



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L PETITION NO. 5 OF 2015

IN THE MATTER OF A PETITION UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE PETITIONERS UNDER ARTICLES 27, 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ACTIONS OF THE RESPONDENTS IN ILLEGALLY AND ARBITRARILY ISSUING A CERTIFICATE OF LEASE IN THE NAME OF MUSA KIPKURERE KIBUSIA TO PROPERLY TITLE NO. KABARNET/MUNICIPALITY/174 WITHOUT DUE PROCESS

BETWEEN

VERONICAH KIPSANG.....1ST PETITIONER

CHRISTINE T. KANDIE.....2ND PETITIONER

PAULINE T. KIPSOI.....3RD PETITIONER

ELIMA P. ARGUT.....4TH PETITIONER

PRISCA KIPCHILAT.....5TH PETITIONER

REGINA TOMNO.....6TH PETITIONER

RAEL CHEPTOO.....7TH PETITIONER

JANE KANDIE.....8TH PETITIONER

RUTH CHESANG.....9TH PETITIONER

JULIA KANGOGO (*Suing for and on behalf of themselves and*

KABARNET PRECIOUS WOMEN GROUP.....10TH PETITIONER

VERSUS

THE LAND REGISTRAR, KABARNET.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

COUNTY GOVERNMENT OF BARINGO....1ST INTERESTED PARTY

LUKA CHEPTORUS CHESIRE.....2ND INTERESTED PARTY

JUDGMENT

PETITIONERS' CASE

1. The petitioners herein have come to court claiming that they were duly allocated that entire parcel of land known as L. R. No. **KABARNET/MUNICIPALITY/175** (hereafter referred to as the suit property) after duly applying for the same and that consequently, a letter of allotment was issued to the petitioners by the Commissioner of Lands (the 2nd respondent) which required that the petitioners make a payment of Kshs.25,990 being stand premium among other charges. That the said property was allocated to the petitioners with vacant possession for development and was subject to the special conditions which required the petitioners to pay rates and outgoings that would be imposed upon the property by the Government and Local Authority.

2. The Petitioners have faithfully and promptly paid to the Government and the Local Authority the requisite charges or levies and is up to date. The petitioners sought to have the same registered to their name under the now repealed Registered Land Act, Chapter 300 of the Laws of Kenya after utilizing the same for some time. The Petitioners have, on conducting a search at the Lands Registry discovered documents that purport to show that the same had now been registered in the name of the 2nd Interested Party. The petitioners are not aware of any breach of the special conditions entitling the respondents to revoke their allocation and they have never been given any notice of cancellation or revocation of the letter of allotment.

3. The purported registration of the suit property in the names of the 2nd Interested Party was arbitrary and denied the petitioners fair administrative practices as guaranteed by the Constitution of Kenya. The said actions of the 2nd and 3rd respondents are illegal and unlawful and meant to deny petitioners a right to a fair process and the right to own and enjoy private property as guaranteed by the Constitution of Kenya, 2010.

4. That it is in the public interest and for ends of justice to him met for this application to be heard on priority basis.

5. The petitioners have listed the violation of the constitution and fundamental rights and freedoms as follows: -

1. To the extent that the respondents have arbitrarily issued a certificate of lease to the 2nd Interested Party herein without giving any notice of cancellation or revocation of his letter of allotment to the property the following provisions of the Constitution have been violated.

(i) Article 47 of the Constitution that guarantees the right of equality and freedom from discrimination.

(ii) Article 47 of the Constitution that guarantees the right to a fair administrative action by public bodies so that any decision adversely affecting an individual is supported by written reasons for the action.

2. To the extent that the respondents have declined to reverse the arbitrary action of issuing a certificate of lease to the Interested Party thereby denying the petitioner a right over the property, the following provisions of the Constitution have been violated.

(i) Article 40 (1)(a)(b) and 3 of the Constitution that guarantees the protection of right to property.

6. The petitioners pray for:

(a)-A declaration that the decision of the respondents to issue a Certificate of Lease in the name of the 2nd Interested Party over L.R. NO. KABARNET/MUNICIPALITY/175 was illegal, arbitrary and discriminatory and contravened the petitioners' freedoms and rights to property and denied the petitioner the right to fair administrative practices.

(b)-A writ of certiorari directed to the 1st and 2nd respondents to remove into this Honourable Court the register of the lease and to quash or cancel any entry thereon of the decision of the 1st and 2nd respondents purporting to register the name of the 2nd Interested Party as owner of L. R. KABARNET/MUNICIPALITY/175.

(c)-An order restraining the 1st and 2nd respondents by themselves or by any servants or agents from howsoever preventing the petitioners from accessing or entering upon or exiting from the property to wit L. R. NO. KABARNET/MUNICIPALITY/175.

(d)-An order for payment of damages for violation of the petitioners' fundamental constitutional rights.

7. The petition is supported by the affidavit of Veronicah Kipsang who states that she is the Chairlady of Kabarnet Precious Women Group. That she is an adult female of sound mind, and the Chairlady of Kabarnet Precious Women Group and she has the authority of the other Petitioners herein to swear this affidavit on their behalf, hence competent to swear this Affidavit.

8. The Petitioners herein are members of Kabarnet Precious Women Group which is a duly registered by the Department of Social Services and the allottee in possession of all that Plot No. 175 Kabarnet Municipality now known as KABARNET/MUNICIPALITY/175, (the suit

property) situated in Kabarnet Township having duly applied for the same and thereafter being issued with a letter of allotment dated 1st November 1996.

9. They had made an application to the Municipal Council of Kabarnet on 5th May, 1994 requesting that they be allocated a Plot and the Planning Markets, Works and Housing Committee recommended by Minutes dated 15th July, 1994 that they be allocated a commercial plot and by a letter dated 11th December 1995, the Town Clerk of Municipal Council of Kabarnet wrote to the Commissioner of Lands notifying him that some individuals had directly made applications for plots to the Commissioner of Lands without involving the Council and advised him only to consider those that had been approved by the Council.

10. By a letter dated 5th January 1996, the District Surveyor wrote to the Commissioner of Lands and the Director of Physical Planning recommending and forwarding PDP No. R.B 328/95/45 and cancelling an earlier PDP R.B 328/9/37 prepared by himself and which had been earlier forwarded vide a letter dated 28th November 1995. That pursuant to the foregoing, the Commissioner of Lands issued them with an allotment letter addressed to them by which they were required to tender their acceptance and a bankers cheque for the amount shown thereon within 30 days and they duly complied.

11. By the letter of allotment, they were required to pay stand premium and other charges which they promptly did and they were given vacant possession for purposes of carrying out development subject to meeting special conditions such as payment of rates and outgoings that would be imposed upon the property by the Government and Local Authority.

12. They were shown the plot and the District Surveyor placed beacons on the plot after which they were issued with a beacon certificate. They have at all times paid rent and rates due to the Municipal Council of Kabarnet as confirmed by the letter dated 18th July 2006 and addressed to the Commissioner of Lands. They visited the Commissioner of Lands office and were surprised to be informed that the plot now belonged to someone else, the 2nd Interested Party having allegedly been allocated the same vide a letter of allotment purportedly dated 18th May, 1995 and a Certificate of Lease purportedly issued to him on 14th May 1998.

13. She is advised by her Advocates, Messrs Geoffrey Otieno & Company Advocates which advise she verily believes to be true that the Respondents did not conform with the requirements of the law relating to allocation of plots. That in light of the confirmation of ownership as per the records by the Town Clerk by the letters dated 18th July 2006 and by the 1st Interested Party vide its letter dated 3rd February 2014, it is rather apparent that the issuance of a certificate of lease to the 2nd Interested Party was in any event arbitrary and therefore illegal and null and void.

14. According to the petitioners, the Respondents either on their own or with the aid of other persons unknown to the petitioners, engaged in a fraudulent transaction with the intention of arbitrarily depriving her of the suit property and yet the 1st and 2nd Respondents have no power or authority to revoke the Petitioners' letter of allotment in flagrant violation of the Petitioner's constitutional right to own property.

15. She believes that the purported issuance of a certificate of lease to the 2nd Interested Party over her property was arbitrary, illegal, null and void for the reasons that no letter of allotment was ever issued to the 2nd Interested Party with the approval of the Municipal Council of Kabarnet as by law required and that the 2nd Interested Party has never paid rent or rates over the subject plot and all the dues arising therefrom were paid by the petitioners.

16. The Part Development Plan purported to be relied upon in the process of registration by the Respondents had been cancelled and that it is also therefore apparent that the registration of the 2nd Interested Party the Respondents did not take into account the ownership status of the property and is obviously irregular illegal and as such null and void and that the 2nd Interested Party could dispose of the subject parcel thereby rendering this suit nugatory if the Court does not intervene and make the orders sought herein pending the determination of this matter.

17. She verily believes that there is an urgent need for this Court to move with speed as a custodian of the majesty of the Constitution and uphold the principle of Constitutionalism and the rule of law by halting any further blatant disregard of the law by the Respondents. That it is the interest of justice that this Honourable Court should grant the prayers sought until this matter is heard and determined in totality.

2ND INTERESTED PARTY'S CASE

18. The 2nd interested party filed a replying affidavit stating that he is an adult of sound mind and disposition and that he has read the petitioners' application together with its supporting affidavit and the petition therein both dated the 16th March, 2015 and filed in court on the 18th March, 2015 states that the Petition and Application as filed by the petitioners is frivolous vexatious and an abuse of this Honourable Court's process and that the petition as filed herein is res-judicata as the issues raised herein were conclusively dealt with in **NAKURU CMCC 2862/19198 LUKA C. CHESIRE VS CHRISTINE T. KANDIE & 8 OTHERS** and the court had competent jurisdiction.

19. According to the 2nd respondent, sometime in the year 1995, he applied to the Commissioner of Lands to allocate to him the suit property. The then Commissioner of Lands upon receiving his application, wrote to various departments to confirm the position of the suit property and the same was confirmed to be vacant as per the letters from the District Lands Officer and the District Commissioner. That subsequently, the process of allocation was begun by the respective authority and the approval was obtained from the Minister and a letter of allotment was issued thereafter. That on the 22nd August 1996, the then Commissioner of Lands duly issued a letter of allotment in his name in respect of title No UNS. COMMERCIAL PLOT C KABARNET MUNICIPALITY (the suit property herein).

20. Upon receiving the letter of allotment, he duly paid the sums required an amount of Kshs. 12,700 where upon he was issued with a certificate of lease from the government of Kenya. That at the time of application of the allotment, they were three people namely MUSA K.

KIBUSIA, EVANS KIPROP and himself, hence the subdivision of the area into three portions as marked in the plan namely A, B and C. After they received their allotment letters, Evans Kiprop surrendered plot No. B to the 2nd respondent and MUSA to develop hence the same now was shared equally between them. The original plot No. C and part of B now were registered under one title which is now the present title No. KABARNET/MUNICIPALITY/175 (the suit property).

21. Sometimes in October 1998, when he was making preparations on developing the land he discovered that the petitioners had encroached into his property (the suit parcel) and fenced it off. He conducted some investigations and he was informed that now the petitioners had also been given an allotment letter to the said parcel of land. However, the allotment letter was issued to the Petitioners much later after his papers had been approved and he had already been issued with a title to the suit property.

22. He has tried to have the petitioners to vacate his suit property but failed and this prompted him to institute a suit to have them permanently barred from encroaching on his land the suit property herein. The petitioners entered appearance and filed their replying affidavit to their application together with a defence and counter claim, in opposition of their suit.

23. The suit went to full hearing and the Nakuru Chief Magistrate who had competent jurisdiction to handle the matter held that he was the legal proprietor of the parcel of land and further ordered that the defendants now the petitioners herein be permanently restrained from in any way interfering with suit property.

24. However, the Petitioners being dissatisfied with the decision of the Chief Magistrate preferred an appeal to the High Court vide a memorandum of appeal dated 2nd October, 2000. The appellants now petitioners failed to prosecute their appeal and his advocates on record M/S ODHIAMBO & ODHIAMBO ADVOCATES applied for the appeal to be dismissed for want of prosecution.

25. The appeal was dismissed for want of prosecution on the 10th February, 2009. That from the foregoing, it therefore evident that the petitioners herein came to this Honourable Court with tainted hands guilty of material non-disclosure with the sole aim of abusing the court process.

26. The cause of action and the whole petition as filed by the petitioners herein is res-Judicata as it is evident that the prayers in the Petition are a copy paste of their prayers in their counter claim that was filed in court on the 15th December, 1998.

27. The petitioners herein have brought in the Land Registrar Kabarnet, a defunct Commissioner of Lands Office and the Attorney General to mischievously obscure real issues in the petition herein and to try and beat the issue of res-judicata since these three parties were not present in the earlier suits. That the only cause of action that the Petitioners have is clearly against him the 2nd interested party, which cause of action was fully heard and determined by a court of competent jurisdiction and the same cannot be opened again save on an appeal.

28. The Petitioners should have applied to the High Court for their appeal to be reinstated for it to be heard on merits rather than coming with a fresh suit under a constitutional petition which if sustained by this Honourable court will be contrary to public policy.

29. That from the foregoing, it is evident that the respondents herein as state actors have not violated any rights of the petitioners as claimed in the petition as it is evident that a court of competent jurisdiction in NAKURU CMCC 2862/1998 was the body which held that the suit property was legally his.

THE RESPONDENTS' CASE

30. Fred O. Nadwa, the Land Registrar Baringo central filed a replying affidavit stating that land parcel No. Kabarnet/Municipality/175 was allocated to the 2nd Interested Party by the Municipal Council of Kabarnet and that the Commissioner of Lands subsequently issued a certificate of lease dated 14.5.1998 and therefore, the 2nd Interested Party is the rightful owner.

PETITIONERS' SUBMISSIONS

31. The petitioners submit that the issuance of the Certificate of Lease to the 2nd Interested Party was arbitrary, irregular and therefore, infringed on his right to property having been issued with a letter of allotment dated 13.11.1996 and having complied with the set requirements. The petitioners further argue that Section 26 of the Land Registration Act No. 3 of 2012 is applicable as the Certificate of Lease was issued to the 2nd Interested Party without approval of the 1st Interested Party. Leasehold are to be issued with the involvement of Municipal Councils which are now different and that their functions have now been taken over by County Governments.

32. According to the petitioners the issuance of the certificate of title to the 2nd interested party offended the rule of law and violated the petitioners' dignity and rights as protected by sections 40 and 47 of the Constitution of Kenya 2010.

SUBMISSIONS BY THE RESPONDENTS

33. The 1st – 3rd respondents argue that the petition has no merit and should be dismissed with costs as the petitioners have no title to the suit property and therefore, their right to property has not been infringed. Moreover, that title to land property can only come into existence after issuance of letter of allotment meeting the conditions stated in such letter and actual issuance thereafter of the title documents pursuant to provision in the Act under which the property is held. The respondents ultimately submit that in the absence of the title document thus, Certificate of Lease, the petition lacks standings to institute or prosecute the petition.

SUBMISSIONS BY THE 2ND INTERESTED PARTY

34. Mr. Aim learned counsel for the interested party submits that the interested party was issued with the allotment letter and title and therefore he is the true owner of the property. Moreover, that the subject matter was determined by a court of competent jurisdiction and therefore the same is *res judicata*.

DETERMINATION

35. Having considered the petition, supporting affidavit, replying affidavits, I do find that the first issue to be considered is whether the petition is res-judicata. The petitioners are 10 in number, petitioning for themselves and Kabarnet Precious Women Group. The 1st to 3rd respondents are state organs or agents of State organs. The 1st Interested Party is the County Government of Baringo whilst the 2nd Interested Party is the title holder to the property. The Petitioners' claim is basically that the act of issuing a certificate of lease to the 2nd Interested Party violated their rights to property as enshrined in Article 40 of the Constitution of Kenya, 2010 and the fact that the petitioners had an allotment letter indicates that the issuance of title to the 2nd Interested Party violated Article 47 of the Constitution that provides for fair administration of justice.

36. The respondent in his replying affidavit state that he instituted Civil Suit No. 2862 of 1998 in Nakuru CMCC. The petitioners entered appearance and filed their replying affidavit with their defenses and counterclaim. The suit went to full hearing and the Nakuru Chief Magistrate who had jurisdiction to handle the matter held that the 2nd Interested Party was the legal owner of the plot and ordered that the defendants be restrained from interfering with the property. The petitioners filed an appeal to the High Court but failed to prosecute the appeal and the same was dismissed for want of prosecution.

37. The legal principle of res-judicata is universal and applies to civil suits and petitions both vertically and horizontally. This if the subject matter has been determined by a court of competent jurisdiction between the same parties on the same issues than it is invited that the court determining the matter was a Lower Court or Superior Court or that a court dealing with a constitutional petition or a moral civil suit. The doctrine of res-judicata is applicable to pre-empt a multiplicity of suits that would be a backlog to the courts systems. This doctrine ensures that litigation comes to an end.

38. The doctrine of *res judicata* in Kenyan law is based or premised on Section 7 of the Civil Procedure Act. It is in these terms: -

“7. Res judicata 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.”

39. *For a suit to be declared res judicata, 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 v the Attorney General and Others [2005] 1 EA 83.*

40. The doctrine was first discussed in the case of **Henderson v Henderson [1843] 67 ER 313**: -

“....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....”

Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

In John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR The Court of Appeal Observed as Follows; -

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and

assuming multifaceted dimensions.”

41. I have perused the plaint in Nakuru CMCC Civil Suit No. 2862 of 1998 and do find that the 10 petitioners were the defendants and the 2nd Interested Party was the plaintiff. The subject matter Kabarnet Municipality/175 and the dispute was on ownership. I have also perused the defence and counterclaim and do find that the issues are the same, thus ownership of the disputed parcel of land.

42. The Chief Magistrate’s Court, Nakuru made a determination and the issue of pecuniary jurisdiction was not raised. I do find that failure to raise the issue of jurisdiction before the Chief Magistrate’s Court in Nakuru, the Petitioners are estopped from claiming that the Chief Magistrate had no jurisdiction without establishing the same. Moreover, there is no evidence in court that the Magistrates court lacked the pecuniary jurisdiction. Moreover, the prayers in the lower court were not for cancellation of title but was for injunction and eviction which prayers were within the jurisdiction of the Chief Magistrate.

43. This matter having been determined by the Chief Magistrate, Nakuru cannot be re-opened even by way of a constitutional petition. The only step the petitioners can take is to institute an appeal.

44. This court concludes that the dispute revolving on the suit land has been resolved by a court of competent jurisdiction between same parties and the addition of the 1st to 3rd respondents is merely cosmetic and intended to give the petitioners a second bite of the cherry and to mislead the court that there is a new cause of action and that petitioners are different from the defendants in the lower court. The petition is *res-judicata*, and is otherwise an abuse of court process and is dismissed with costs to the respondents.

Dated and delivered at Eldoret this 11th day of May, 2018.

A. OMBWAYO

JUDGE