



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT NYAHURURU

ELC PETITION NO 24 OF 2017

JOHN MWANGI KANYI.....1st PETITIONER

JOHN KING'ORI KANYI.....2nd PETITIONER

LABAN NDUATI MACHARIA.....3rd PETITIONER

VERSUS

MARY WANGUI WAITATHU.....1st RESPONDENT

LAND REGISTRAR, NYANDARUA.....2nd RESPONDENT

HON ATTORNEY GENERAL.....3rd RESPONDENT

RULING ON A PRELIMINARY OBJECTION

1. The Petitioner's Notice of Motion application dated 11th July 2017, seeks the following substantive orders;

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iii. That pending the hearing and determination of this Application inter-partes, there be a conservatory order restraining the 1st and 2nd Respondents by themselves or any other person acting on their behalf from altering or rectifying land registration records, taking possession the using, alienating or in any other manner interfering with the Petitioners' titles Nyandarua/Karagoini Block 1/56, and 705.

iii. That pending the hearing and determination of the petition that there be a conservatory order restraining the 1st defendant and 2nd Respondents by themselves or any other person acting on their behalf from altering or rectifying land registration records, taking possession, using, alienating or in any other manner interfering with the Petitioner's titles No. Nyandarua/Karagoini Block 1/56, and 705.

iv. That costs of the application be provided for.

2. The application was supported by the annexed affidavit of John King'ori Kanyi and Laban Nduati Macharia as well as the grounds on the face of the application.

3. To put matters into perspective, the Petitioner's Petition dated 11th July 2017, was premised on the facts that the Petitioners, who are all brothers, are the registered proprietors of the respective suit lands namely Nyandarua/Karagoini Block 1/56, 1/705 and 1/57 respectively.

4. That in the year 2009 the 1st Respondent filed a claim vide Ndaragwa Land Disputes Tribunal Case No. NDA /17/2009 against Ephraim Macharia Nduati and Kanyi Wathatha (deceased) in regard to parcels No. Nyandarua/Karagoini Block 1/56, 55 and 57.

5. That after deliberation on the matter, the decision of the tribunal was that the two, Ephraim Macharia Nduati and Kanyi Wathatha (deceased) were entitled to 8 acres and 8 1/2 acres respectively, of land previously owned by Nyahururu Farmers' Co-operative society Ltd in which they were shareholders.

6. It was further passed that the District land Registrar and District surveyor to visit the site to establish the correct boundaries and right acreages as per entitlement of the claimant and the defendants so that they could be issued with their respective documents.
7. On the 30th March 2010, the tribunal's ward was adopted as the judgment of the court in Nyahururu PMC Land Dispute Case No. 6 of 2010.
8. That on the 19th June 2017 the Petitioners received a letter from the 2nd Respondent that he would visit the suit land among others on the 27th June 2017 to implement his ruling which was undisclosed.
9. On the 27th June 2017, the 2nd Respondent, in the company of the district surveyor, Nyandarua North, visited the suit land.
10. To their surprise, vide a letter dated the 22nd October 2015 written by the 2nd Respondent and addressed to the Principle Magistrate, the 2nd Respondent had excised a total of two (2) acres from land parcels Nyandarua/Karagoini Block 1/56 and Nyandarua/Karagoini Block 107 respectively and added the same to Title No. Nyandarua/Karagoini Block 1/57 belonging to the 1st Respondent thereby reducing their acreages and creating new boundaries.
11. The 2nd Respondent had not notified the Petitioners of this opinion nor given them a copy of the same.
12. The Petitioners' thus sought the following reliefs.
 - i. A declaration that the ruling of the 2nd Respondent dated the 22nd of October 2015 and the subsequent excision of two acres out of the Petitioners' title numbers Nyandarua/Karagoini Block 1/56 and 705 is unconstitutional null and void.
 - ii. An order directing the Respondents to restore the illegality excised portion back to the Petitioners failing which the Petitioners be authorized to do so at to the Respondents' costs.
 - iii. A conservative order do issue to preserve the status quo prevailing prior to 27th June 2017 until this suit is heard and determined.
 - iv. The cost of the suit plus interest at court's rate.
 - v. Any other or better relief deemed fit to grant by the honorable court
13. Grounds upon which the relief is sought
 - i. The impugned ruling is an affront to the Petitioners' constitutional rights to protection against arbitrary deprivation of property without compensation under Article 40 of the Constitution.
 - ii. The impugned ruling is an affront to the Petitioners' right to due process and fair hearing enshrined under Article 50 of the Constitution.
 - iii. The 1st Respondent is disentitled to retain the illegally acquired land in the pendency of this suit.
 - iv. The impugned ruling goes against to the doctrine of fair administrative Action which is enshrined in Article 47 of the Constitution.
14. The above issues form the substratum of the Petition, but before any directions with regard to either the Notice of Motion or Petition could be made, the 1st Respondent filed a Notice of Preliminary Objection dated 29th September 2017, objecting to the hearing of the Petitioner's Notice of Motion Application, as well as the Petition, on the grounds that;
 - i. Matters raised in the Petition dated 11th July 2017 are res judicata
 - ii. That the Petition dated 11th July 2017 is otherwise an abuse of the court process
 - iii. That both the Petitions dated 11th July 2017 and Application dated 11th July 2017 should be struck out with costs to the 1st Respondent.
15. The court found that the Preliminary Objection dated 29th September 2017 raised the issue of res judicata which in effect sought to dispose of both the Petition and application dated the 11th July 2017. It was to this effect that the court directed that the Preliminary Objection be disposed of first by way of written submissions.
16. The 1st Respondent filed their written submissions dated 2nd November 2017 on the same day. The Petitioners on the other hand filed their submissions dated the 16th November 2017 on the 17th of November 2017.
17. The 1st Respondents' contention in preliminary objection is that pursuant to the said award and Decree the district land surveyor and

district land registrar visited the disputed parcels of land on various dates with a view of establishing the correct boundaries and acreage of the parcels of land in dispute.

18. That throughout, the Petitioners were aware of the proceedings in the Land Disputes Tribunal and actively participated in the proceedings and have never challenged the Tribunal's award and/or the consequential decree in Nyahururu PMC Land Dispute No 6 of 2010.

19. That District Land Registrar and the Districts surveyor acted in execution, enforcement or implementation of a Decree of a competent court of law in carrying out the works or act complained of by the Petitioners.

20. The 1st Respondent wondered whether the Petitioners could challenge the work of the district surveyor or district land registrar through the instant Constitutional Petition.

21. The 1st Respondent relied on Sections 7 of the Civil Procedure Act which reads 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.

22. The 1st Respondent's claim before the land Dispute Tribunal (now defunct) was not a claim for title to or ownership of the adjacent Land parcel No. Nyandarua/Karagoini Block 1/55 and 56 but that the area of the 1st Respondent's land parcel No. Nyandarua/Karagoini Block 1/57 was less than the rightful entitlement of 7 acres. That the owners of the adjacent land parcels No. Nyandarua/Karagoini Block 1/55 and 56 were occupying more land than their respective entitlement of acres each thus occupying part of his land which amounted to trespass and encroachment.

23. He therefore wanted the boundaries of all the parcels of land being Nyandarua/Karagoini Block 1/55, 56 and 57 to be determined in a way so as to ensure that each of the parcels of land in dispute measured 7 acres respectively.

24. That section 3(1) of the defunct Land Disputes Tribunal Act provided as follows;

(1) Subject to this Act, all cases of a civil nature involving a Dispute as to

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land, shall be heard and determined by a Tribunal established under section 4

25. That the Land Disputes Tribunal had the requisite jurisdiction to hear and determine the dispute filed before it by the 1st Respondent.

26. The 1st Respondent submitted that the petitioners have raised the same issues in the instant case that were raised before the said Land Disputes Tribunal which issues were heard and conclusively determined by a competent court which issues were never challenged through an appeal thus bringing the said Petition into the ambit of the principles of Res judicata.

27. That the 1st and 2nd Petitioners herein are claiming through their late father Kanyi Wathatha who was a party in the Tribunal case and who was the original owner of Land Parcel No. Nyandarua/Karagoini Block 1/56.

28. The 3rd Petitioner who is a son to and/or claiming through Ephraim Macharia also participated in the Land Tribunal proceedings together with his father.

29. The Respondent's contention therefore was that the Petition dated 11th July 2017 do not raise Constitutional issues but is based on the same matters and issues that were raised in the Land Disputes Tribunal, and relied on the High Court case of; **Benjoh Amalgamated Ltd and another vs. Kenya Commercial Bank Ltd [2008] 1 EA 29**

30. The 1st Respondent, while relying on the High court case of **Joseph Mwangi Theuri and 37 others vs. David Gitonga Githinji (Nakuru ELC No. 238 of 2014)** further submitted that the questions, issues and matters raised by the Petitioners in their Petition ought to have been raised in the Nyaururu PMC Land Dispute case No 6 of 2010 and not in a separate suit or proceedings. That raising the same issues in a separate suit or proceedings was in contravention of Sections 34 of the Civil Procedure Act which reads as follows;

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes

of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

31. Lastly, that the issue on res judicata was decided in the Environment and Land court case of **Hellen Murring Kabutha vs. Nyandarua District Land Registrar and 5 Others (Nakuru ELC No. 252 of 2013)** wherein the court dismissed the matter for being res judicata.

32. The 1st Respondent submitted that the court had inherent powers under rule 22 of the High Court Practice and Procedure Rules(LN Number 6 of 2006) to invoke the legal principles of scandalous, frivolous and vexatious litigation or an abuse of the court process without incorporation of order of the Civil Procedure Rules. Counsel submitted that the petition be struck out with costs and that the conservatory order granted to the Petitioners on 18th July 2017 be vacated and set aside.

33. In opposing the Preliminary Objection on the Petition, the Petitioner contends that the defendant's submissions are full of allegations that need to be confirmed at the hearing of the Petition and not at this Preliminary Objection stage.

34. The Petitioner further contends that the issue raised in the petition is not similar to the issues raised and determined in the tribunal case and the same ought to be interrogated and this Petition.

35. What the petition seeks is for the interrogation of the 2nd Respondent's ruling dated the 22nd October 2015 and the subsequent excision of two (2) acres out of the suit properties for being unconstitutional null and void.

36. The petitioner's submission was that the ruling of the 2nd Respondent has not been the subject matter of the previous proceedings in a previous suit and cannot therefore be deemed res judicata.

37. That what the court is being called up to determine is whether the 2nd Respondent's order of excision of two (2) acres out of the petitioner's land Parcels without compensation acted unconstitutionally or against the Principals of natural justice under Article 40 and 50 of the Constitution of Kenya.

38. Another issue for determination is whether the 2nd Respondent acted out of jurisdiction when he went against the award of the Ndaragwa Land Disputes Tribunal and the Decree issued pursuant thereto.

39. The petition contends that they are not challenging the findings of the land disputes tribunal nor the Decree of the subordinate court but that the petition is squarely premised upon the ruling of the 2nd Respondent which was clearly in contravention of the law.

40. That the Land Disputes Tribunal and the subordinate court which adopted the award are not competent to deal with constitutional issues raised in the present Petition, which powers are donated to this court by virtue of Article 155(3) (d) (ii) of the Constitution as well as Article 152(2) (b) of the Constitution. In so submitting, the Petitioners relied on the case of **Bernard Mugo Ndegwa vs James Nderitu Githae and 2 others [2010]eKLR**

41. The Petitioner was categorical that parties in the petition, the tribunal case and the subordinate court were not similar and that this was an issue for arguments which would not be determined by a preliminary objection.

42. The petitioners relied on the case of **Mehuba Gellan Keil and 2 others vs. Abdulkakir Shariff Abdiirim and 4 others [2015] KLR** to submit that a Preliminary Objection should be based on pure points of law which do not require copious probing of evidence in order to ascertain.

43. The petitioners reiterated that they did not want to re-open the decision of the land dispute tribunal but challenged the fresh hearing of the dispute and ruling of the second respondent which was a complete departure from the orders he was purporting to act upon.

44. The petitioners submitted that the preliminary objection is misconceived bad in law and an abuse of the court process and should be dismissed with cost.

45. I find the matters for determination being;

- i. Whether the present suit is res judicata.
- ii. Whether the Preliminary Objection raised is sustainable.

46. On the first issue, the court finds that the doctrine of res judicata is important in adjudication of cases and serves two important purposes;

- i. It prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
- ii. It ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

47. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. what issues were really determined in the previous case;
- ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

48. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision.

49. I shall endeavor to tackle the issues one at a time to determine whether the same passed the test as herein enumerated in the case of **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR, supra**.

50. Looking at issues raised in the present Petition as well as the finding and award in Land Disputes Tribunal that was subsequently adopted as the judgment in the Nyahururu PMC Land Disputes case No. 6 of 2010, this court finds as follows.

51. The 1st Respondent's claim before the land Dispute Tribunal (now defunct) was that the Nyahururu Farmers' Co-operative society had issued each of its members 7 acres of land yet his own area of his parcel of land being No. Nyandarua/Karagoini Block 1/57 was less than the rightful entitlement of 7 acres in comparison to the owners of the adjacent land parcels No. Nyandarua/Karagoini Block 1/55 and 56.

52. It was on the basis of this claim that the Land Tribunal visited the suit land and made its findings to the effect that the common meeting angle on all the 3 plots being 55, 56, and 57 differed with the RIM.

53. Based on this finding, the Tribunal's award dated the 4th February 2010, was to the effect that the District land Registrar and the District surveyor do visit the site and **establish the correct boundaries and right acreages as per entitlement of the claimant and the defendants so that they could be issued with correct documents. (emphasis added)**

54. That this award was adopted by the subordinate court in Nyahururu PMC Land Dispute Case No. 6 of 2010 on 31st March 2010 as the judgment of the court.

55. The Petitioner's main concern in the petition was that vide a letter, by the 2nd Respondent dated the 22nd of October 2015 and addressed to the Principle Magistrate's Court to the effect that **two acres should be excised from the Petitioners' title numbers Nyandarua/Karagoini Block 1/56 and 705 was unconstitutional null and void.(emphasis again added)**

56. From the above summary it is clear that the matter in issue is not identical in both suits.

57. As to whether the parties in both suits are the same, I have looked at the parties involved in the Land Tribunal Dispute as being;

- i. The claimant was Mary Wangui Nduati-parcel No. 57
- ii. Defendants herein were;
 1. Ephraim Macharia Nduati
 2. Laban Nduati Macharia }
 3. Paul Mwangi Macharia }

58. That Laban Nduati Macharia and Paul Mwangi Macharia represented Kanyi Wathatha (deceased) on parcel No. 55 and 56

59. The parties in the present Petition are as follows;

- i. John Mwangi Kanyi
- ii. John King'ori Kanyi
- iii. Laban Nduati Macharia
- iv. Mary Wangui Waitathu
- v. Land Registrar, Nyandarua
- vi. Hon Attorney General

60. From the above, it is clear that the parties are not completely the same and/or neither are they litigating under the same title in the Petition.

61. Clearly the claim in the two sets of matters are distinguishable in that in the first case at the Tribunal, the claimant sued for the boundary issue to be sorted out so that correct boundaries could be established and right acreages between the parties. In the present Petition, the Petitioners are challenging the action of the 2nd Respondent which according to them was illegal and unconstitutional, a claim which cannot be filed in the subordinate court for want of jurisdiction.

62. Secondly on the issue as to whether the Preliminary Objection raised is sustainable, I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A preliminary objection per Law J.A. was stated to be thus:-

“So far as I am aware, a preliminary objection 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

63. I have pondered over the issue as to whether the decision in the Land dispute Tribunal was decided in finality or not and I find with due respect, that the award was for further investigation to be carried out on the ground which in my humble opinion did not constitute a finality in the decision. Suffice to say that as the matter stands, the same is still pending before the Chief Magistrate's court following the 2nd Respondents' letter dated the 22nd October 2015 which I make a finding that the same did not constitute a ruling by a competent court as per the definition of the law, but an opinion by the 2nd Respondent.

64. As far as this matter is concerned, the letter to the Principle Magistrate by the 2nd Respondent has not been adopted as an order of the court to bring the matter to a conclusion, but then again, this could be a matter that is argumentative in nature and needs to be canvassed at a hearing.

65. The upshot thereof is that the Preliminary Objection raised is unsustainable herein having failed the test as is stipulated in **Mukisa Biscuits Manufacturing Co.** herein supra.

66. In the premises thereof the application dated the dated the 29th September 2017 raising a Preliminary Objection is herein dismissed with cost to the Petitioners.

Dated and delivered at Nyahururu this 8th day of February 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE