



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA CONSTITUTION PETITION CASE NO 41 OF 2017

FORMERLY MERU CONSTITUTIONAL PETITION CASE NO. 4 OF 2015

IN THE MATTER OF ARTICLES 2 (1), (4) 19 (2), (3), 21(1), 23(1), 27, 28, 0, 159(2) AND 165 (3) (b) OF THE CONSTITUTION OF KENYA AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES AND FREEDOMS UNDER ARTICLES 28, 40 AND 45 (1) OF THE CONSTITUTION OF KENYA AND

IN THE MATTER OF THE REGISTERED LAND ACT (REPEALED) CHAPTER 300 LAWS OF KENYA SECTIONS 159

AND

IN THE MATTER OF THE JUDICATURE ACT, CHAPTER 18 LAWS OF KENYA SECTION

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT SECTION 3

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT (CAP 160) SECTION 48

IN THE MATTER OF THE ESTATE OF CHABARI KAJIATHI (DECEASED)

BETWEEN

JOHN KARANI MWENDA.....PETITIONER

VERSUS

JAPHET BUNDI CHABARI.....RESPONDENT

RULING

1. This ruling concerns a Notice of Preliminary Objection dated 30th April, 2015 filed by the respondent's advocate. It states as follows:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that prior to the hearing of the petitioner's Notice of Motion application dated 18.2.2015 the respondent shall raise and urge a preliminary objection on points of law in the following terms:-

1. **That** the entire petition as presented is fatally defective and bad in law for the reasons that:-

a) The petition is res judicata Meru H.C.C.A No. 2 of 2011

b) The petition discloses no reasonable cause of action and is an abuse of the process of court.

REASONS WHEREFORE the respondent prays that the application dated 18.2.2015 and the petition be dismissed with costs to the

respondent.

DATED AT MERU THIS 30TH DAY OF APRIL, 2015

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BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE RESPONDENT

2. This court directed that the Preliminary Objection be canvassed by way of written submissions. On **13th November, 2018**, it was confirmed that the respondent's advocate had filed submissions. It was also confirmed by Miss Njenga holding brief for Mr. Kioni, the petitioner's advocate, that he had not filed the apposite submissions. Mr. Muriithi, the respondent's advocate, asked the court to give a ruling concerning this matter on account of the age of the Preliminary Objection which had remained undetermined for several years.

3. The respondent's affidavit sworn on **23rd May, 2018** gives a useful conspectus of the facts apposite to this suit. It states as follows:

I, JAPHET BUNDI CHABARI an adult male person of sound mind do hereby make oath and state as follows:

1. That I am the respondent herein properly versed with the issues stated herein.
2. That my advocates on record have read and explained to me the content and import of the petition dated 18.2.2015 and it is in response thereto that I swear this affidavit.
3. That the dispute between me and the petitioner began at the District Land Disputes Tribunal where I emerged victorious and the District Land Registrar ordered to transfer the suit property into my name.
4. That the award of the Tribunal was duly adopted as a judgment of the court. (Attached hereto and marked 'J B C I' is a copy of the proceedings).
5. That the petitioner, being aggrieved by the decision of the Tribunal appealed to the Provincial Land Disputes Appeal Tribunal where he again lost and the earlier award upheld. (Attached hereto and marked 'J B C II' is a copy of the proceedings).
6. That the petitioner was again dissatisfied with the award of the Provincial Land Disputes Tribunal and preferred an appeal to the High Court in Meru H.C.C.A. No. 2 of 2011.
7. That the appeal was heard on its merits and the same was dismissed. (Attached hereto and marked 'J B C III' is a copy of the judgment).
8. That it is after the determination of the appeal before the high court that the petitioner preferred this petition alleging the infringement of his constitutional rights.
9. That I am advised by my advocates that the petitioner's instant approach is an abuse of the court process as the dispute was determined by a court of parallel jurisdiction to the present one and hence these proceedings amount to forum shopping.
10. That I am further advised by my said advocates that the mere fact that the District Lands Tribunal ruled against the petitioner does not amount to a breach of his constitutional right.
11. That I am also counseled that the petitioner is guilty of laches as it apparently took him six (6) years to realize that his constitutional rights had been infringed.
12. That the petitioner has litigated this dispute in all conceivable forums and it is my prayer that the court finds that litigation must come to an end and proceed to dismiss this petition.
13. That I depose to the foregoing believing the same to be true and accurate to the best of my knowledge, belief and understanding.

4. The respondent's submissions state as follows:

RESPONDENT'S SUBMISSIONS ON PRELIMINARY OBJECTION DATED 30.4.2015

Your Lordship the following represents submissions for the respondent on the Notice of Preliminary Objection dated **30.4.2015**.

Introduction

Your Lordship, the respondent raised an objection to the entire petition contending that the same was res judicata Meru H.C.C.A.

No. 2 of 2011, that it did not raise a reasonable cause of action and was thus an abuse of the court process.

The submissions

Your Lordship, prior to instituting this petition the petitioner had lodged Meru H.C.C.A. No. 2 of 2011 challenging the decision of the Provincial Land Disputes Appeals Tribunal.

The said appeal was dismissed after the court considered it on merit which prompted this constitutional petition.

Your Lordship, it is on the basis of this action by the petitioner of instituting this petition that has informed the objection the subject of these submissions.

It is submitted that this petition is res judicata Meru H.C.C.A. No. 2 of 2011 as per section 7 of the Civil Procedure Act.

Your Lordship section 7 of the Civil Procedure Act lists the following parameters for a matter to be res judicata;

- a) The subject-matter is directly and substantially the same.
- b) The issues are directly and substantially the same.
- c) There is sameness in title.
- d) The court that heard and determined the issue was competent.
- e) Such issue has been heard and (sic) finally determined by such court.

Taking into account all the prevailing aspects of this dispute, the conditions set out above have been met.

Basically, the doctrine of res judicata is a public interest policy aimed at pre-empting judicial absurdities where courts of concurrent jurisdiction arrive at divergent decisions regarding the same dispute. Obviously the rationale behind the doctrine is to ensure there is reliability and finality in judicial decisions.

Thus in *Peter Muneria Ole Muiya & 4 Others vs Principal Magistrate, Narok & 6 Others [2014] eKLR*, whose copy is attached, the court found the constitutional petition before it to be res judicata the judicial review proceedings determined earlier and which revolved around the same subject matter.

We urge the court to be guided by the persuasive authority cited above and proceed to find that the instant petition is res judicata Meru H.C.C.A. No. 2 of 2011 and hence an abuse of the court process and do proceed to dismiss the same with costs.

We so humbly pray.

DATED AT CHUKA THIS 24TH DAY OF MAY, 2018

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FOR: BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE RESPONDENT

- 5. The respondent’s advocate proffered the case of Peter Muneria Ole Muiya & 4 Others Versus Principal Magistrate, Narok & 6 Others [2014] eKLR which found the Constitutional Petition before it res judicata Judicial Review proceedings which had earlier determined a matter apposite to the same subject matter. I do opine that this authority is veritably relevant to the facts and circumstances of this case.
- 6. I have carefully considered the averments and the one authority proffered by the respondent in this case. I find that the submissions filed by the respondent have not been controverted in any way.
- 7. In the circumstances, I uphold this Preliminary Objection on Points of Law. It is hereby declared that this petition is res-judicta MERU H.C.C.A. No. 2 of 2011.
- 8. This suit is, therefore, dismissed.
- 9. Costs shall follow the event and are awarded to the respondent.
- 10. It is so ordered.

Delivered in open court at Chuka this 14th day of November, 2018

in the presence of:

CA: Ndegwa

Mark Muriithi present for the Respondent

John Karani Mwenda – Petitioner - Present

P. M. NJORGE,

JUDGE.