



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 34 OF 2017

WILLIAM K. KOROS (*Sued as the administrator of the estate of*

ELIJAH C.A. KOROS).....**PLAINTIFF**

VERSUS

NELSON KIPTOO.....**1ST DEFENDANT**

JONATHAN KIPKOGEL.....**2ND DEFENDANT**

SOLOMON KIBETT KOSGEL.....**3RD DEFENDANT**

BENARD KIBETT KOSGEI (*Sued as legal personal representative of*

KIBET CHEROTICH KIMURON).....**4TH DEFENDANT**

WILLIAM KIPRUTO (*Sued as legal personal representative of*

CHEBIATOR CHEMIOR CHEBITONG.....**5TH DEFENDANT**

KIPRONO KIPSEREN (*Sued as legal personal representative of*

CHEREM KIPTOTICH).....**6TH DEFENDANT**

CHARLES BARCHIGEI (*Sued as legal personal representative of*

JONATHAN KOPKORORS BARCHAGEL.....**7TH DEFENDANT**

R U L I N G

1. The application dated 2/11/2017 has been brought by the 7th defendant. In that application he seeks that the suit against him be stayed pending the hearing and determination of *Kitale ELC Petition No. 8 of 2016 - Charles Barchigei -vs- William Koross*. The application seeks an alternative order that the suit be struck out.

2. The applicant's grounds are that this court lacks jurisdiction by virtue of **Section 6** of the **Civil Procedure Act**; that *Kitale ELC Petition No. 8 of 2016* in which he is the petitioner is pending, and is scheduled for hearing on 29/3/2018; that the issue as to whether the 7th defendant is entitled to ownership and occupation of the suit land is directly and substantially in issue in both this suit and the petition; and that the plaintiff herein is guilty of material non-disclosure.

3. The application is opposed. The 1st - 6th defendants filed grounds of opposition to the application on 12/1/2018. They aver that the suit cannot be stayed at the instance of one defendant only to the detriment of the other parties; that the suit can only be stayed in its entirety and not as against one defendant, and that the application does not meet the threshold for a grant of stay and is an abuse of the court process.

4. The plaintiff has also filed a replying affidavit that he swore on 15/1/2018. He avers that the application is brought in bad faith and that the legal regime governing this suit is different from that which governs and that the 1st - 6th defendants are not parties to the petition. He avers that the defendants are wasting part of his land and the case should therefore not be stayed as that would only benefit the defendants.

5. The plaintiff depones that the Court of Appeal has already determined the issue of ownership regarding the suit land. He avers that if the case proceeds there is no likelihood that the court may arrive at a conflicting decision as there is already a binding decision of the Court of Appeal. He further avers that joinder of the 7th defendant to this suit was not an afterthought but was meant to enable the plaintiff attain justice against him as a trespasser on the suit land.

6. The 7th defendant filed written submissions on the application on 26/1/2018. The plaintiff filed his submissions on 29/1/2018. I have gone through the court record and found no written submissions on behalf of the 1st - 6th defendants.

7. In my view, the only question that arises from the application of the 7th defendant is whether the suit is *res subjudice*, and contrary to the provisions of **Section 6** of the **Civil Procedure Act** by reason of the existence of **Kitale Petition No. 8 of 2016**.

8. The *res subjudice* test in accordance with **Section 6** of the **Civil Procedure Act** must be applied herein. That Section states as follows:-

“Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation. The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court”.

In my view the Section envisages the following:-

(1) The matter in issue must be directly and substantially in issue in a previously instituted suit, or proceeding.

(2) That previously instituted suit or proceeding must be between the same parties or parties under whom they or any of them claim, litigating under the same title.

(3) That other proceeding must be still pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

9. I must compare the prayers in the petition and those in the suit. **Petition No. 8 of 2016** seeks the orders against **William Koross** (the plaintiff herein), the Attorney General and the Chief Land Registrar as follows:-

“(i) A declaration that the registration of the entire property known as LR. No. 11440 in the name of the 1st respondent as the sole owner infringes on the petitioner’s rights to property as enshrined in Article 40 of the Constitution of Kenya.

(ii) A declaration that the petitioner is entitled to be registered as the owner of 203.82 acres comprised of the property known as LR No. 11400.

(iii) An order of judicial review by way of mandamus to compel the 3rd respondent to delete the registration of the 1st respondent as the sole owner of the entire property known as LR No. 11440 in the register.

(iv) An order of judicial review by way of mandamus to compel the 3rd respondent to register 203.82 acres comprised of the suit property in favour of the petitioner.

(v) In the alternative to the above, an order compelling the 1st respondent to give up and transfer 203.82 acres comprised of the property known as LR No. 11440 and transfer it to the petitioner.

(vi) A permanent injunction restraining the respondents by themselves, their agents, assigns or representative from alienating or interfering with the petitioner’s possession of 203.82 acres comprised of the property known as LR No. 11440 by forcible entry or otherwise in any manner prejudicial to the petitioner.

(vii) In the alternative to the above, an order directing the 1st respondent to compensate the petitioner for loss of user of 203.82 acres comprised of the property known as LR. No. 11440.

(viii) An order directing the respondents and the petitioner to file a report in court setting out compliance with the orders of the court within 120 days from the date of this decision.

(ix) An order for costs of this petition”.

10. Paragraph 47 and 49 of the petition are instructive, they state as follows:-

“47. Based on the facts which have been set out above, the petitioner plead that his proprietary interest over the suit property has not been litigated before any court as amongst himself and the respondents herein.

”49. By dint of the agreement between the 1st respondent, the petitioner and the interested parties, your petitioner is entitled to ownership of 203.82 acres comprised of the property known as LR. No.11440.

11. In effect the thrust of the entire petition is that orders made in previous litigation in respect of the suit property, to wit, *Kakamega High Court Civil Suit No. 43 of 1978*, *Eldoret HCCC No. 89 of 1997* and *Civil Appeal No. Eldoret 223 of 2013* did not affect the petitioner’s rights over part of the suit property as the petitioner was never made a party to *Kakamega High Court Civil Suit No. 43 of 1978*.

12. On the other hand the instant suit seeks the following orders against the defendants who include the petitioner in *Petition No. 8 of 2016*:-

(a) A permanent injunction restraining the defendants, their families, servants and/or agents and/or any other person(s) acting or claiming interest through them from trespassing or any portion of LR. No. 11440.

(aa.) A mandatory injunction requiring the defendants, their families, servants and/or agents and/or any other person (s) acting or claiming interest through them to remove themselves together with their properties from Land Parcel No. 11440 in default thereof they be removed with reasonable force and at their own expense.

(b) Costs and interest thereon.

(c) Any other appropriate relief this Honourable Court may deem fit to grant.

13. It is clear from both sets of prayers in the petition as well as in the plaint that the petitioner and the plaintiff are trying to keep the other out of what they consider to be their rightful share, or the whole, of LR. No. 11440. On the plaintiff’s part the claim is for the entire land parcel. And the 7th defendant asks this court to stay the claim by the plaintiff against him or in the alternative, that the plaintiff’s entire suit be struck out for being *res subjudice* the petition.

14 The proceedings by way of plaint are usually different from proceedings by way of a petition. In the earlier mode of proceeding, the claimant normally seeks redress under private law while in the latter, a claimant normally seeks remedies for violation of rights under public law. Usually the claim for violation of right lies against the Government or its agencies in petitions.

15. This court has noted that numerous prayers in the petition are addressed to the 1st respondent, a private person, regarding the land subject matter common to both proceedings. It has also been noted that in *Kitale ELC 89 of 1997*, this very court issued a ruling removing Jonathan Kipkoross Chesangur, Chebiatori Chemchor. Julius Kibet Cherotich and Kipserem Rotich from the evictions list in respect of the suit land. I note that some of these persons are or appear to be represented by some parties in the instant suit.

16. This court is aware of various decisions of the High Court in which horizontal application of constitutional rights has been addressed. In the case of *Mike Rubia & Another v Moses Mwangi & 2 others* [2014] eKLR, [*Nairobi Petition No.70 OF 2012*] the court stated as follows:

“The Respondents have in that regard relied on the case of *Uhuru Muigai Kenyatta v Nairobi Star Publication (supra)* to contend that the State is the one which has an obligation to observe, protect and respect the human rights of individuals and that obligation is not imposed on private citizens. However, whereas this Court generally prescribes and holds the same views as in the *Uhuru Muigai Kenyatta v Nairobi Star* case because of the unique circumstances of that case the Court subsequently clarified that issue in *Jemimah Wambui Ikere v Standard Group Ltd and Anor Petition No. 466 of 2012* where it stated as follows;

“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution.”

Similarly in *Rapinder Kaur Atwal v Manjit Singh Amrit Petition No. 236 of 2011* I expressed myself as follows;

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true.....I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any Country in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

17. Later in the same judgment the court went on as follows:

“I do not see any reason and the Respondents have given me none as to why I should depart from the above reasoning. It is also clear to my mind that there is nothing in the Constitution that draws the distinction between vertical and horizontal application of the Bill of Rights. The Bill of Rights applies to all persons and binds everybody. My sister and brother, Mumbi

J. and Majanja J. have respectively and equally held that the Bill of Rights applies both horizontally and vertically. (See Law Society of Kenya v Betty Sungura Nyabuto & 2 Others (2012) e KLR, B.A & Another v The Standard Group Ltd (2012) e KLR) and I agree with their reasoning.

Having found that the Petitioners can claim a violation of fundamental rights as against the Respondents, I now turn to determine whether the Respondents' actions as above violated the Constitution in any way, as alleged."

18. In view of the above views, it is therefore not necessary to delve specifically into the issue of application of rights at this point with regard to the *Kitale Petition No. 8 of 2016* in order that this court does not prejudice a fair trial of the petition which is still pending. The orders of striking out of the suit are therefore premature. It suffices to state each of the two cases should be tried on its merits.

19. In determining the instant application I have considered that the issue of ownership is crucial in both the petition and the suit commenced by plaintiff. The issue of which parties were involved in previous litigation relating to the suit land also features in both the suit by plaintiff and the petition.

20. In the circumstances, I find that the best manner of proceeding in view of the fact both the petition and this suit are pending determination and also that not all parties are common to both proceedings is not to strike out this suit, but to stay it pending the hearing and determination of the petition which has already been assigned a hearing date.

21. I therefore order that the suit herein is stayed in its entirety pending the hearing and determination of *Kitale Petition No. 8 of 2016*.

Dated, signed and delivered at Kitale on this 12th day of March, 2018.

MWANGI NJOROGE

JUDGE

12/3/2018

Coram:

Before- Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Majanja holding brief for Ondabu for 2nd Respondent

N/A for the Respondents - 1st and 3rd - 7th

N/A for the Plaintiff

COURT

Ruling read in open court in the presence of the Counsel for the 2nd Respondent.

MWANGI NJOROGE

JUDGE

12/3/2018