



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**PETITION NO. 2 OF 2018**

**MBURU MUCHERU.....PETITIONER**

**VS**

**SAMUEL CHEGE MUCHUNU.....1<sup>ST</sup> RESPONDENT**

**MURANGA LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling arises from the humble petition of the Petitioner dated the 2/6/17 and filed in Court on the 8/6/17. The Petition is brought under the Article 165(3), 20,21,22,23, 40, 47 and 60 of the Constitution, 2010 and section 12 and 13 of the Environment and Land Court Act.

2. The Petitioner states that he is the legitimate, bonafide and registered owner of LOC4/NGARARIA/855 (the suit land) having become so registered in 1966 and for which he retains the original title thereof. That he did not sell the suit land to the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent used his office as a senior Chief to illegally transfer the suit land in his favour and that the suit property was transferred while the 1<sup>st</sup> Respondent was embroiled in HCCC No 2666 of 1976 which was challenging the decision of the Central Land Board that refused the consent to transfer the suit land to the 1<sup>st</sup> Respondent. That the transfer was done without the consent of the Land Control Board.

3. Further he contended that the title was acquired fraudulently and that he has never surrendered to anyone the original title deed for transfer of the land. That the 1<sup>st</sup> Respondent colluded with the 2<sup>nd</sup> Respondent to have the suit land illegally transferred to the 1<sup>st</sup> Respondent's name. That the 1<sup>st</sup> Respondent used his influence to have the Kandara Land control Board to forcefully, fraudulently and illegally obtain consent of the land control board. That generally his rights under Article 40 of the Constitution have been violated. The particulars of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are set out in para 1-6 of the petition.

4. Finally, the Petitioner sought the following orders;

- a) Issue a declaration that the Petitioner is the legal owner of all that parcel land Known as Title Number LOC 4/NGARARIA/855.
- b) Issue an order for revocation of the Title (Land Certificate) issued to the 1<sup>st</sup> Respondent.
- c) Issue a permanent injunction restraining the 1<sup>st</sup> Respondent by himself, servants and agents from trespassing and or interfering in any way with the suit property LOC 4/NGARARIA/855.
- d) Issue an order directing the 2<sup>nd</sup> Respondent to rectify the lands register by cancelling the 1<sup>st</sup> Respondent's title (Land Certificate) to LOC 4/NGARARIA/855 and substitute the same with the Petitioner as the registered owner.
- e) Costs of and incidental to the Petition.
- f) Any other orders as the Honourable Court shall deem fit and just to grant.

5. The 1<sup>st</sup> Respondent filed a statement dated the 7/7/17 and filed on even date. At the onset the 1<sup>st</sup> Respondent fired two objections; the Court has no jurisdiction to hear the petition and that the petition is resjudicata.

6. The 1<sup>st</sup> Respondent gave a history of the disputes surrounding the suit land which is summarized hereunder; The parties litigated over the suit land in **HCCC NO 1976 of 1976- Samuel Muchunu Vs Mburu Mucheru** and **HCCC NO 2666 of 1976 Mburu Mucheru Vs Chege Muchunu** which cases were consolidated under **HCCC NO 2666 of 1976**. In 1982 the Court ordered the Petitioner to transfer the suit land to the 1<sup>st</sup> Respondent. On his refusal to so transfer, the Court on 26/4/83 ordered the Deputy Registrar of the High Court to execute the

necessary documents including the land control board forms and the transfer in the name of the 1<sup>st</sup> Respondent.

7. The 1<sup>st</sup> Petitioner stated that the suit land had initially been sold by the Petitioner to David Karanja Mwangi but the father of the Petitioner refused to complete the sale on account that the suit land could only be sold at Kshs 7100/-. The said David Karanja Mwangi could not complete the sale at the set price and the land was offered to him to buy at the price of 7100/- which he paid in full between 1972 and 1974 through the Petitioner's brother in law, a Mr Wilson Mwaura Kamau (as per arrangement of the parties). He annexed the said agreement and the copy of payments thereto. That when the Petitioner failed to obtain consent of the land control board, he filed HCCC No 1976 of 1976 for specific performance on 3/9/76. The Petitioner also filed suit against the 1<sup>st</sup> Respondent on 23/11/76 HCCC No 2666 of 1976 over the same suit land seeking special damages of Kshs 30,000/- mesne profits of Kshs.400/- per month and general damages and interest for trespass.

8. The 1<sup>st</sup> Respondent avers that the decision of the High Court in HCCC No 2666 of 1976 in which the suit land was transferred to him has not been varied, appealed and or set aside.

9. The 1<sup>st</sup> Respondent denied the particulars of fraud, collusion and or illegality and stated that the suit land was transferred to him through a Court order. He contended that the Petitioner is undeserving of the orders sought in the Petition and the same should be rejected.

10. The 2<sup>nd</sup> Respondent filed grounds of opposition and contended that there are no Constitutional rights raised for the Court to determine. That the Petitioner has not demonstrated how the articles of the Constitution cited have been infringed. And finally, that the petition is at best misconceived, mischievous and an abuse of the process of the Court.

11. On the 20/3/18 the 1<sup>st</sup> Respondent filed a Preliminary Objection that the suit is resjudicata in view of the order and decree dated the 31/7/82 in HCCC NO 2666 of 1976 between the parties which dealt with and finalized the Petitioner's claim in the suit land.

12. Parties elected to file written submissions which I have read and carefully considered.

13. As regards the allegations of fraud collusion and illegality the 1<sup>st</sup> Respondent submitted that he bought the suit land from the Petitioner who signed the transfer documents before the Land Registrar Muranga and the application for Land control board consent but refused to attend the board to obtain land control board consent. He then sought an order vesting the suit land in his name which order was issued by the Court. The first order dated 21/9/81 arose from the arbitration of the panel of 4 elders which returned a verdict that the Petitioner transfers the suit land to the 1<sup>st</sup> Respondent. The High Court authorized the Deputy Registrar to sign all documents necessary to effect the transfer of the suit land to him.

14. As regards the doctrine of resjudicata, the 1<sup>st</sup> Respondent submitted that section 7 of the Civil Procedure Act bars the Petitioner from bringing this suit. He contended that any matter that might have been a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such former suit. In other words that the Petitioner ought to have raised the present issues in the former two suits or appeal if he was dissatisfied with the outcome of the decision of the former suits.

15. He relied on the decision of Gachuhi J.A in **Benson Ngugi Vs Francis Kabui Kinyanjui & 3 others CA No 1 of 1986** (unreported) where the Learned Appellate Judge said;

“ in law, any litigation has to come to an end. Once a decision has been reached by a competent Court, it cannot be reopened to be started all over again unless the decision reached has been set aside. Any decision reached, if not set aside, it can only be challenged on appeal and cannot be challenged in any inferior Court, tribunal or in the same Court except in case of review. The law will not allow any dispute between the same parties or between those who claim through them to reopen the dispute while the judgment still remains on record.”

16. The Petitioner submitted that the petition is properly before the Court and the Court has the power to so determine it. Citing the case in **Mukisa Biscuits Vs West End Distributors**, he submitted that a Preliminary Objection will stand if it is purely on a point of law. In the case at hand he submitted that the 1<sup>st</sup> Respondent has raised issues of facts thus negating the point of law. He contended that the current petition is of a constitutional nature urging constitutional interpretation and enforcement of constitutional rights and therefore does not raise the same issues as in the previous two suits. He faulted the 1<sup>st</sup> Respondent for not raising any point of law in aid of the Preliminary Objection and urged the Court to find it unmerited in that regard.

17. In his further submission, he averred that the parties in this current suit are not the same as in the previous suits. The 2<sup>nd</sup> Respondent was not a party in the previous suits. He urged the Court no to allow the Petitioner's claim to be short-circuited without being accorded his day in Court to prosecute his cause on how his constitutional rights have been violated by the Respondents jointly.

18. Regurgitating the prayers in the petition and the constitutional underpinnings in which the petition has been adverted, the Petitioner stated that of great importance are the prayers addressed to the 2<sup>nd</sup> Respondent which require the Court to *inter alia* receive evidence at the full hearing and look at the entire record of the HCCC No 2666 of 1976, something that cannot be done in a Preliminary Objection.

19. He implored the Court that under Article 22 and 23 of the Constitution, the Court is empowered to entertain any matter that seeks to enforce a right or prevents against denial of such a right as embodied in the said articles.

20. Quoting the case of **D T Dobie & Company (Kenya) Limited Vs Muchina (1982) KLR1** cited with approval in the case of **Tulip Properties Limited Vs Mohammed Koriow Nur & 6 others (2014) EKLK** whilst equating striking out a case to a Preliminary objection, the Petitioner submitted that a suit should be sustained as long as it shows a mere semblance of a cause of action rather than strike it out.

21. Having considered the petition, the Preliminary Objection and the rival submissions and all the material before the Court, the key issue that will dispose the Preliminary Objection is whether the petition is resjudicata.

22. The definition of a Preliminary Objection is acknowledged in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

"..... 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".

23. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

**".....a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."**

24. The effect of the case law cited above means for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

25. The gist of the Preliminary Objection is rooted in the doctrine of resjudicata. Section 7 of the Civil Procedure Act provides 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"

26. The literal meaning of res is everything that may form an object of rights and includes an object, subject matter or status. Resjudicata literally means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments. In the case of **Subramanian Swamy V state of T.N AIR 2015 SC 460** the Supreme Court of India explained the doctrine of Resjudicata in the following words;

"the literal meaning of res is everything that may form an object of rights and includes an object, subject matter or status and res judicata literally means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgements. *Res judicata pro veritate accipitur* is the full maxim which has, over the years, shrunk to mere resjudicata, which means that res judicata is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of roman jurisprudence *interest reipublicae ut sit finis litium* (it concerns the state that there be an end to law suit) and partly on the maxim *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice over the same cause)."

27. The doctrine is founded on high public policy intended to achieve three objectives namely there must be a finality to litigation and that individual should not be harassed twice over on account of the same litigation. It underscores the fundamental doctrine of law that there must be an end to litigation. The doctrine is also founded on equity and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving the determination of the same issue.

28. In order to decide the question whether a subsequent proceeding is barred by resjudicata it is necessary to examine the question in reference to;

- a) Matters directly and substantially in issue in the former suit.
- b) Whether the parties are the same or parties under whom they are or any of them claim
- c) Litigating under the same title
- d) Competence of the Court.
- e) Matter has been heard and finally decided.

29. The essence of the res judicata doctrine is further explicated by Wigram, V-C in **Henderson v. Henderson (1843) 67 E.R. 313**, as follows:

"... 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 the 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 the 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” .

30. In the case of **George W M Omondi & another v National Bank of Kenya Ltd & 2 Others [2001] eKLR** the Court stated as follows;

The doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction, but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined.

31. Further the Court held that;

“.....the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties of causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments. I wholly agree with the opinion of Kuloba J in **Mwangi Njangu v Meshack Mbogo Wambugu** (supra) where he said:-

“If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays”.

It cannot be otherwise if the doctrine is to serve the two public policy objectives for which it was fashioned, namely, that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same matter.

32. In HCCC No 1976 of 1976, the 1<sup>st</sup> Respondent sued the Petitioner for specific performance arising from the purchase of the suit land and sought *inter alia* the following orders;

- a) An order vesting the said piece of land known as LOC4/NGARARIA/855 and measuring 7.1 acres of thereabouts in favour of the plaintiff
- b) General damages
- c) Alternatively, a sum of Kshs 7,370/-
- d) Interest thereon at the rate of 12% p.a from the 22/7/72 till date of the judgment.

33. On the other hand, in the case HCCC NO 2666 of 1976 the Petitioner sued the 1<sup>st</sup> Respondent for trespass and unlawful excavation of stones and sought *inter alia* the following orders;

- a) Special damages in the sum of Kshs 30,000/-
- b) Mesne profits *appendre* at Kshs 400/- per month
- c) General damages
- d) Interest at 8% since 1973 till date of judgment
- e) Removal of caution
- f) Costs and interest thereon.

34. According to the record the two suits were consolidated into HCCC No 2666 of 1976 and on the 13/5/1981 the then Justice Todd ordered by consent that the dispute be arbitrated by 4 elders chaired by the District Officer Kandara. On the 31/7/82 the Court issued an order that the Petitioner do transfer the suit land to the 1st Respondent as per the decree on record issued on the 13/10/82. It is manifestly clear that the parties in this suit consented to have their dispute subjected to arbitration and a verdict of the Court rendered. On the 26/4/1983 Lady Justice Effie Owuor ordered as follows;

“ 1. That the plaintiffs advocate M/s CK Mwihia do have all the relevant documents signed within 3 days to effect the transfer of land reference number LOC4/NGARARIA/855 from the plaintiff to the Defendant free from all encumbrances and delivered to Mr Kinuthia, Advocate within 71 days from the date of delivery.

2. That in default, the Deputy Registrar of this Court be and is hereby empowered to sign on behalf of the plaintiff the application for land board consent forms, transfer forms and mutation forms to register the land in the name of the Defendant”.

35. The record speaks for itself. The documents filed by the Petitioner shows that the application for land control board consent dated the 2/12/83, the letter of consent dated the 6/12/83 and the transfer dated the 2/12/83 were all executed pursuant to the Court decree dated the 26/4/83 in HCCC NO 2666 of 1976. In view of this the claim of the Petitioner that the 1<sup>st</sup> Respondent acquired the suit land by either fraud collusion ( with 2<sup>nd</sup> Respondent) and or illegality is not prima facie supported by his own documents on record.

36. The current petition *inter alia* seeks the following prayers;

- a) Issue a declaration that the Petitioner is the legal owner of all that parcel land Known as Title Number LOC 4/NGARARIA/855.
- b) Issue an order for revocation of the Title (Land Certificate) issued to the 1<sup>st</sup> Respondent.
- c) Issue a permanent injunction restraining the 1<sup>st</sup> Respondent by himself, servants and agents from trespassing and or interfering in any way with the suit property LOC 4/NGARARIA/855.
- d) Issue an order directing the 2<sup>nd</sup> Respondent to rectify the lands register by cancelling the 1<sup>st</sup> Respondent's title (Land Certificate) to LOC 4/NGARARIA/855 and substitute the same with the Petitioner as the registered owner.
- e) Costs of and incidental to the Petition.
- f) Any other orders as the Honourable Court shall deem fit and just to grant.

37. The issues raised in the current petition and the two previous suits are similar in all respects. The Petitioner is challenging title to the suit land and the petition has been brought under the auspices of a violation of constitutional rights but is basically seeking title in the suit land.

38. Section 2 of the Civil Procedure Act defines a suit to mean all civil proceedings commenced in any manner prescribed. The Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013 provide for the manner in which petitions are filed. For that reason, a petition is as much a suit as defined under section 2 of Civil Procedure Act. The operating word of section 7 is "no Court shall try any suit or issue....." the words of the Act are mandatory.

39. The Petitioner has not demonstrated by way of evidence that the decree issued in the previous suit HCCC No 2666 of 1976 was vitiated by fraud or illegality as to negate the doctrine of resjudicata.

40. This Court finds and holds that the matters directly and substantially in issue in HCCC NO 2666 of 1976 are directly and substantially in issue in this petition.

41. The parties in HCCC No 2666 of 1976 were the Petitioner and the 1<sup>st</sup> Respondent save the 2<sup>nd</sup> Respondent. The Petitioner has submitted that the suit is not resjudicata on account that the 2<sup>nd</sup> Respondent was not a party. This Court disagrees with that view because nothing barred the parties then to sue the Land Registrar. The actions complained about took place that time and the 2<sup>nd</sup> Respondent in pursuance of a Court order registered the 1<sup>st</sup> Respondent as owner of the suit land. Entry No 11 on the green card is testament to that. The parties just as in the former suits are litigating under Land reference LOC4 /NGARARIA/855. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case to Court at once. They are forbidden from litigating in instalments (see **Mwangi Njangu v Meshack Mbogo Wambugu above**).

42. The previous suit was heard and determined to finality by the High Court, a Court of concurrent jurisdiction with the ELC Court. The High Court is and was empowered under the then section 84 of the old Constitution to grant the reliefs, if any, now prayed in this petition. I hold that the matter in issue was determined by a competent Court.

43. Relying on the decision of **Benson Ngugi Vs Francis Kabui Kinyanjui & 3 others CA No 1 of 1986** aforesaid, litigation must come to an end. Once a decision is reached and is not appealed or set aside parties are forbidden to reopen the case and relitigate on the same issues. It is not permissible to obtain a second judgment for the same civil relief on the same cause of action. It is the cause of action which gives rise to an action and that is why it is necessary for the Courts to recognize that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment or give rise to another cause of action on the same facts. Allowing otherwise, might lead to conflicting judgments of equal authority, lead to multiplicity of suits and bring the administration of justice into disrepute.

44. I have reviewed the petition in its entirety and the material before this Court and note that the principal claim which would be subject to the Constitutional interpretation is whether the Petitioner's right to own property is or has been tampered with by the Respondents jointly or severally. The procedure through which the 1<sup>st</sup> Respondent became the owner of the suit land and the circumstances under which the 2<sup>nd</sup> Respondent registered the 1<sup>st</sup> Respondent as owner of the suit land is explained in summary as pursuant to a Court order. The said Court order is as explained valid to date. In those circumstances the Petitioner's right to own property as a constitutional matter is not in any manner infringed by the 1<sup>st</sup> or 2<sup>nd</sup> Respondent. In such a case there is great merit in the objection taken by the 1<sup>st</sup> Respondent.

45. The upshot of the Preliminary Objection is that it is merited. The Preliminary Objection is upheld and the Petition is dismissed with costs to the 1<sup>st</sup> Respondent.

**It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 13<sup>TH</sup> DAY OF DECEMBER 2018**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Petitioner – Present

James Kimani HB for Tumu for the Petitioner

Respondents: 1: Mungai HB Mwicigi Kinuthia for the 1<sup>st</sup> Respondent

1<sup>st</sup> Respondent is absent

2<sup>ND</sup> – Attorney General is absent

Irene and Njeri, Court Assistants