



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

CONSTITUTIONAL PETITION NO. 05 OF 2019

OLOOLOLO GAME RANCH LTD.....PETITIONER

-VERSUS-

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

IKAREKESHE GROUP TRUST.....2ND RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....3RD RESPONDENT

-AND-

THE CHIEF LAND REGISTRAR.....1ST INTERESTED PARTY

THE MINISTRY OF LANDS.....2ND INTERESTED PARTY

THE DIRECTOR OF LAND

ADJUDICATION AND SETTLEMENT.....3RD INTERESTED PARTY

RULING

The Petitioner Oloololo Game Ranch Limited had by a Petition dated 4th March, 2019 sought for orders: -

1. A Declaration that the 2nd Defendant is guilty of material non-disclosure of fact by failing to disclose the decision of the High Court at Nairobi and the court of Appeal between the Petitioner and the Respondents respectively.
2. A declaration that the 1st Respondent violated the provisions of Section 14,15(2) (d) (e) of the National Land Commission Act Section 4 of the Fair Administrative Action Act, Articles 10, 20, 21(c), 40(1) (3) (4) 47,50,60,64,68,232(1)(2)
3. An order of certiorari to quash the decision of 1st Respondent published in the Kenya Gazette dated 1/3/2019 with respect to the suit property.
4. An order of prohibition against the 1st Respondent from hearing and determining any complaint in respect of the suit property.
5. An order of prohibition against the 1st, 2nd and 3rd Interested Party from acting on the directive of the 1st Respondent published in the Kenya Gazette of 1st March, 2019.
6. An order of prohibition against the 2nd Respondent from lodging, publishing or in any way commenting on the Petitioner's ownership of title and
7. Costs of the suit.

The Petitioner contended that it is the registered owner of Land parcel Narok/Trans Mara/Oloololo/1 hereinafter referred to as the suit

property hereinabove and that by a Gazette Notice dated the 1st March, 2019. The 1st Respondent caused to be published a Notice revoking the title of the Petitioner herein and reverting it back to the 2nd Respondent without prior Notice to the Petitioner and/or without according it a hearing consequently in which the 1st Respondent acted in excess of its mandate as the 1st Respondent had no right to set an Appeal against the decisions of the courts; that is, the High Court and the Court of Appeal.

The Petitioner further contended that the 1st Respondent's decisions undermined the authority of the court and subverted the decision of the court and further to the above the 1st Respondent failed to accord the Petitioner the right to be heard contrary to the provisions of Article 50 of the Constitution of Kenya and further controverted the provisions of the Section 14 of the National Land Commission Act which provides that any person who has an interest or disposition in land must be accorded an opportunity to appear before it.

The Petitioner having been aggrieved by the decisions of the 1st Respondent thus filed the instant Constitutional Petition seeking the orders hereinabove mentioned on the grounds that I have just elucidated upon.

The 2nd Respondent Ikarekeshe Group Trust, a Group duly incorporated under the trustees (Perpetual Succession) Act Cap 164 of the Laws of Kenya filed a Cross Petition seeking the following orders:

1. A declaration that the process of adjudication and subsequent registration of the petitioner as the owner of Narok/Trans Mara/Ololo/1 was devoid of integrity, transparency and accountability and the same violated the provisions of Article 3 of the constitution of Kenya.
2. A declaration that the process of resolution of the dispute in respect of the suit and mode of management of the affairs violated the provisions of Articles 10(20) (d) of the Constitution of Kenya 2010.
3. A declaration that the interested parties' failure to provide leadership in resolving the dispute over Ololo section controverted the Provisions of Article 21 of the Constitution of Kenya.
4. A declaration that the failure of relevant Government agencies to reign the Petitioner and Petitioners over the Ololo Section contravened the provisions of Articles 21 of the Constitution of Kenya.
5. A declaration that the petitioners disposition of the cross petitioner's land amounted to deprivation of right to our land which contravened the provisions of Article 40, 47 and 63 of the Constitution of Kenya.
6. A declaration that the approach adopted by the court in Nairobi HCC No. 4090 of 1994 (**Ikarekeshe -Versus- Land Adjudication Officer Narok and 6 others and Nairobi HCC No. 3457 of 1995 Ololo Game Ranch Limited -Versus- Ikarekeshe and Another**) contravened the Provisions of Article 259 of the Constitution of Kenya and further that the Historical injustices were occasioned to Cross-Petitioner.
7. A declaration that the court is possessed of the requisite jurisdiction donated to it by Section 13 of the Environment and Land Court Act to make a finding on Historical Injustices.
8. An order of permanent injunction restraining the petitioners (Ololo Game Ranch Limited) either by itself, servants, agents from selling, alienating, leasing, developing, subjecting the member of the cross petitioner to the payment of grazing or access fees and
9. Lastly a declaration directing the petitioner to provide accounts for the income generated form the use of Land Parcel Narok/Trans Mara/Ololo/1 from June, 1993 to date together with general damages and costs.

The 2nd Respondent with the cross petitioner hereinabove also filed a Notice of Motion dated 24th April, 2019 wherein they sought for orders: -

- (a) That the Petition raises issues on an interpretation of the constitution.
- (b) That the Petition raises substantial questions of law and consequently refer the same to the Chief Justice for directions including empanelling a three judge bench.
- (c) That conservatory orders against the Petitioner(Ololo Game Ranch Limited) and the interested parties herein, either by itself, its servants, agents, representatives or assigns form selling, transferring, alienating, leasing, developing, subjecting the members of the Cross-petitioners to payment of grazing or access levies or in any way dealing with Narok/Trans-Mara/Ololo/1 in a manner detrimental to the interests of the cross petitioners pending the interparties hearing and determination of this application.
- (d) That conservatory orders against the Petitioner (Ololo Game Ranch Limited) and the Interested parties herein, either by itself, its servants, agents, representatives or assigns from selling, transferring, alienating, leasing, developing, subjecting the members of the cross petitioners to payment of grazing or access levies or in any way dealing with Narok/Trans Mara/Ololo/1 in a manner detrimental to the interests of the Cross-Petitioners pending the hearing and determination of this petition.
- (e) That conservatory orders directing the Petitioner (Ololo Game Ranch Limited) either by itself, its servants, agents, representatives or assigns to deposit all income, provide accounts and account for the income generated from the use of Narok/Trans-Mara/Ololo/1 from June 1993 to date pending the hearing and determination of this petition.

(f) That Ms Kemboy law and Julius K. Kemboy be disqualified from acting for the petitioners herein and that the documents filed by themselves be expunged from the court records.

(g) That costs of this application be provided to the Cross-Petitioner.

This court on the 3rd May, 2019 when the Petition came up for hearing for directions the Petitioners had filed a Notice of Preliminary objection on points of law against the Cross Petition and the 2nd Respondent's Notice of Motion dated 24/4/19. The court in its direction on the aforementioned date directed that it will first dispose off the Preliminary objection raised by the Petitioner and thus directed the parties to file their respective submissions on the preliminary objection dated 2nd may, 2019.

It is the Petitioners contention that the court lacks the requisite jurisdiction to entertain the matter set out in the 2nd Respondents Cross-Petition as the same goes beyond the court defined mandate as the hearing of Cross-Petition will amount to sitting on appeal on the findings of a court of concurrent jurisdiction or review the decision of a court of superior jurisdiction.

Secondly, the Petitioner in his Notice of Preliminary Objection contended that the 2nd Respondent's Cross Petition is res judicata and that 2nd Respondent should not be allowed to relitigate the issues afresh and that the 2nd Respondent's cross petition is an abuse of the court process.

The Petitioner argued that the Jurisdiction of the Environment and Land Court is denoted from the provisions of Article 162 (2) (b) of the constitution of Kenya together with sections 13 and 18 of the Environment and Land Court Act 2011 which donates both original and Appellate jurisdiction.

It is the Petitioners contention that the cross petitioner acknowledges in their cross petition that there existed previous proceedings before the **High Court being Nairobi HCCC No. 3457 of 1995 between the Oloololo Game Ranch Limited –Versus- Ikarekeshe Group Trust and Another** who are the Petitioner and Cross Petitioners herein which the High Court effectively determined the rights of the Petitioner and the Cross-Petitioner in respect of the suit land and the Appeal arising from the above was equally determined and by a Judgement and decree of the High Court dated 20th December, 1999 title to the land was conclusively vested in the Petitioners. Further to this the Petitioner asserts that the Cross petitioners suit against the land Adjudication officer and & others which included the petitioners herein was struck out by Hon. Justice Hayanga (as he then was) on 19th January, 1995 and that the cross petitioner wishes to challenge and relitigate the matter in which the High Court had made a finding.

From the above the Petitioners averred that the Environment and Land Court lacks the requisite jurisdiction to review or overturn the decision of the High court.

The Petitioners 2nd point of objection is that the 2nd Respondent (cross petition) is res judicata and that it should not be allowed to relitigate the same afresh. It is his contention that the matters raised by the cross petitioner was conclusively determined by the **High Court in Nairobi HCCC No. 4090 of 1994 Ikarekeshe –Versus- Land Adjudication Officer Narok and 6 others and Nairobi HCC No. 3457 of 1995 Oloololo Game Ranch -Versus- Ikarekeshe Group Trust.**

The Cross Petitioner contends that the Cross-Petition is not res judicata and that there exist special circumstances for the reopening of the case at hand as their existed legal provisions that prevented them from prosecuting the case. The cross petition states that **NAIROBI HCCC 4090 OF 1994 IKAREKESHE –VERSUS- THE LAND ADJUDICATION OFFICER AND 7 OTHERS AND NAIROBI HCCC 3457 OF 1995** were dismissed without going to the full hearing merits of the case and therefore the issues raised therein were not sufficiently resolved. The Cross Petitioner alleges that their current claim is of historical injustice and not of proprietorship as was envisaged in the other two cases.

It is the contention of the cross-petitioner that they brought the matter under the ambit of section 15 of the National Land Commission Act which a party may bring what constituted a historical injustice.

On whether the court has jurisdiction to hear the cross petition, the cross petitioner states that what is before the court by way of the cross petition is not review of declaration made in the previous suit but whether there was historical injustice to warrant the court to interrogate the same and make a determination. Therefore, the cross petitioner further averred that the issues raised could not be raised in the previous court as their existed no provisions to ventilate the same.

I have carefully read the petition and the cross petition together with the Notice of Preliminary objection on point of law raised by the petitioners. It has been severally determined that a preliminary objection constitutes strict point of law which when heard and determined will entirely determine the issues between the parties. From the above, I must satisfy myself if the points raised by the Petitioner will constitute what amounts to preliminary objection on points of law. The petitioner has in the preliminary objection canvassed two main issues which are: firstly, that this court lacks the requisite jurisdiction to hear and entertain the cross petition as hearing it will amount to this court sitting an appeal or purporting to review the decisions of a court of concurrent jurisdiction and/or sitting an appeal on the said decision. Secondly, the petition has stated that the cross petition as drawn is res judicata as the issues raised have been determined.

Having carefully considered the preliminary objection on point of law and the submissions made by counsel, am satisfied that the same falls within the strict definition of what constitutes preliminary objections of point of law.

In the case of **MOTOR VESSEL LILINA 'S'-VERSUS CALTEX OIL KENYA LIMITED (1989) 1KLR** Nyarangi J (as he then was) expressed himself in the following terms when he addressed the issue of jurisdiction.

“jurisdiction is everything without it a court has no power to make one more step, when a court has no jurisdiction there is no basis

for the continuance of the proceedings.....”

In the case of **JOSEPH NJUGUNA MWAWA AND OTHERS -VERSUS- REPUBLIC** the court of appeal observed

“it is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction”

The Petitioners on the Notice of Preliminary objection have asserted that the cross petition as filed amounts to freshly litigating a matter which was heard by courts of competent jurisdiction and therefore this court lacks the requisite jurisdiction.

I have had occasions to read the judgement and decree of both previous cases and the current cross petition. First I must point out the issue of historical injustice could have been litigated upon if the cross petitioner had filed their own separate petition. It is not convincing that they waited since 1995 to raise that point only when the current petitioner filed the instant petition.

Having considered the above, I find that the issue being raised and canvassed by the cross petition were issues which were heard and conclusively determined by the courts of equal concurrent jurisdiction that I have no power to either sit on appeal or review the decision and in the circumstances I find that I have no jurisdiction to hear and determine the cross petition as drawn as the orders sought therein were effectively and conclusively determined by court of competent jurisdiction.

Having determined the issue of jurisdiction what I must also determine is whether the issues in the cross petition amount to res judicata. As the name donates, res judicata refers to matters that have been heard and determined.

Section 7 of the Civil Procedure Act provides that: -

“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 parties under whom they or any of them claim, litigate under the same title in a court of competent jurisdiction to try such subsequent suit or the suit in which such issue has been subsequently raised and have been heard finally and decided by such court”.

In the preliminary objection it is the contention of the petitioner that the doctrine of res judicata is meant to prevent the public from repetitive litigation. They contend that the cross petition raises the same issue that were heard and determined in Nairobi HCCC No. 4090 of 1990 between the cross petitioner and the petitioner and also in Nairobi HCCC No. 3457 of 1995. The cross petitioner states that the cross petition is not res judicata as their existed special circumstances that would allow the reopening of the instant cross petition.

I have considered the matter in contention in aforementioned case and judgement and the decree issued therein and I find that the parties in the aforesaid matters who are the cross petitioners and petitioners respectfully and the dispute involved the same suit land that is, Narok/Trans Mara/Ololo/1 and both courts in arriving at the judgement had conclusively determined the issue of proprietorship which was central to the above and the current cross petition and I am thus convinced that the cross petition and the other suit therein are res judicata as what is contained in the cross petition has already been determined.

The upshot of the above is that I uphold the preliminary objection on points of law and I consequently struck out the cross petition as filed.

Since the cross petition was filed by a public trust I will not condemn the cross petitioners to pay costs but I direct that each party bears its costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAROK ON THIS 14TH DAY OF NOVEMBER, 2019.

Mohammed Kullow

Judge

14/11/19

In the presence of: -

CA:Chuma/Kimiriny

Mr. & Mrs Kemboy for the Petitioners

Mr Kibet for Mr. Kilele for the 2nd Respondents

N/A for the 1st and 3rd Respondents and interested parties

Mohammed Kullow

Judge

