



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC PETITION NO. 12 OF 2017

**(Formerly Kisii ELC Case No. 29 of 2014 & Formerly
Homa –Bay HCJR 8 OF 2013)**

IN THE MATTER OF ARTICLE 22(1) AND

23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS

OR FUNDAMENTAL FREEDOMS UNDER ARTICLE

40(1) (2) (b) OF THE CONSTITUTION OF KENYA

BETWEEN

CONNIE FRANCIS C.O. OWALA.....PETITIONER

VERSUS

JAPHET ANGILA ATINGA.....1ST RESPONDENT

PAUL OJIGO OMANGA.....2ND RESPONDENT

AND

JOHN MARK OHAGA.....INTERESTED PARTY

RULING

1. A Notice of Preliminary Objection dated 10th June 2016 (hereinafter referred to as the Preliminary Objection) was filed by Odhiambo Oronga and Company Advocates for the 2nd respondent. The Preliminary Objection is on a point of law on the ground that the matter herein is res judicata.

2. On 1st July ,2014, this petition was transferred from Homa Bay High court to Kisii Environment and Land Court (ELC). On 9th May, 2017, the petition was further transferred from Kisii ELC to this court for hearing and determination.

3. At the request of the petitioner's counsel and 1st respondents' counsel on 15/6/2017, this court directed that the Preliminary Objection be canvassed by way of written submissions in lieu of viva voce evidence pursuant to **Order 51 rule 16 of the Civil Procedure Rules, 2010**. The plaintiff, the 1st and the 2nd Respondent's respective counsel filed submissions on the Preliminary Objection accordingly.

4. The 2nd respondent's counsel filed submissions dated 8/5/2017. The counsel submitted that the matter is res judicata as it has been subject of proceedings before a competent court of law between the petitioner's father one Isaiah Owala, who he purports to represent and the 1st

respondent herein. He referred to paragraphs 6, 7 and 8 of the petition, paragraphs 5, 7, 8 and 11 of 2nd Respondent supporting affidavit thereto, Nairobi HCCC No. 75 of 1990 and Court of Appeal at Nairobi Civil Appeal No.57 of 1995. He submitted that the two cases were determined in favour of the 1st Respondent .

5. Further submissions by the 2nd defendant's counsel are that the petition is a "back door" attempt by the petitioner to re-open the case which was fully adjudicated upon hence it is res judicata. He also submitted that the issues raised in the previous suits are the same as the ones in the instant petition that has not followed due procedure and it is a clear abuse of the process of court. He urged this court to uphold the Preliminary Objection and dismiss the matter with costs to the defendants.

6. Mr.P.R Ojala counsel for the 1st respondent filed his submissions dated 3/10/2017, in which he did concur with the Preliminary Objection and the submissions of the 2nd respondent's counsel. The counsel termed the petition an abuse of the due process of the law. He referred to Nairobi HCC No.75 of 1990 and Court of Appeal at Nairobi Civil Appeal No. 57 of 1995, whereby the dispute was determined in favour of the 1st respondent.

7. The 1st Respondent's counsel further submitted that the suit property does not form the estate of Isaya Arnold Owala Orwa hence the petitioner can't claim to bring the petition on behalf of the estate of the deceased. He argued this court to dismiss the entire suit/petition with costs.

8. Mr G.S Okoth counsel for the petitioner filed submissions dated 9th October 2017 by which he indicated that the petition contains a declaration of the ownership of the plot No.L.R No.1432/17 measuring 0.0557 of hectare within Homa Bay Town. He submitted that on the plot, stands one storey building jointly erected by three partners namely 1st respondent, Isaya Arnold Owala and the interested party. He referred to several previous suits between the parties or some of them. These suits are ;

- a) Nairobi HCC No.75 of 1990; Isaya Arnold Owala –vs—Saga Trading Store relating dissolution of 'Saga Trading Store' partnership,
- b) Kisii HCCC No. 197 of 1999 Japheth Angila –vs—Isaya Arnold Owala and Kenya Industrial Estate concerning the proprietorship of plot No. L.R 1432/177.
- c) Kisii HCCC No. 251 of 2002; Japheth Angila –vs—Connie F.C.O Owala sued as legal representative of Isaya Arnold Owala (deceased) and the A-G on whether allegations of fraud, forgery and uttering false documents against the 1st Respondent were malicious.

9. The Petitioner's counsel also highlighted eleven (11) issues that arise from the pleadings for determination, among them, whether the present petition is res judicata the previously decided suits. He cited the following authorities:

- a) **Section 19 (1) of the Environment and Land Court (ELC) Act** with regard to expeditious action by the court without undue regard to technicalities of procedure.
- b) **Articles 42, 69, 70 and 162 (2) (b) of the Constitution of Kenya, 2010.**
- c) **Section 13 (1), (2) (3) and & ELC Act** in respect of jurisdiction of ELC Court
- d) **Karaba –vs—Gitahi and Another (2010) 1KLR 321**
- e) **Section 47 of the Evidence Act (Cap 80 Laws of Kenya)** on proof that judgment was incompetent or obtained by fraud or collusion
- f) **Section 43 of the Evidence Act (Cap 80)** regarding judgment excluding jurisdiction
- g) **Section 7 of the Civil Procedure Act, 2010 (CPA Cap 21)** on res judicata
- h) ET- v—Attorney General and Another (2012) 1KRL 143—145 with respect to ownership and dissolution of partnership
- i) **Sections 24 (1) and 29 of the Partnership Act (Cap 29)**
- j) **Section 13 (1)and (2) of the Land Act** as to lessee preemptive right to allocation
- k) **Nairobi Milimani HCCC No. 1740 of 2002; Paul Ojigo Omanga – Japheth Angila and Aduda Auctioneers.**
- i) Homa Bay HCC Constitution petition No.1 of 2014; Anne Pacifica Ochieng –vs—AG where estate of a deceased damages for violation of rights and fundamental freedoms.
- m) Articles 22, 23(1) and 24 of the Constitution of Kenya, 2010.

10. The petitioner's counsel further filed a list of authorities dated 16/10/2017 together with the submissions. He had earlier filed a list of

authorities dated 4/5/2017. He relied on Section 7 of the Civil Procedure Act, Section 47 of the Evidence Act and the ELC Act in both lists of authorities.

11. The interested party is not represented in the present petition. He has never appeared in this court. He filed no written submissions herein.
12. I have considered the entire petition, the Preliminary Objection raised against it, the submissions including all authorities relied upon by the Petitioner's counsel, the 1st respondent's counsel and the 2nd respondent's counsel on the Preliminary Objection. The issue to resolve is whether the matter is res judicata.
13. The doctrine of Res Judicata is founded on **Section 7 of the CPA Cap 21** which 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 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 order. (Emphasis added)

Explanation (1)-The expression “former suit means a suit which has been decided before the suit in question whether or not it was instituted before it. (Emphasis added)

Explanation (4)-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been matter directly and substantially in issue in such suit.

14. According to the **Concise Oxford English Dictionary 12th Edition by Angus Stevenson and Maurice Waite**, the term res judicata means “judged matter”. It expounds the meaning of res judicata as follows ;-

“a matter that has been adjudicated by a competent court and may not be pursued further by the same parties.”

15. The 2nd Respondent's counsel submitted by relying on paragraphs 6, 7 and 8 of the petition and paragraphs 5, 7, 8 and 11 of the 2nd respondent's supporting affidavit thereto sworn on 30th September, 2013. He did submit that the matter has been subject of proceedings in Nairobi HCCC No. 75 of 1990 and Court of Appeal at Nairobi Civil Appeal No. 57 of 1995. Both cases were heard and determined in favour of the 1st Respondent. The cases clearly feature in the 2nd Respondent's Replying affidavit sworn on 30th September, 2013. The claim was hinged on lapse of lease, dissolution of partnership and subdivision of assets particularly plot No. 1432/177 at Homa Bay Town. At paragraph 3 of the replying affidavit, the 2nd Respondent stated;

THAT I am advised by my advocate on record which advice I verily believe to be true that :-

- a) The petitioner is bad in law, incompetent and an abuse of the court process as it does not raise any constitutional matters.**
- b) The claim against me is time barred.**
- c) The petition is fatally incompetent because constitutional rights cannot be enforced by and /or on behalf of a deceased person, his estate or dependents.**
- d) The entire claim is based on a lease which was in any case lapsed and the rights contained therein extinguished by effluxion of time. Attached and marked “POO1” is a true copy of the said lease.**
- e) The matters raised in the petition and the prayers sought have been raised in concluded suits between the same parties hence the present petition is res judicata. Attached hereto and marked “POO2” it is a bundle of pleading, judgments and decree in decided cases over the same subject matter**
- f) The petition amounts to no more than an ingenious attempt to circumvent the law as to limitation of time) for filing suit and/or filing an appeal) and the procedural law on setting aside and/or appealing a court decision. (Emphasis Supplied)**

16. Similarly the 1st Respondent stated at paragraphs 4,5,6,8 and 13 of his replying affidavit sworn on 9th October, 2013 that the cases were heard and determined. He stated at paragraph 4 of the replying affidavit thus;

THAT I know by my own knowledge that sometimes in the year 1990 the late ISAYA ARNOLD OWALA filed a case against me claiming that the partnership was still existing and claiming that the assets be divided particularly plot No. L.R. 1432/177 at Homa Bay town in High Court of Kenya at Nairobi Civil Suit No. 75 of 1990 and in said suit, the late Isaya Arnold Awala prayed for the following orders;-(Emphasis added).

17. The defendants in their respective replying affidavits relied on a Judgment delivered on 29th January, 1992 and a decree issued on 3rd February, 1995 in Nairobi HCCC No. 75 of 1990 together with a notice of appeal dated 8th February, 1993 and memorandum of appeal dated 7th April, 1995 in Court of Appeal at Nairobi Civil Appeal No. 57 of 1995. They further relied on an order dated 19th September, 2012 issued in Nairobi Milimani HCCC No 1740 of 2002 (which the petitioner's counsel cited as an authority) with regard to the sale of suit property namely L.R Nos. 1432/177 and L.R 1432/247 by public auction.

18. The petitioner's counsel submitted that prior to the filing of the instant petition, there have been several suits between the parties or some of them. He named those several suits including Nairobi HCCC No. 75 of 1990 where in its judgment, J W Mwera, Judge (as he then was) held, inter alia:

“.....The applicant is in conclusion not entitled to reliefs as prayed.

The partnership was dissolved by the partners themselves on 12.11.72....

.....then why should the court dispute what the three put in writing?

Accordingly there are no partnership accounts to be taken on this court's orders.”

19. Having studied the entire petition, replying affidavits and submissions by counsel, I note that the instant matter was directly and substantially in issue Nairobi HCCC No.75 of 1990 and later in the Court of Appeal at Nairobi Civil Appeal No. 57 of 1995. It was heard and determined by court at appellate level. The suit land which was the substratum of the dispute was even ordered disposed of on 19th September, 2012 in Nairobi Milimani HCCC No. 1740 of 2002 where both defendants were parties. The petitioner's father the late Isaya Arnold Owala was a partner in the suit land. The petitioner who purports to claim under the estate of his late father has no locus standi herein. Since the substratum of the petition was extinguished thereof. Moreover, the petitioner in his submissions, does not dispute that there have been several suits between the parties to this petition or some of them. In the case of **Ukay Estate & another-vs-Shah Hirji Manek Ltd & 2 others (2006) 1KLR 27 at 39**, the court remarked;

“I consider that what the court hearing the subsequent suit has to decide is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit “.....(Emphasis supplied)

20. I find that the present petition concerns parties or some parties and the suit land which matter was directly and substantially in issue in **NAIROBI HCCC NO. 75 OF 1990**, Court of Appeal at **NAIROBI CIVIL APPEAL NO. 57 OF 1995** and partly **NAIROBI Milimani HCCC NO. 1740 OF 2002**. The matters were heard and finally decided. Clearly the matter is resjudicata as envisaged under **Section 7 Civil Procedure Act Cap 21 and Ukay Estate case (supra)**. Indeed litigation has to come to an end. I am want of jurisdiction over the petition and I have to down the tools as judicially noted in **Mukisa Bisquit Manufacturing Co.Ltd-vs-West End Distributors Ltd (1969) EA 696-701**.

21. A preliminary objection has been defined in quite a number of case law. In **B-vs-Attorney General (2008) 1 KLR (Gender and Family Vol. 1) 535 at 549**, it was observed;

‘.....that a preliminary objection should be founded on pure points of law, and should be truly prefatory and preparatory to the issue of substance in the claim of question; such an objection may also touch on uncontested facts, on the basis of which decision by the court would dispose of the whole matter coming before it in limine” (Emphasid supplied)

22. To this end, the submissions on the Preliminary Objection by the defendants counsel are sound. The submissions by counsel for the Petitioner were well presented but fail to undermine the Preliminary Objection. Therefore, I am inclined to uphold the Preliminary Objection by the 2nd Respondent's counsel to which the 1st Respondent's counsel concurs.

23. This petition lacks merit.

24. I accordingly strike out the petition with costs to the Respondents

Delivered, Signed and Dated at Migori this 18th day of January, 2018

G.M.A. ONGONDO

JUDGE

In the presence of:

Mr. Ojala Counsel for the 1st Respondent and holding brief for Oronga counsel for 2nd Respondent.

Mr. Jura counsel holding brief for G.S. Okoth counsel for the Petitioner.

Tom Maurice- Court Assistant