



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

CONSTITUTIONAL PETITION NO.731 OF 2017

(FORMERLY CONSTITUTIONAL PETITION NO.31 OF 2017 NAIROBI)

IN THE MATTER OF : ALLEGED CONTRAVENTION OF CONSTITUTIONAL RIGHTS AND FUNDAMENTAL
FREEDOMS IN ARTICLES 19,20,22,23,27,28,31,40,47,48 & 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE CONSTITUTION IN ARTICLES
2,3,19,60,64,73,75 AND 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LAND ACT 2012, THE LAND REGISTRATION ACT 2012, REGISTERED
LAND ACT, CAP 300 (REPEALED), LAND DISPUTES ACT NO.18 OF 1990(REPEALED)

BETWEEN

STANLEY THUO MURUNYU..... PETITIONER

-VERSUS-

ALICE WARUGURU NGUGI

BETH WAMBUI MUTUMA

(Sued as the Legal Representatives of the Estate of

BEATRICE MUKUHI MWANGI(Deceased).....1ST RESPONDENT

THE LAND REGISTRAR,

THIKA SUB-COUNTY LAND REGISTRY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

The Petitioner *Stanley Thuo Murunyu*, filed the instant *Petition* on 22nd August 2017, and sought for various orders among them being a declaration that the Award by the Tribunal transferring land parcel *No.Ruiru/Ruiru East Block 1/302*, back to *Beatrice Mukuhi Mwangi* (deceased) and ordering a refund of *Kshs.450,000/=* to the Petitioner was a nullity as the tribunal lacked requisite jurisdiction to among other things to interfere with title to land parcel *No.Ruiru/Ruiru East Block 1/302*, by ordering the same transferred back to *Beatrice Mukuhi Mwangi*.

Simultaneously, the Petitioner filed a **Notice of Motion** even dated and sought for conservatory orders to restrain the 2nd Respondent through themselves or their agents/representatives from issuing Certificate of title to third parties, transferring, alienating and/or interfering in any manner with the disputed parcel of land pending the hearing and determination of the Petition.

After the said **Notice of Motion** was served upon the Respondents, the 1st Respondent filed a **Notice of Preliminary Objection** on 27th September 2017 and stated as follows:-

- 1) *That the Petition and the application seek to challenge the award by the Ruiru Land Disputes Tribunal in claim No.TKA/LDT/50/2005 made on 14th August 2006.*
- 2) *That the Petitioner had filed a similar challenge to the said award by way of Judicial Review in Nairobi High Court Misch.Civil Appl. No.588 of 2007, Republic...Vs...The Chairman, Ruiru Division Land Disputes Tribunal, Beatrice Mukuhi Mwangi Exparte Stanley Thuo Murunyu seeking inter alia:-*
 - i. *That an order of certiorari to bring forth before and/or remove into this Honourable Court, the proceedings, Ruling and Award of the Ruiru Division Land Disputes Tribunal in claim No.TKA/LDT/50/2005 and quash the said proceedings, Ruling and Award of the Tribunal.*
 - ii. *That an order of prohibition do issue to prohibit and/or restrain the Chief Magistrate, Thika Law Courts from hearing further proceedings or issuing further orders in Thika Chief Magistrate, DO Case No.68 of 2006 and the Ruiru Division Land Disputes Tribunal from hearing and determination of matters relating to and/or ownership of the land parcel No.Ruiru East/Block 1/302.*
- 3) *That the said Judicial Review application was heard substantively and on merit by way of written and oral submissions and a Ruling thereon made on the 3rd November 2010 by the Hon. A. Mbogholi Msagha Judge, dismissing the entire application with costs.*
- 4) *That the Petitioner appealed to the Court of Appeal from the said decision of Nairobi Civil Appeal No.227 of 2016, Stanley Murunyu..Vs..The Ruiru Land Disputes Tribunal, Thika Chief Magistrate and Beatrice Mukuhi Mwangi. The said Appeal abated and was marked as such by the Court of Appeal on the 18th September 2017 .*
- 5) *That the present Petition seeks the same determinations as the ones heard and determined by the High Court and to the extent that the principal issue in determination in the present Petition is the validity or otherwise of the award of the Ruiru Land Disputes Tribunal with respect to the ownership of title No.Ruiru East/Block 1/302, then the entire Petition is res judicata and thereby incompetent.*
- 6) *That the application and the entire Petition are otherwise an abuse of process and liable for dismissal.*

Therefore the 1st Respondent asked the Court to strike out the entire Petition *in limine*.

The 2nd and 3rd Respondent also filed a **Notice of Preliminary Objection** on 4th October 2017 and averred that:-

- 1) *That the entire suit herein is Res judicata.*
- 2) *That the entire suit herein is an abuse of the court process.*
- 3) *That the entire suit herein is frivolous, vexatious and a waste of the court's judicious time.*

However on 13th February 2018, the State Counsel appearing for 2nd & 3rd Respondents applied to withdraw the **Notice of Preliminary Objection** dated 2nd October 2017 filed by the office of the Attorney General.

The Court had earlier directed that the **Notice of Preliminary Objection** be canvassed first by way of written submissions. In compliance thereof, the **Law Firm of Muchoki Kangata Njenga & Co. Advocates** for the 1st Respondent filed the written submissions on 15th November 2017 and submitted that the Petitioner herein had filed a similar challenge to the Tribunal Award being **Judicial Review** in **Nairobi High Court, Misc.Appl.No.588 of 2007, Republic...Vs...Chairman, Ruiru Division Land Disputes Tribunal, Beatrice Mukuhi Mwangi exparte Stanley Thuo Murunyu**, which Judicial Review matter was heard substantively and decided on merit wherein the entire application was dismissed on 3rd November 2010. It was further submitted that the Petitioner thereafter filed an Appeal at the Court of Appeal being **Civil Appeal No.227 of 2016, Stanley Murunyu...Vs...The Ruiru Land Disputes Tribunal, Thika Chief Magistrate and Beatrice Mukuhi Mwangi**, which Appeal is still pending for hearing and determination.

The 1st Respondent therefore submitted that this Petition is *Rejudicata* and therefore the same is incompetent. The 1st Respondent relied on **Section 7** of the **Civil Procedure Act**, which states:-

“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”.

The 1st Respondent further relied on the findings in the case of *John Florence Maritime Services Ltd & Another...Vs...Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR*, where the Court stated:-

*“From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (See *Karia & Another...Vs...The Attorney General & Others (2005) 1EA 83*).*

The *Law Firm of Muma & Kanjama Advocates* for the Petitioner filed their submissions on 13th November 2017 and submitted that what the 1st Respondent has raised is not a competent point of Preliminary Objection as described in the *Mukisa Biscuits Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696*. The Petitioner submitted that for the Court to determine the Preliminary Objection herein, it has to ascertain facts and therefore the said *Notice of Preliminary Objection* should be dismissed with costs. The Petitioner relied on various decided cases to support this argument.

The Petitioner relied on the case of *Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) EKL*R, where the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

The Petitioner further relied on the case of *George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR*, where the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

Further, the Petition urged the Court to be persuaded by the findings of the court in the case of *Muhu Holdings Ltd...Vs...James Muhu Kangari (2017) eKLR*, where it was held that:-

“I would need to receive evidence to enable me determine whether or not the matters in issue in this suit are also directly and substantially in issue in the previously instituted Nairobi High Court Succession Causes No.1027 of 1989 and No.226 of 2013 and whether or not parties in both matters are the same or litigate under the same title. Such evidence would include but not limited to copies of pleadings, proceedings, rulings and or judgement in the said cases. No such evidence had been placed on record by the Plaintiff as at the date the Preliminary Objection was filed. Similarly, ground 4 of the Preliminary Objection seeks to show that the suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process. All these allegations need to be established by way of evidence”.

The Court has now carefully considered the instant Notice of Preliminary Objection, the written submissions and cited authorities. The Court has also considered the entire pleadings and the Court renders itself as follows:-

Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean:-

“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”.

Further Sir *Charles Nebbold, JA* stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

Therefore from the above description and findings of the Court, it is clear that a Preliminary Objection raises pure point of law, which is

argued on the assumption that all facts pleaded by the other side are correct and it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion..

Further, in the case of Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the Court held

that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

In determining a **Preliminary Objection**, the Court will also take into account that the Preliminary Objection must stem from the pleadings. See the case of Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

Before the Court embarks on determining the merit of the **Notice of Preliminary Objection**, it has to first determine whether what has been raised herein satisfy the ingredients of a **Preliminary Objection**. As the Court determines whether what the 1st Respondent has filed amounts to a Preliminary Objection or not, the Court will also be persuaded by the findings in the case of Oraro...Vs...Mbaja(2005) 1KLR 141, where the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

In the instant **Preliminary Objection**, the 1st Respondent has averred that the Petition herein is *Resjudicata* as the issues raised in the instant Petition were the same facts which were raised and canvassed in the Judicial Review application No. Nairobi High Court Misc.Civil Appl. No.588 of 2007, Republic...Vs...The Chairman, Ruiru Division Land Disputes Tribunal, Beatrice Mukuhi Mwangi Exparte Stanley Thuo Murunyu. However the Petitioner has denied that allegation. For the Court to determine whether the issues herein were directly and substantially in issue in the said Judicial Review, the Court will have to ascertain facts by having to call for the said proceedings and pleadings of the Judicial Review No.Nairobi High Court Misc.Civil Appl. No.588 of 2007, Republic...Vs...The Chairman, Ruiru Division Land Disputes Tribunal, Beatrice Mukuhi Mwangi Exparte Stanley Thuo Murunyu.

Further this Preliminary Objection as raised does not stem from the pleadings but it requires the Court to call for ascertainment of facts. Though Section 7 of the Civil Procedure Act deal with the issue of *Resjudicata*, it is evident that the said issue of *Resjudicata* cannot be raised in a Preliminary Objection. As was held in the case of George Kama Kimani & 4 Others ...Vs...County Government of Trans-Nzoia (supra) the best way to raise the issue of *res judicata* is by way of Notice of Motion where pleadings would be annexed to allow the Court consider whether the issues in the previous suit are similar to the issues in the suit being in issue.

Given the limited scope of the jurisdiction on Preliminary Objection and the test to be applied, the Court finds that an issue of *resjudicata*, involves probing of evidence and therefore the same cannot be determined via a Preliminary Objection.

This Court finds that given the description of Preliminary Objection in the Mukisa Biscuits case (supra) and given that an issue of *res judicata* involves ascertaining of facts, then this instant **Notice of Preliminary Objection** as raised by the 1st Respondent does not meet the test of what amounts to a Preliminary Objection. It does not raise pure points of law and it cannot be determined without ascertainment of facts from elsewhere.

Therefore, this Court finds and holds that the **Notice of Preliminary Objection** as filed by the 1st Respondent is not a Preliminary Objection as per the Mukisa Biscuits case (supra). For the above reasons the said **Notice of Preliminary Objection** is accordingly dismissed entirely with costs being in the cause.

The Petitioner’s **Notice of Motion** dated 21st August 2017 and Petition even dated to be heard and determined on merit.

Consequently, the Respondents are granted leave of **14 days** from the date hereof to file their Replying Affidavits with correspondence leave to the Petitioner/Applicant to file Supplementary Affidavit if need be. The

said **Notice of Motion** application to be given a hearing date.

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of April 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Mwangi holding brief for Mr. Kanjama for Petitioner

M/S Mwangi holding for Mr. Njenga for 1st Respondent 2nd Respondent

Mr. Emaka holding brief for M/S Kubai for 3rd Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

13/4/2018