



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NYERI**  
**JUDICIAL REVIEW DIVISION**  
**ELC JR NO. 3 OF 2015**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK ORDERS OF CERTIORARI  
AND PROHIBITION AND LEAVE TO OPERATE AS STAY**

**IN THE MATTER OF THE LAW REFORM ACT, CAP 26**

**LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT**

**AND**

**IN THE MATTER OF AN APPLICATION BY THE APPLICANT FOR JUDICIAL REVIEW  
ORDERS OF**

**CERTIORARI AND PROHIBITION**

**IN THE MATTER OF ORDERS 53 RULES 1, 2 AND 3 OF THE CIVIL PROCEDURE RULES,  
CIVIL PROCEDURE ACT, LAWS OF KENYA**

**BETWEEN**

**JOSEPH NDERU WANGECE & 8 OTHERS ..... APPLICANTS**

**-VERSUS-**

**VINCENT NYIGI NDERITU & 3 OTHERS.....RESPONDENTS**

**RULING**

**Introduction**

1. Vide the chamber summons dated **17th April, 2015** and filed on the same day, the applicants herein, *inter alia*, seek leave of this court to institute judicial review proceedings against the judgment of

**Ombwayo J.**, delivered on **19th February, 2015** in Nyeri High Court Petition No. 4 of 2012. The applicant prays that the leave, if granted, should operate as stay of execution of the decree issued in favour of the 1st respondent in that suit.

2. The application is opposed through the 1st respondent's notice of preliminary objection dated **5th May, 2015**. Vide that notice of preliminary objection, the 1st respondent challenges the application on the grounds that:-

- 1. The application violates the provisions of Article 165(6) of the Constitution.**
- 2. This court lacks jurisdiction to grant the orders sought**
- 3. The 1st respondent being a private person, the orders sought cannot issue against him and that**
- 4. The issues raised in the matter are *res judicata* the judgment and decree of this court in Nyeri High Court Constitutional Petition No.4 of 2012- Vincent Nyingi Nderitu v, Hon. Attorney General & Others.**

3. The notice of preliminary objection was disposed of by way of written submissions.

#### **1st respondent's submissions**

4. On behalf of the 1st respondent, it is submitted that a cursory look at the application reveals that the application is a collateral attack on the decision of this court in Nyeri High Court Constitutional Petition No.4 of 2012 (*supra*). The application is also said to be a collateral attack on the decision of **Mwera J.**, delivered on 13th May, 1992. It is contended that through the two cases, the issues raised in the instant applicant were heard and determined by courts of competent jurisdiction and to that extent *res judicata*.

5. Based on **Article 165(6)** of the Constitution of Kenya, 2010 and the cases of **Peter Nganga Muiruri vs. Credit Bank Kenya Limited (2008) eKLR; Civicon Ltd v. Kenya Revenue Authority & Another** and **Ventaglio International SA & Another v. Registrar of Companies and Another Nairobi HC Constitutional Petition No.410 of 2012**, it is submitted that the court lacks jurisdiction to entertain the current proceedings. It is further submitted that the orders sought cannot issue against the 1st respondent because he is private individual.

6. With regard to the prayer for declaratory reliefs, it is submitted that such reliefs cannot issue under **Section 8 and 9** of the Law reform Act.

7. Terming the application vexatious, the 1st respondent urges the court to dismiss it with costs to the respondents.

#### **2nd, 3rd and 4th respondent's submissions**

8. On behalf of the 2nd, 3rd and 4th respondents, it is submitted that the application is incurably defective for contravening **Article 165(6)** of the Constitution of Kenya, 2010 and that in as long as the application seeks to re-litigate issues that were subject of litigation in Nyeri HCCC Petition No.4 of 2012 (*supra*) it amounts to utter abuse of the process of the court (Matter is *res judicata*). It is further submitted that the application is *res subjudice* Nairobi HCCC No. 4699 of 2012.

#### **Applicant's submissions**

9. On behalf of the applicant, it is submitted that the issues raised in the current proceedings are dissimilar with those raised in the former suits or proceedings in that the current proceedings relate to the validity of the title held by the 1st respondent while the former proceedings touched on the ownership of the suit property.

10. Arguing that the issues raised in the application are arguable, the applicant urges the court to accord the applicant an opportunity to challenge the validity of the title held by the 1st respondent.

### **Analysis and determination**

11. Vide a judgment delivered on **19th February, 2015** in Nyeri HCCC Petition No.4 of 2012 (*supra*), **Ombwayo J.**, entered judgment in favour of the 1st respondent in the following terms:-

**“This court finds that the 5th-13th respondents have been in illegal possession of the petitioner’s land and have no reason whatsoever to remain on the said parcel of land. A declaration is hereby made that the petitioner’s right to land title number Nyandarua/Njabini/656 is protected by Article 40 of the Constitution of Kenya...An order is hereby made directing the 5th to 13th respondents to forthwith vacate any portion of land title number Nyandarua/Njabini/656 that they currently unlawfully occupy. Moreover the 5th to 13 respondents and all persons claiming either under them or at par with them are hereby restrained from entering, remaining or in any other manner trespassing to or interfering with the petitioner’s ownership and exclusive quiet possession and enjoyment of all that parcel of land known as land title number Nyandarua/Njabini/656. (Emphasis supplied).**

12. The court also directed the 1st to 4th respondent in that matter to ensure compliance with the orders.

13. Barely two months after the applicants herein lost the case filed against them by the 1st respondent through the above cited petition, they brought the current proceedings *inter alia* seeking judicial review of the judgment of the superior court!

14. The decision that is the subject matter of the intended judicial review proceedings being a decision of a superior court, the question to answer is whether a decision of a superior court is subject of judicial review.

15. In answering this question I will not re-invent the wheel but adopt the decision in the case of **Peter Ng’ang’a Muiruri v Credit Bank Ltd and Anor.** Court of Appeal Civil Appeal NO. 203 of 2006 where it was held:

**“The High Court’s Constitutional division or indeed any other division cannot supervise any other superior court of concurrent jurisdiction....It is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any other court process through the same court or a court of concurrent jurisdiction a different decision from one already rendered by the court in the other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-litigate the matter through constitutional petition or other proceedings.”**

16. Being of the view that the proceedings herein offend the provisions of **Article 165(6)** of the Constitution of Kenya, I find them to be misadvised and a gross abuse of the process of the court.

17. I also find the application in as far as it seeks to re-litigate the issue of title and ownership of the suit property which was heard and determined by a court with competent jurisdiction to do so to be *res judicata*. The applicants having had their day in court, cannot be heard to say that they are entitled to re-introduce the same issues through the current proceedings. In my view, if dissatisfied with the decision of the court the applicants’ ought to have either applied for review or appealed against the decision. In this regard see the case of **Civicon Limited v Kenya Revenue Authority & Another (2014)eKLR** where it was stated:

**“I agree with the judicial policy that variously set out by the authorities relied by the 2<sup>nd</sup> respondent – *Peter Ng’ang’a Muiruri v Credit Bank Ltd and Anor. Court of Appeal Civil Appeal NO. 203 of 2006* and *Ventaglio International SA and Anor. v The Registrar of***

***Companies and Anor Nairobi HC Constitutional Petition No. 410 of 2012 (per Lenaola, J) that the High Court’s constitutional division or indeed any other division cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinates courts under Article 165 (6) of the Constitution. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any other court process before the same court or court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See Beta Healthcare International Ltd. v Commissioner of Customs, and 2 Ors. Nairobi HC Petition No. 125 of 2010 (per Majanja, J).”***

18. Having found the application herein to be misadvised and an abuse of the court process, I dismiss it with costs to the respondents.

**Dated, signed and delivered in Nyeri on this 24<sup>th</sup> day of January, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mrs. Njeru for the respondent

N/A for the applicant

Mr. Gisemba for the 2nd-4th respondents

Court clerk - Esther