



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L NO. 11 OF 2015

JOEL KENDUIYWA.....PETITIONER

-VERSUS-

DISTRICT CRIMINAL INVESTMENT OFFICER

NANDI CENTRAL.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

FRANCIS SIRATIE MISSOS.....3RD RESPONDENT

ANDREA RUTO.....4TH RESPONDENT

PAULINE CHEKEMOI.....5TH RESPONDENT

RULING

1. Introduction.

These proceedings were convened by way of a Petition dated 23rd June, 2015 supported by an affidavit of Joel Kenduiywa filed on the same day. In the Petition, the Petitioner sought for orders against the respondents jointly and severally for:

- a. Mesne profits
- b. Compensation for character assassination.
- c. Loss of income
- d. Pain, psychological torture
- e. Resti.....of property Nandi/Kamobo/914.
- f. Costs of the suit.

Afterwards, the Petitioner filed a Notice of Motion application dated 16th September, 2015 under Certificate of Urgency seeking amongst others orders for Mesne profits and vacant possession of Nandi/Kamobo/914. The said application was later withdrawn with costs to the 3rd, 4th and 5th

Respondent on 24th January, 2016.

2. Preliminary Objection.

By a Preliminary Objection dated 27th November, 2015 and filed on 8th December, 2015, the 3rd, 4th and 5th Respondents seek the dismissal of the Petition with costs to the Respondents.

The Preliminary Objection is premised on 6 grounds namely:

1. THAT the Petitioner's Petition and/or Application are odious, premature bad in law, incompetent, unmerited, an afterthought, misadvised, baseless, frivolous, scandalous, vexatious and an outright abuse of the due process of the court.
2. THAT the Petitioner's Petition is incompetent and untenable in law for want of form and that it does not disclose the Article of the Constitution upon which the Petitioner's fundamental rights have been violated notwithstanding that even the Notice of Motion Application itself is not premised on any relevant provisions of the law.
3. THAT the Applicants' application and Petition offends the provisions of Sections 2 of Cap 41 Laws of Kenya and we shall urge the court to declare the Petitioner herein a vexatious claimant since he has filed numerous suits over land parcel **No. Nandi/Kamobo/914** being Eldoret E&L Case No. 231/2012, Eldoret HCC Misc. Application NO. 181/1996, Eldoret CMCC No. 963/1997, Eldoret HCC Misc. Application NO. 205/1997 and Eldoret HCC Misc. Application No. 48/1999 inter alia.
4. THAT the petition herein is sub-judice since there exists Eldoret E&L Case No. 231/2012 between the Petitioner and the 3rd and 5th Respondent over land parcel **NO. Nandi/Kamobo/914** and the Applicant is determined to take the Respondents in circles with the sole intention of frustrating them.
5. THAT this honourable court lacks jurisdiction to entertain this instant Petition herein.
6. THAT petition herein is fatally defective for misjoinder of parties and this should be dismissed with costs.

3rd, 4th and 5th Respondents submissions

Mr. Kagunza Counsel for the 3rd, 4th and 5th Respondents argued the Preliminary Objection on 22nd February, 2017. He addressed the court on the 6 grounds of the Preliminary Objection filled on 8th December, 2015.

He elaborated on the grounds on the notice of Preliminary Objection and further submitted that there is an ongoing case Environment and Land case NO. 231/12 pending before Eldoret Court which involves the Petitioner and the 3rd & 5th Respondents in respect of the said parcel of land namely LR NO. Nandi/Kamobo/914 (hereinafter known as the suit property).

Counsel further submitted that there were numerous applications that had been filed by the Petitioner in respect of the said suit property. The cases are:

1. Eldoret E&L Case No. 231/2012
2. Eldoret HCC Misc. Application NO. 181/1996
3. Eldoret CMCC No. 963/1997

4. Eldoret HCC Misc. Application NO. 205/1997

5. Eldoret HCC Misc. Application No. 48/1999

Parties appeared before Hon. Justice Ombwayo on 18th November 2015 and it was agreed by consent that all matters in respect of the suit property be stayed and the status quo be maintained until the suit is heard and determined.

Counsel for the Respondents submitted that the Petitioner filed this Petition knowing that there is a pending suit in respect of Nandi/Kamobo/914 vide E&L 231/2012. The Petitioner was all along party to the proceedings in E&L 231/2012 and was aware of the order staying all the suits relating to the suit property until case No. 231/2012 is heard and determined.

It is argued that the Petitioner's suit is subjudice and the court is expressly barred from presiding over a matter which is expressly and/or impliedly prohibited by any law. (Section 5 of Civil Procedure Act) Counsel also submitted that Section 6 of the Civil Procedure Act bars this court from presiding over a matter which was similar or substantially similar. Issues pending before a court of competent jurisdiction. It does not matter whether or not all the parties in the former suit are parties to the current suit.

Further the Petitioner is challenged on the ground that the Environment and Land Court does not have jurisdiction to hear the prayers in the Petition for compensation for character assassination, loss of income, pain, psychological torture, amongst others. It was argued that these prayers do not fall under the purview of the Environment and Land Court and therefore it lacks jurisdiction to entertain the petition.

Counsel for the Respondents also submitted that the Petitioner has listed the 2nd and 4th Respondents in this Petition while the issue in E&L 231/2012 does not concern the two. The 3rd Respondent being a neighbour who has no interest in the suit land and the 4th Respondent being the son of the 5th Respondent therein. Counsel urged the court to strike out the names of the 3rd and 4th Respondents.

In conclusion, counsel for the 3rd, 4th and 5th Respondents submitted that the Preliminary Objection is merited on all the grounds stated and urged the court to allow it as prayed.

1st and 2nd Respondents Submission.

Miss Lungu submitted that they had not filed any grounds in response to the Preliminary Objection but she however associated herself with the submissions of counsel for the 3rd, 4th and 5th Respondents.

Petitioner – Joel Kenduiywa's submissions.

The Petitioner stated that he had filed Grounds of Opposition to the Preliminary Objection on 8th January, 2016 together with a Supporting Affidavit and annexures. He stated that he is not a party to the E&L Case NO. 231/2012 although the land is the same as what is in this Petition. He confirmed the prayers that he is seeking for in the Petition when prompted by the court. He prayed that the Preliminary Objection be dismissed with costs.

Analysis.

I have considered the submissions for and against the Preliminary Objection and come to the conclusion that the issues for determination are as follows:-

1. Whether the Petition is an abuse of the court process.
2. Whether this Petition is sub judice.

3. Whether this court has jurisdiction to hear the prayers sought in the Petition.

On issue No. 1.

As indicated above this Petition was filed during the pendency of E&L No. 231/2012. It is apparent from the proceedings in E&L 231/2012 and the submissions for counsels for the respondents that suit property known as LR Nnandi/Kamobo/914 is similar in both suits involving same parties. It is also on record in E&L No. 231/2012 that all the cases earlier mentioned in respect of the suit property involving the Petitioner and other parties were stayed on 8th November, 2016 pending the determination of that suit.

It is to prevent abuse of the court process when parallel proceedings are heard before different courts with concurrent jurisdiction or before the same court.

Section 6 of the Civil Procedure Act requires the court to stay the consideration of any suit or application where a suit or application is pending for determination by a court of competent jurisdiction.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between same parties, or between parties under whom they or any of them claim litigating under the same title. When such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The filing of an application or a petition before this court in respect of the same parties and which the matter in issue is also directly and substantially in issue in E&L 231/2012 which is pending before a court of competent jurisdiction is clearly an abuse of the court process. This finding also disposes of the issue of determination as to whether the petition is subjudice.

Issue NO. 3.

The issue as to whether the court has jurisdiction to entertain the prayers sought for in the petition.

Section 13(2) of the Environment and Land Court provides that:

“In exercise of its jurisdiction under Article 162(2) (b) of the constitution the court shall have power to hear and determine disputes –

- a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. Relating to compulsory acquisition of land,
- c. Relating to land administration and Management;
- d. Relating to public, private and community land and contracts, leases in action or other instruments granting any enforceable interests in land; and
- e. Any other dispute relating to environment and land.

From the foregoing, my finding on the issue of jurisdiction is that the Petitioner’s claim for compensation for character assassination, loss of income, pain and psychological torture do not fall under the purview of the Environment and Land court and therefore the same is struck off.

The Petitioner’s prayers for mesne profits and institution of property, known as LR NO. NANDI/KAMOBO/914 can be pursued vide ELDORET E&L 231/2012 if the Petitioner so wishes.

I am guided by the principles set out in **Mukisa Biscuits Manufacturing Co. Ltd versus Westend**

Distributors on points of law.

The court is also alive of the meaning for the term sub-judice as defined in BLACK'S LAW DICTIONARY 9TH EDITION as "Before the court or judge for determination."

In the current case, it is therefore obvious that the matter is sub judice as there is a pending suit which is under consideration being Eldoret Environment and Land Court Civil Case No. 231 of 2012.

Accordingly, after analysis of the issues raised by counsel for the 3rd, 4th and 5th Respondents, I therefore find that this Petition amounts to an abuse of the court process and must be struck off which I hereby do.

Costs of the Petition to the Respondents.

DATED AND DELIVERED THIS 1ST DAY OF MARCH 2017

M. ODENY

JUDGE