



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO. 26 OF 2016

HANNAH WANGUI NJENGA.....PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF LAND, HOUSING & URBAN

DEVELOPMENT.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

DIRECTOR OF SURVEY.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

(Petition claiming violation of right to property; petitioner claiming that she bought land with a borehole but the area of the borehole was excised to be a public utility yet she was not compensated; petitioner having earlier filed an ordinary civil suit seeking prayers that the borehole is part of her land; petitioner's civil suit having been dismissed; no avenue for filing a petition claiming similar orders; petition dismissed as being res judicata).

1. This is a constitutional petition commenced on 17 May 2016. The petition is said to be premised on various provisions of the Constitution, but principally, Article 40, which protects the right to property. The petitioner is the registered owner of the land parcel Nakuru/Cedar Lodge/41 which she states measures about 4 acres. This land, it is said, was a subdivision of a parcel of land registered and owned as part of the large Cedar Lodge Settlement Scheme. It is stated in the petition that prior to the subdivision of the settlement scheme, there were 3 boreholes, which subsequently became private properties of those who were allocated the portions where these boreholes were situated.

2. It is claimed in the petition that on unknown dates, the respondents, without any authority or consent of the petitioner, accessed the portion where the borehole was situated and purported to create a land parcel No. 116 as a public utility. It is averred that the respondents did not follow due process in compulsory acquisition of this portion of land and that the petitioner has never been compensated for the value of this

portion. It is further pleaded in the petition, that on 15 March 2013, the Court (High Court), made a judgment where it was admitted that the petitioner's cause is righteous but that the court however fell in error by allowing the use of the borehole by the public.

3. The petitioner has contended that her right to own property under Article 40 of the Constitution has been violated; that she has been subjected to psychological and emotional torture contrary to Article 29 of the Constitution; that she has been deprived the right to dignity contrary to Article 28 of the Constitution; that the process of compulsory acquisition as set out in Article 40 (3) was never followed; and that the respondents disregarded the petitioner's right to fair administrative action contrary to Article 47 of the Constitution.

4. In the petition, the petitioner has asked for the following orders :-

(a) A declaration that the actions of the respondents of interfering with the parcel of land known and fully described as Nakuru/Cedar Lodge/41 are brazen, illegal, egregious, discriminatory and hence null and void for violating the right to property.

(b) An order of mandamus compelling the state to provide security against reckless individuals within the Government.

(c) A declaration that the petitioner is the legal owner of the whole parcel of land known as Nakuru/Cedar Lodge/41 measuring 4 acres.

(d) A declaration the Government of Kenya has abdicated its role and has become an escapist.

(e) The petitioner be paid costs of this Petition.

5. In her supporting affidavit, the petitioner has annexed a copy of the title deed to the land parcel Nakuru/Cedar Lodge/41 (hereinafter referred to as "the suit land") and a certificate of official search showing that the land is registered in her name. She has annexed a copy of the judgment in Nakuru HCCC No. 85 of 2010, which she believes was erroneously determined, together with an application for review of the said judgment. She is strongly of the view that her right to property as enshrined in the constitution has been violated.

6. The respondents filed Grounds of Opposition listing five grounds, in opposition to the petition, as follows :-

(i) The petition is fatally and incurably defective.

(ii) The petition is bad in law and an abuse of the court process.

(iii) The petitioner has failed to lay basis for her claim.

(iv) The petition lacks merit.

(v) The petition is based on distortion of facts, misrepresentation frivolous and irrelevant matters and the applicant is coming to court with unclean matters (sic).

7. I issued directions on 14 March 2017, that parties file written submissions, and also specifically address me on whether this petition is *res judicata*.

8. In his written submissions, Mr. B.N. Kipkoech, learned counsel for the petitioner, inter alia argued that the issues in Nakuru HCCC NO. 85 of 2010 and the issues in this petition are substantially different. He submitted that this petition seeks the court to determine whether the rights of the petitioner have been violated, which he argued, was different from the prayers in Nakuru HCCC No. 85 of 2010. He submitted that in Nakuru HCCC No. 85 of 2010, the petitioner was confirmed by the court to be the legal owner of

the suit land and that in this petition she seeks to enforce her constitutional rights. He submitted that the petitioner does not wish to re-litigate the issues in Nakuru HCCC No. 85 of 2010. He also pointed out that, save for the petitioner, the parties in the two suits are different. He submitted that in any event, the Constitution at Article 22 and 258 (1) give the right to commence court proceedings which cannot be taken away by any provisions in the Civil Procedure Act or Rules, as these are not applicable in proceedings commenced under the Bill of Rights. He submitted that under the special circumstances rule, a matter can still be re-litigated if the plaintiff or petitioner provides the court with substantial material to prove that she has exceptional special circumstances. He relied on the case of ***Henderson vs Henderson (1843-60) All ER 378***, cited in the case of ***Prisca Auma Misachi vs County Assembly of Kisumu & 6 Others (2015) eKLR***. He submitted that the petitioner is fully entitled to the prayers that she has sought as she is the owner of the suit land and deserves the protection granted by Article 40 of the constitution and Sections 24, 25 and 26 of the Land Registration Act, Act No. 3 of 2012. He referred me to other cases which protect a title holder of property.

9. In his oral submissions, he added inter alia that this suit is sui generis and not an ordinary suit. He submitted that an individual is allowed to file an ordinary suit and a constitutional petition if the claims are not similar and especially where the issues cannot be tried in an ordinary civil suit.

10. In his submissions, Mr. Kirui for the respondents, argued inter alia that the petition contravenes Section 6 of the Mining Act, 2016 since the first schedule to the statute categorizes water as a mineral. He submitted that on the suit land is a borehole, which is used by the public, and that water is owned by the Government in trust for the public, yet the petitioner wants to access it alone. He submitted that this is what was held in the previous suit.

11. Mr. Kipkoech in his reply did not believe that the Mining Act, 2016 applies and submitted that it is the Water Act, of 2012, which applies. He submitted that the borehole is in the plaintiff's land and therefore the plaintiff owns it. He submitted that boreholes are manmade and cannot belong to the Government.

12. It is with the above pleadings and submissions that I need to determine this matter. It will be observed that there was a previous suit, Nakuru HCCC No. 85 of 2010, over the same land. Judgment in this suit was delivered by Emukule J, on 15 March 2013. I will only go into the substantive issues in this petition, if I find that the petition passes the test of *res judicata*, and I therefore feel it necessary to address this point first.

13. I have not seen the pleadings of the case Nakuru HCCC No. 85 of 2010, but the judgment of the court annexed by the petitioner does contain a lot of the material details. From the judgment, I have discerned that the said suit was commenced by the petitioner, as plaintiff, on 1 April 2010. The defendants were four in number, being the District Land Registrar, the Commissioner of lands, Director of Survey and the Attorney General. The prayers sought were as follows :-

(a) A declaration that the creation of Nakuru/Cedar Lodge/116 within land parcel number Cedar Lodge/41 is illegal and hence null and void;

(b) A declaration that the plaintiff's parcel of land No. Nakuru/Cedar Lodge/41 (4 acres) comprises and is inclusive of the area of the borehole (now known as Nakuru Lodge/116).

(c) An order directing the 3rd defendant to amend Sheet No. 1 Cedar Lodge Settlement Scheme to cancel and/or remove Parcel No. 116.

(d) An order directing the 1st and 2nd defendants to rectify the Register for the Nakuru Cedar Lodge registration Section and to cancel the registration of parcel No. 116.

(e) An order restraining the defendants either by themselves, agents and/or servants howsoever from interfering alienating disposing or in any way dealing with the plaintiff's parcel No. Nakuru/Cedar Lodge/41.

(f) *Costs of the suit.*

14. From the judgment, I have discerned that the petitioner, as plaintiff, testified inter alia that she owns the land parcel Nakuru/Cedar Lodge/41. The court indeed mapped out the plaintiff's claim to be that she bought the suit land together with the borehole. I have seen from the evidence tendered in that case, that the complaint of the petitioner was that the public have been allowed to access this borehole. There was evidence led to show that there was an excision of this borehole from the suit land so that it falls into an independent land parcel No. 116. The court held as follows on the substance of the case :-

"Despite the technical righteousness of the plaintiff's cause, an order granting exclusivity of access to the borehole according to the Latin maxim (quic quid plantatur solo solo cedit) may well work injustice to the residents of the area who have no knowledge of this case, and for whose benefit the borehole was excised. I therefore decline to issue the orders sought.

Instead of granting the orders the plaintiff seeks, there shall issue a prohibitory order to be noted on the register of Plot No. 116, as against the 2nd defendant from allocating the said Plot 116, and against the 1st defendant from registering any other person as the proprietor of the said Plot No. 116 (Nakuru/Cedar Lodge/116) without first giving the plaintiff the option to consolidate it as part of the suit land. "

15. Earlier in this judgment, I set out the prayers sought by the petitioner but the totality of the prayers are encapsulated by the prayer for a declaration that the petitioner is the legal owner of the whole of the parcel of land known as Nakuru/Cedar Lodge/41 measuring 4 acres. In her supporting affidavit, the petitioner has averred at paragraph 6 thereof, that the respondents accessed a portion of her land where the borehole is situated and purported to create land parcel No. 116, thus reducing the acreage of her land. It is also said that they purported to convert the same arbitrarily to be used as a public utility, which in the view of the petitioner, is unconstitutional.

16. I really see no difference between these prayers and the prayers sought in the suit Nakuru HCCC No. 85 of 2010. In the said suit, the petitioner similarly sought a declaration that she owns the suit land, which is 4 acres, and sought orders to have declared as null and void, the creation of Plot No. 116 from this land.

17. The issue about the manner of creation of the parcel No. 116 from the suit land owned by the petitioner was decided in Nakuru HCCC No. 85 of 2010 and Emukule J, opted not to grant the petitioner the orders that she sought. I do not see how then, I can entertain another suit, introduced by way of a petition, seeking similar orders.

18. In as much as Mr. Kipkoech tried to argue that the rule of *res judicata* does not apply because this is a constitutional petition, that to me holds no water. Indeed, the very authority that Mr. Kipkoech sought to rely on, that of ***Prisca Auma Misachi vs County Assembly of Kisumu & 6 Others (supra)*** contradicts his position. In that case, a petition was filed in the High Court seeking inter alia to have declared as unconstitutional, the decision of the County Assembly of Kisumu, which removed the speaker of the County Assembly from office. It emerged that the speaker who was affected, had earlier moved to the Industrial Court at Kisumu, where the court held that her removal was not procedural. The High Court held that the petition before it was *res judicata* as the issues had already been decided by the Industrial Court and proceeded to dismiss the petition.

19. It is the same scenario in this case. The petitioner now wants to re-litigate the very issues that she litigated in the suit Nakuru HCCC No. 85 of 2010, albeit now, through a constitutional petition. That cannot be allowed and I do not see how Article 258 of the Constitution can assist the petitioner. That provision of the law only gives one the right to file suit, claiming that there is a violation of the constitution. It does not give any person a right to file multiple suits over the same subject matter. It is a matter now settled that constitutional petitions are also captured by the *res judicata* rule (See for example the case of ***Silas Make Otuke vs Attorney General & 3 Others (2014) eKLR***) and one cannot argue that the rule does not apply because it is noted in the Civil Procedure Act. The rule of *res judicata* is not only a statutory rule, but also a rule of public policy, for it cannot be the intention of the public that persons

continue re-litigating the same issues that have there before been decided.

20. A petition is one mode of instituting proceedings just as a plaint is another mode. One cannot be allowed to commence suit by way of plaint, have the matter heard, then come back again with a similar suit, now filed as a petition, and say that it is not covered by the *res judicata* rule, because it is now a constitutional petition. That to me is an abuse of the process of court.

21. From the above, it is my holding that this petition is *res judicata*. The petitioner cannot seek the declaration that she is owner of four acres comprised in the suit land, which is more or less the same order that she sought and was denied in the suit Nakuru HCCC NO. 85 of 2010. If the petitioner was not happy with the decision of the learned Judge, her avenue was to file an appeal or seek review. There is indeed evidence that an application for review was filed. Probably the petitioner can consider pursuing it, if she has not done so already, but my own view is that an appeal was perhaps the best open option. It is possible that the petitioner may have a case for compensation for what was taken away from her, but I have no such prayer before me, and it will be unwise, if not prejudicial to the respondents, if I am to address that point without having the appropriate pleadings. Having held that this petition is *res judicata*, it will not be wise for me to go to the merits or demerits of it, for I will then be sitting on appeal against the decision of Emukule J, rendered in the suit Nakuru HCCC No. 85 of 2010, of which I have no jurisdiction.

22. I see no merit in this petition and it is hereby dismissed with costs.

22. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Langat instructed by M/s Gordon Ogola & Kipkoech Advocates, for the plaintiff.

No appearance on the part of the State Law office for the respondent.

Court Assistant :Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU