



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC PETITION NO. 12 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

**IN THE MATTER OF ARTICLES 40 (1) & 40 (6), 60, 64, 68 AND 162 (2) OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS TO PROPERTY ENSHRINED UNDER ARTICLES 40 OF
THE CONSTITUTION OF KENYA, 2010**

AND

THE RIGHTS PROTECTED BY SECTION 26 OF THE LAND REGISTRATION ACT, 2012

JOHN OLE PULEY.....PETITIONER

VERSUS

JACKSON KARANJA MUHIA.....1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO.....2ND RESPONDENT

COUNTY LAND REGISTRAR, KAJIADO.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

RULING

What is before me for determination is the 1st Respondent's Notice of Preliminary Objection dated the 31st January, 2019 in respect of the Application dated the 15th October, 2018 and the suit in its entirety, on the following grounds:

1. That the Petitioner/ Applicant's claim as contained in the said application and suit herein is *res judicata* as the matter directly and substantially in issue has been directly and substantially in issue in former suits between the same parties that is Machakos J R Misc. Application No. 39 of 2012; Kajiado ELC Cause No. 242 of 2017 and Nairobi ELC Cause No. 1102 of 2014, all of which have been heard and finally determined by the respective courts, to the detriment of the Petitioner/ Applicant.
2. The Application and the suit are therefore contrary to section 7 of the Civil Procedure Act.
3. That indeed the application and the suit are vexatious, fatally defective, misconceived, bad in law and an egregious abuse of the hallowed court process.
4. That the application and the suit should be struck out with costs to the 1st Respondent.

The Petitioner opposed the Notice of Preliminary Objection and insisted the suit herein did not raise the same issues dealt with in former suits. He explained that the Machakos JR Application No. 39 of 2012 challenged the procedure which the County Council of Ol Kejuado had used to revoke the title issued to the 1st Respondent but the question of the rightful owner was not dealt with. Further, he denies being a party to the said proceedings. He contends that Nairobi ELC No. 1192 of 2014, which he instituted, was struck out due to the pendency of

Machakos JR Application No. 39 of 2012 matter, but never heard and determined on merit. Further, the ELC Misc. Application JR Number 242 of 2017 did not proceed to conclusion, as it was time barred. He insists no Honourable Court of competent jurisdiction has ever heard and determined the questions relating to the rights and ownership of the subject land Ngong Township Block 2/ 350 which forms the basis of this Petition. He states that the Petition is not contrary to section 7 of the Civil Procedure Act and neither is it vexatious, defective, misconceived or bad in law.

The parties filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Notice of Preliminary Objection dated the 31st January, 2019 including the Petitioner's, 1st, 2nd and 3rd Respondents submissions, the only issue for determination is whether the suit and application dated the 15th October, 2018 should be dismissed on the grounds cited above.

The 1st Respondent submitted that this suit is res judicata as the issues had been determined in another suit . He mainly relied on the aforementioned Machakos JR matter and the Nairobi ELC 1192 of 2014 to contend that the issues in respect of the dispute herein had been heard and determined.. The 1st Respondent relied on section 7 of the Civil Procedure Act as well as the following cases: **Reference No. 1 of 2007 James Katabazi & 21 Others V Attorney General of the Republic of Uganda EACJ; John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others Civil Appeal No. 42 of 2014** to buttress his arguments. The 2nd and 3rd Respondents submitted that the Petition and application is res judicata and relied on section 7 of the Civil Procedure Act as well as the cases of **Nguruman Ltd V Jan Bonde Nielsen & Another (2017) eKLR; DSV Silo V Owners of Sennar (1985) 2 All ER ; Republic V Registrar of Titles Mombasa & 4 Others Ex parte A. K. Abdulgani Limited (2018) eKLR; Athi Paper Mills Limited V Dakawou Transport Limited (2017) eKLR and Abigael Barma Vs Mwangi Theuri ELC No. 393 of 2013** to support their arguments. The Petitioner opposed the Preliminary Objection and relied on section 7 of the Civil Procedure Act as well as the following cases: **Aviation & Allied Workers Union Kenya V Kenya Airways Limited & 3 others (2015) eKLR; JMK V MWM & Another (2015) eKLR; W. E. Tilley (M) Limited V Peter Njuguna Mwangi (2018) eKLR Kenya Commercial Bank V Benjoh Amalgamated Limited (2017) eKLR; and Stephen Wanganga Njoroge V Stanley Ngugi Njoroge & another (2017) eKLR** to support his arguments.

Section 7 of the Civil Procedure Act, stipulates 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.**’

In the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows:’ A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion. ‘**

Further in the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** referred to **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

‘ in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.’

In the instant Preliminary Objection, I note that in the Machakos JR application No. 39 of 2012, the Petitioner herein was not a party to the proceedings therein. Further, in the said proceedings, it was mainly concerned with the procedure the 2nd and 3rd Respondents had adhered to, to revoke the 1st Respondent's title to the suit land. As for the Nairobi ELC Case No. 1192 of 2014, Lady Justice Gacheru struck the same out on the 18th March, 2016 due to the fact that the aforementioned Machakos JR matter was still pending. I note in the Petition, the Petitioner seeks orders to confirm ownership of the suit land as well as revocation of the 1st Respondent's title. I opine that the dispute over ownership of the suit land which is claimed by both the Petitioner and 1st Respondent can only be determined when the matter is set down for hearing on merits and not struck out at an interlocutory stage. None of the parties has furnished court with proceedings and judgment to confirm the dispute relating to the ownership of suit land was heard and determined by a Court of Competent jurisdiction. Section 7 of the Civil Procedure Act is very explicit on when one can rely on the principle of res judicata. Further in the case of **Kenya Commercial Bank V Benjoh Amalgamated Limited (2017) eKLR**; the Court of Appeal clearly outlined the grounds upon which a party can rely on the doctrine of res judicata and held thus:’ **The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit; (a) The suit or issue was directly and substantially in issue in the former suit. (b) That former suit was between the same parties or parties under whom they or any of them claim. (c) Those parties were litigating under the same title. (d) The issue was heard and finally determined in the former suit. (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.’**

In another case of **W. E. Tilley (M) Limited V Peter Njuguna Mwangi (2018) eKLR** Justice Mboghli Msagha observed that a suit that is struck out is one not heard on merit. In relying on my analysis above as well as associating myself with the judicial authorities quoted herein, I find that this Petition cannot be deemed res judicata as all the elements as outlined in section 7 of the Civil Procedure Act as well as the case of **Kenya Commercial Bank V Benjoh Amalgamated Limited (2017) eKLR** are not present. Further, that some of the issues raised in the preliminary objection therein have to be ascertained. It is my considered view that as a Court, it is pertinent for it to administer substantive justice and grant parties an opportunity to be heard and determine the matter on merits and not rely on procedural technicalities.

In the circumstance, I find the instant Notice of Preliminary objection dated the 31st January, 2019 unmerited and will disallow it.

Costs will be in the cause

I direct that the Petition be set down for hearing on its merits.

Dated signed and delivered in open court at Kajiado this 12th day of November, 2019

CHRISTINE OCHIENG

JUDGE