



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NYERI**

**ELC PETITION NO. 10 OF 2015**

***(Formerly NYERI HC PETITION NO. 15 OF 2013)***

**IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF**

**FUNDAMENTAL RIGHTS AND FREEDOM UNDER**

**ARTICLE 40 OF THE CONSTITUTION OF KENYA**

**GATARAKWA FARMERS COMPANY LTD.....PETITIONER**

**-VERSUS-**

**ATTORNEY GENERAL.....1ST RESPONDENT**

**G. ISSAIS & COMPANY (K) LIMITED.....2ND RESPONDENT**

**JOHN KAMAU MWANGI (Sued as Chairman,**

**Gathwara Self-Help Group).....3RD RESPONDENT**

**EDWARD NDEGWA MWANIKI (Sued as Secretary,**

**Gathwara Self-Help Group.....4TH RESPONDENT**

**BILHA MUTUNDU WANJAU (Sued as Treasurer,**

**Gathwara Self-Help Group.....5TH RESPONDENT**

**PETERSON G. GITHUI.....6TH RESPONDENT**

**PARAIS ISSAIAS.....7TH RESPONDENT**

**COLLINS SCOTT.....8TH RESPONDENT**

**RULING**

1. This ruling is in respect of the notice of motion dated **4th November, 2015**.
2. The motion which is brought under **Section 6** of the Civil Procedure Act; **Sections 2, 3, 4, 5, 13** and **18** of the Environment and Land Court Act; and **Rules 3, 4, 5** and **8** of the Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules, seeks to strike the petition herein on the ground that the parties and the matters in issue are directly and substantially in issue in Petition No. 1 of 2011 which is pending before this court. In alternative to the prayer for striking out, the applicants pray that the petition be stayed pending the hearing and determination of Petition number 1 of 2011 pending before this court.
3. The application is opposed on grounds that it is meant to delay trial of Petition number 10 of 2015; that **Section 6** of the Civil Procedure Rules is not applicable to the petition; that the 2nd respondent/applicant has no power to seek the reliefs sought (is a busy body in Petition number 8 of 2015; that the issues raised in Petition number 10 of 2015 do not concern the 2nd respondent and that the 2nd respondent is not a party in Petition number 8 of 2015.
4. The application was disposed off by way of written submissions.
5. On behalf of the applicants it is reiterated that the application is pointed out that the respondent has not denied or traversed the grounds on which the application is premised.
6. Arguing that the sole issue for determination is whether filing the second petition during the former over the same subject matter constituted abuse of court process for which the petition ought to be struck out, it is submitted that the petition offends **Section 6** of the Civil Procedure Act.
7. Concerning the contention that **Section 6** is not applicable to constitutional petitions, reference is made to **Section 2** of the Civil Procedure Act, which defines a suit to include all civil proceedings prescribed in any manner prescribed and submitted that the provisions of the Civil Procedure Act apply to constitutional petitions.
8. Based on the provisions of **Section 3A** of the Civil Procedure Act and **Rule 3(8)** of the Mutunga Rules, it is submitted that the court this court has power to make such orders as may be necessary for ends of justice or for preventing abuse of the court process.
9. Because the petitioner had brought an application under the former suit which was dismissed, it is submitted that the application for conservatory reliefs brought under this petition is res judicata the orders issued in the former.
10. Based on the overruling objectives of the court under **Sections 1A, 1B** of the Civil Procedure Rules; **Sections 3** and **19(2)** of the Environment and Land Court Act; **Rules 3(2), 4, 5, 6** and **7** of the Mutunga Rules, the applicant urges the court to find that filing of two petitions over the same subject matter to be contrary to the overriding objectives set in those provisions of the law and strike out the petition with costs to them.
11. In the submissions filed on behalf of the petitioner/respondent, a brief background of the petitions is given. The background mainly focuses on the merits of the petitions.
12. Concerning the current application, it is contended that the 8 of the respondents in the current petition are not parties to the former and that only one of the reliefs sought in the current suit is the same as the reliefs sought in the former.
13. Based on the observation of **Wakiaga J.**, that the current petition raises fundamental constitutional

issues, the petitioner argues that this court's power to strike out pleadings is inapplicable in the circumstances of this case.

14. Arguing that the application has been brought to court dishonestly and for an improper purpose ( it is contended that the application is meant to enable the respondents to continue enjoying the petitioner's land without paying any rent in respect thereof).

15. According to the petitioner, **Section 6** of the Civil Procedure Act is inapplicable to the case because the Mutunga Rules contain the procedure for enforcing fundamental rights. Based on the decision in the case of **Speaker of the National Assembly v. Njenga Karume** to the effect that where a procedure for enforcing rights that procedure must be followed, it is submitted that it is the Mutunga Rules as opposed to the Civil Procedure Act that is applicable to the petition herein.

16. It is contended that even assuming the section applied to constitutional petitions, it would not apply to the current petition because the parties to the current petition are different from those in the former petition.

17. The cause of action is also said to be different, that is trespass to the suit property which the petitioner claims to be beneficial owner.

18. The respondent further contends that the issues sought cannot be granted because the respondents are on the suit illegally.

19. The application is said to be premised on a misapprehension of the causes of action which the petitioner is enforcing and the law applicable to the application. In this regard, it is submitted that neither the doctrine of res subjudice nor that of *res judicata* applies to the petition.

### **Analysis and determination**

20. I have read and considered the pleadings filed in the two petitions and in particular the following averments of the petitioner/respondent concerning the current petition:

1. That the said uaso/nyiro/suguroi/block vi/3027 is one of the many parcels of land registered in the name of the government of kenya which came from the mentioned 32 farms which belonged to the petitioner before they were taken possession of by the government in 1986 and sub-divided;
2. That through inadvertence, parcel No. 3027 was not included in the parcels of land in respect of which a declaration for constructive trust has been made in Nyeri HC Petition No. 1 of 2011;
3. That the suit property is one of the 296 plots which were curved from the 32 parcels and set as public purpose plots.

(See paragraphs 17, 22 and 26 of the affidavit sworn in support of the petition herein (**averments as per applicant's submissions**))

21. It is clear from the aforementioned averments and in particular that contained in paragraph

22 of the affidavit sworn in support of the petition herein, that were it not for the said inadvertence, the issues raised in the current petition would have been raised in the former petition.

22. Whereas the said inadvertence could easily and conveniently have been sorted by way of amending the former petition, no explanation has been offered as to why the petitioner decided to institute a fresh suit when it knew or ought to have known that the issue or issues it sought to address through the current suit could be addressed through the former by way of amending those pleadings.

23. In the absence of any explanation for decision of the petitioner to institute two suits over the same

subject matter and raising substantially the same issues and in which the parties are litigating under the same title, one can be forgiven for concluding that the petitioner was diversifying his prospects with the hope that if he loses one of the cases, he will still have another where he can try his luck.

24. This court under **Rule 3(8)** of the Mutunga Rules has power to make orders as may be necessary for ends of justice or to prevent abuse of the court process.

In the circumstances of this case, I find the order that best commends itself in the circumstances to be an order staying Petition 10 of 2015 pending the hearing and determination of Petition 8 of 2015.

25. Costs of the application to abide the outcome of the petition.

**Dated, signed and delivered in open court at Nyeri this 27th day of February, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Mahan h/b for Mr. Njage for petitioners 2-5 (10/15)

Mr. Karanja for the petitioners in both Petitions 10/15 and 8/15

Mr. Kimunya h/b for Waweru Macharia and J.M. Mwangi for respondents in Petition 10/15

Court assistant - Esther