovo/340 be subdivided among five brothers and subsequently acquire a portion occupied by 1st petitioner Beatrice Aviona Oyigo. That at the time of filing the claim at the tribunal land Parcel No. Kakamega/Lugovo/1775 was registered in the name of the petitioners. That at the Vihiga Land Disputes Tribunal the petitioners herein who are the registered owners of land parcel No. Kakamega/Lugovo/1775 were never parties to the suit and never accorded the opportunity to be heard. That the subject matter of litigation was land parcel No. Kakamega/Lugovo/340 which title had already been closed. That the Vihiga Land Disputes Tribunal made a verdict that Francis Mbalanya Omari's (2nd respondent's) name be included in the title of land parcel No. Kakamega/Lugovo/1775. That the said respondent as a result of the award by the tribunal has moved the Land Registrar to de-gazette and cancel title No. Maragoli/Lugovo/1775. That the petitioners aver that the tribunal proceedings leading to the de-gazette notice of land title No. Kakamega/Lugovo/1775 was in contravention of the law and the Constitution. The legal foundation is as follows;

1. Article 20 of the Constitution provides for the application of Bill of Rights.
2. Article 21 provides for the implementation of rights and fundamental freedoms.
3. Article 22 provides for enforcement of Bill of rights.
4. Article 40 of the constitution provides for the right to own and protect property.
5. Article 47 of the Constitution provides for a fair administrative action.
6. The jurisdiction of this court to grant orders in respect of the Bill of rights is provided for under Article 23 of the Constitution.

The jurisdiction of the repealed Land Disputes Tribunal was set out under section 3 (1) as follows subject to this Act, all cases of civil nature involving a dispute as to

- (a) The division of or the determination of boundaries to land including land held in common.
- (b) Claim to occupy or work land or
- (c) Trespass to land shall be heard and determined by a tribunal under section 4.

The Land Control Act in section 6 and 8 thereby control all transactions affecting agricultural land. The petitioners jointly aver that they were not parties of the Vihiga SPM Misc. Case No. 19 of 2006 where the 2nd respondent filed an application to adopt the tribunal's award. The tribunal awarded the 2nd respondent right to be enjoined land parcel No. Kakamega/Lugovo/340 based on an agreement made between the 2nd respondent acting as an agent of the 1st petitioner and Harrison Mulusa Adalo. The petitioners jointly aver that the tribunal had no jurisdiction to deal with issues of contract and awarded the 2nd respondent title to land. The jurisdiction of the tribunal was set out in section 3 (1) of the Repealed Land Disputes Tribunal act and it is clear that it had no power to order deregistration of land and subsequent registration and the subsequent adoption of the award and execution thereof were equally without jurisdiction in law hence null and void. That the petitioners were denied the right to be heard on and parcel registered in their joint names. That the petitioners jointly aver that the decree adopting the Vihiga Land Disputes Tribunal is on land parcel No. Kakamega/Lugovo/340 and not Kakamega/Lugovo/1775. That the petitioners jointly aver that the said decree is non executable ad amounts to reach of fundamental rights which is right to own property under Article 40 of the Constitution. The petitioners jointly aver that this court has power under section 7 (2) of the Civil Procedure Act to determine whether the Land Disputes Tribunal had power to act as it did herein and invoke its jurisdiction under Art. 21, 22 and 23 of the Constitution and remedy the situation. The petitioner prays for;

- (a) A declaration that the tribunal's award made on 30th January, 2006 was made without jurisdiction hence null and void.
- (b) That the petitioner's rights to be heard and right to property were violated.
- (c) That the gazette notice issued by the Land Registrar de-gazetting title No. Kakamega/Lugovo/1775 is null and void abinitio.
- (d) Costs of the petition to the petitioner.

The 2nd respondent submitted that, he purchased a portion of land known as Kakamega/Lugovo/340 from one Harrison Mulusa Adalo at a consideration of Ksh. Twenty thousand (Ksh. 20,000/=). That he then paid for a semi-permanent house at a consideration of Kenya shillings seventeen thousand (Ksh. 17,000/=). That he paid a consideration of thirty-seven thousand Kenya Shillings (Ksh. 37,000=) in total in the year 1991. (Annexed is a copy of the sale agreement marked "FMO1"). That in the year 2005, he launched a claim at the Lands Tribunal through claim No. V/LTD/13B/2005 (Annexed and attached herein is a copy of the tribunal proceedings marked "FMO2"). That his main claim was that upon the closure of the title to Kakamega/Lugovo/340, the late Esau Sidiko Adolo had without his consent given the whole title of Kakamega/Lugovo/1775 to the petitioners herein thus disinherit him of his rightful share. That upon the said sub-division the parcel of land known as Kakamega/Lugovo/1775 was then registered in the name of the petitioners. That the 2nd petitioner, through the purchase of the portion belonging to Juma Tambwe Adolo should have acquired a title of the same rightfully but not a title to the whole parcel of land. That after the conclusion of the tribunal's case, the case was decided in his favour. That through Miscellaneous application 19 of 2006, he then moved the court to have the said award of the tribunal adopted. (Annexed and attached is a copy of the court proceedings Misc. Application 19 of 2006 marked "FM03"). That on the 21st day of November, 2006, the court through an order adopted the award of the Lands Tribunal. (Annexed and attached is a copy of the decree marked "FMO4"). That there being no appeal from the said award, he then applied to the Land Registrar in Vihiga County for the cancellation of the title Kakamega/Lugovo/1775. That the petitioners herein then filed a suit against him in the Environment and Land Court Case Number 32 of 2014 seeking orders to restrain the de-gazette the said title. That the suit ELC 32 of 2014 was later on dismissed for want of prosecution (Annexed and attached is a copy of the order marked "FMO5"). That the petitioners through an application dated 26th April, 2018 sought to have ELC 32 of 2014 reinstated. (Annexed and attached is a copy of the said application marked "FMO6"). That the application was dismissed with costs to the 2nd respondent. (Annexed and attached is a copy of the ruling marked "FMO7")

That the petitioners then moved to Vihiga Law Courts where they filed an application in ELC 154 OF 2018, formerly Miscellaneous Application 19 of 2006 seeking among other orders to stay the intended de gazette of the title Kakamega/Lugovo/1775 and a review and/or setting aside of the orders made on 30th January 2006 and issued on 21st November 2006. (Annexed and attached is a copy of said application dated 20th July, 2018 marked "FMO8"). That he then responded to the said application via a replying affidavit dated 1st October, 2018. (Annexed and attached is a copy of the replying affidavit marked "FMO9"). That upon hearing of all parties in ELC 154 of 2018 in the application, the honourable Magistrate dismissed the said application through a ruling delivered on 27th November, 2018 and court order dated 4th February, 2019. (Annexed and attached is a copy of the said ruling and court order marked "FM010a and 10b respectively).

This court has considered the petition and the submissions herein. The preliminary issue and/or objection to be determined before going into the merits and demerits of this petition is whether the same is res judicata. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

"..... 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"

In the same case, Sir Charles Newbold said:

"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".

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a 'Preliminary Objection'.

"I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the

processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised determined as a Preliminary Objection. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"

Section 7.

"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."

The 2nd respondent submitted, that the petitioners moved to Vihiga Law Courts where they filed an application in ELC 154 OF 2018, formerly Miscellaneous Application 19 of 2006 seeking among other orders to stay the intended

degazettement of the title Kakamega/Lugovo/1775 and a review and/or setting aside of the orders made on 30th January 2006 and issued on 21st November 2006. (Annexed and attached is a copy of said application dated 20th July, 2018 marked "FMO8"). That he then responded to the said application via a replying affidavit dated 1st October, 2018. (Annexed and attached is a copy of the replying affidavit marked "FMO9"). That upon hearing of all parties in ELC 154 of 2018 in the application, the honourable Magistrate dismissed the said application through a ruling delivered on 27th November, 2018 court order dated 4th February, 2019. (Annexed and attached is a copy of the said ruling and court order marked "FM010a and 10b respectively). This petition is res judicata because this honourable court has already made a decision in ELC 154 OF 2018, formerly Miscellaneous Application 19 of 2006. I have perused the ruling of this court and I find that the same was dismissed, the parties are the same and so is the subject matter. The same was dismissed and it was upto the petitioner to appeal against that decision if they felt aggrieved. The petitioner cannot abandon that matter and now file afresh suit by way of a petition. This petition is not only misconceived but also res judicata Kakamega ELC No. 154 OF 2018. This petition is struck off with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE