



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTION PETITION NO. 27 OF 2016

COUNTY GOVERNMENT OF LAMU.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

MANDA SURVEYING PROJECT COMMITTEE.....INTERESTED PARTY

RULING

1. By a Constitutional Petition dated 14th December 2016 and filed herein on 15th December 2016, the Petitioner accuses the Respondent of breaching the Constitution and attempting to launch a Settlement Scheme within its area of jurisdiction in Manda Island without any consultation, its participation, invitation, consent and/or approval. The Petitioner further accuses the Respondent of failing to recognize the Petitioner's Constitutional and Statutory roles, mandate, powers, functions, rights and responsibilities as a result whereof the Respondent has proceeded with the survey, planning, adjudication and/or settlement exercise despite the fact that the physical plan for the Manda Scheme is yet to be agreed upon and/or be approved by all the Stakeholders.

2. The Petitioner thus contends that the actions of the Respondent are in violation of the Constitution and seeks this Court's protection to declare all the unilateral activities the Respondent has undertaken in regard to the Manda Scheme as unconstitutional, null and void. In addition, the Petitioner is seeking a permanent injunction to issue restraining the Respondents from undertaking any survey, mapping, planning, demarcation, settlement and/or any such related activities on Manda Scheme without the Petitioner's invitations, participation, involvement, written approvals and/or consent.

3. Contemporaneous with the Petition, the Petitioner filed a Chamber Summons application under Certificate of Urgency on the same 15th Day of December 2016 seeking various conservatory orders to issue against the Respondent. The said application was placed before the Honourable Justice Said Chitembwe of the High Court on 16th December 2016. Having perused the said application, the Learned Judge declined to grant any interim orders thereon and directed that the matter be placed before the Environment and Land Court Judge for mention and further directions on 7/2/2017.

4. On 17/1/2017, a day after the Honourable Justice Chitembwe declined to grant the Interim Orders, the Petitioner filed an Amended Chamber Summons application dated 16th January 2017 seeking the same conservatory orders but on the urgent platform that the Respondent had on 11/1/2017 relaunched the survey and other activities sought to be restrained on the Manda Island Settlement Scheme. The application dated 16th January 2017 is seeking for orders as follows:-

1. Spent

2. Spent

3. That a conservatory order be (issued) restraining the Respondent whether by itself, its employees, servants, representatives and/or their agents or whomsoever on acting on its behalf from undertaking and/or continuing with any survey, mapping, planning, demarcation, settlement and or any such related activities on Manda Scheme without invitation, participation, involvement, written approval and/or written consent of the Petitioner and strictly in compliance with the Provisions of the Constitution of Kenya, the Land Act, the Physical Planning Act, the National Land Commission Act and the County Government Act and/or in any other manner implementing, effecting and/or executing any reports, plans, maps, demarcations and/or settlement arising from and or upon any such survey, mapping, planning, demarcation pending the hearing and determination of this petition.

4. That the costs of these proceedings be met by the Respondent.

5. The said application supported by an Affidavit sworn on 17/1/2017 by the Petitioner's Director Physical Planning one Erick Kombe Randu is premised on a number of grounds that may be summarized as follows:-

(a) That all that unalienated land within Lamu County constituting Manda Island has since the pre-colonial era been mainly under the occupation and use of the Bajuni Community as their ancestral land and has been held as trust land by the Government under the repealed Constitution.

(b) That upon promulgation of the Constitution of Kenya 2010, the Manda land became and was vested upon the Petitioner by didn't of Article 62 (2) thereof to hold in trust and use for the benefit of the people resident within Lamu County.

(c) That during the transition process from the old Constitution to the current one, the then District Commissioner, Lamu West in conjunction with the Director Land Adjudication and the District Land Adjudication & Settlement Officer (DLASO) - Lamu West initiated a process of survey and adjudication of Manda Land for settlement of the people resident therein during which process a perimeter survey was undertaken and approximately 1696.6 Hectares of the land was reserved for the proposed Manda Island Settlement Scheme. The process of survey, planning, adjudication and/or settlement was however not concluded.

(d) Upon its inauguration, the Petitioner in the exercise of its rights, functions and mandate under Articles 6, 40, 60, 62, 174, 186, 189 and the Fourth Schedule of the Constitution took over the process from the District Commissioner and the District Land Adjudication and Settlement Officer (DLASO) while the Respondent took over the role of the (Former) Commissioner of Lands.

(e) That sometime in March 2016 after the Petitioner had invited the Respondent to avail itself and comment on a draft Physical Plan prepared by the Petitioner in respect of the scheme, the Petitioner came to learn that the Respondent had attempted to launch the Manda Island Settlement Scheme without any consultation, participation, invitation, consent and/or approval of the Petitioner.

(f) That the Respondent has failed to recognize the Constitutional and statutory roles of the Petitioner and has now proceeded with the exercise despite the fact that the Physical Plan of Manda Scheme is yet to be agreed upon and approved by all the stakeholders and the Petitioner in particular is yet to exercise its mandate to survey and demarcate the Manda Scheme.

(g) That it thus likely that the Respondent shall proceed with speed to complete the unconstitutional exercise soon unless the orders sought herein are granted.

6. On 27th January 2017, before the Petitioner's application could be heard inter-partes, a group styling itself the Manda Surveying Project Committee filed an application seeking to be urgently enjoined in the proceedings as an Interested Party. The application went before the Honourable Justice Angote on 30/1/2017 and was allowed by the consent of the Parties.

7. On 14th February 2017, both the Respondent and the newly enjoined Interested Party filed two separate Notices of Preliminary Objection to the Petition and the Amended Chamber Summons Application dated 16th January 2017. The Respondent's Notice of Preliminary Objection raises three issues as follows:-

1. That the instant Petition and application is a gross abuse of the Court Process as the issues raised herein have already been heard and determined on merits in Malindi Environment and Land Court Judicial Review No. 4 of 2016 between Emmanuel Kaingu Karisa & Another –vs- National Land Commission and Lamu District Land and Adjudication Settlement Officer.

2. That this Court has no jurisdiction to entertain, re-open, sit on appeal and determine the instant application and Petition as it raises issues that have already been addressed and determined by a Court of competent and parallel jurisdiction.

3. That the instant Application and Petition be dismissed summarily with costs.

8. On their part, the Interested Party is opposed to both the Petition and the Amended Chamber Summons on one similar ground stated as follows:-

1. The Petition is res judicata. The issues arising and raised in the Petition herein have been fully heard and determined by this Honourable Court having been directly at issue, in two previous suits being Malindi ELC Misc Civil Application No. 13 of 2013(JR); Republic –vs- National Land Commission, Lamu Land Adjudication Officer ex-parte Mohamed Avukame Haroon and Malindi ELC No. 4 of 2016; Republic –vs- The National Land Commission, Land Settlement & Adjudication Department, The County Government of Lamu and Manda Surveying Project Committee.

9. The application dated 16/1/017 and the two Preliminary Objections were argued simultaneously before me on 11th May 2017 after the Parties filed submissions thereon. I have considered the Application, the two Preliminary Objections raised as well as the submissions placed before me by the Learned Advocates for the Parties herein.

10. In my mind, the two objections though differently worded, deal with the same issues that is the question of whether or not the issues raised in the Petition and the application are matters res judicata. The doctrine of res judicata in Kenyan law is anchored at Section 7 of the Civil Procedure Act in these terms:-

“Res Judicata

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”

11. From the above definition, the ingredients of res judicata are firstly, that the issue in dispute in the former suit must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title. Lastly, the Court or tribunal before which the former suit was litigated was competent and determined the suit finally (see ***Karia & Another –vs- the Attorney General & Others (2005) 1 EA 83.***

12. As was stated many centuries ago in ***Henderson –vs- Henderson (1843) 67 ER 313:-***

“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 a 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 Parties to form an Opinion and pronounce a Judgement , 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..”

13. Thus simply put, res judicata is essentially a bar to subsequent proceedings involving the same issue as had been finally and conclusively decided by a competent Court in a prior suit between the same parties or their representatives. Considering the same doctrine in ***John Florence Martine Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR***, the Court of Appeal sitting at Malindi observed as follows:-

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a Party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of the Court’s Limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.

Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

14. In the present case, it is not denied that all the Parties herein were also Parties in Malindi ELC No. 4 of 2016. Mr. Onyango Learned Counsel for the Petitioner/Applicant submitted that the existence of a previous suit is a matter of fact and not a point of law which can be raised in the manner done herein. Referring the Court to the case of ***Galaxy paints Company Ltd –vs- Falcon Guards Ltd (2000) EA 385***, Learned Counsel submitted that without pleadings being attached from the previous disputes, the Preliminary Objections before me amount to nothing but mere assertions and speculations from the bar. Having perused the Galaxy Paints Case (Supra), I think the authority is clearly distinguishable from the present case. In that matter, the Court of Appeal was dealing with the issue of whether or not it was open for the trial Court to consider an issue which had not been included in the agreed issues by the Parties. That case does not vouch for the proposition that in the absence of pleadings a Court such as this one would be incapable of discerning what the issues were as between the Parties in previous disputes.

15. In the matter before me, both the Respondent and the Interested Parties have attached full-length copies of the two Judgments rendered in both Malindi ELC Misc App No. 13 of 2013 and Judicial Review Application No. 4 of 2016. In the Judicial Review Application Paragraph 1 of the Judgment delivered on 1st December 2016 reproduces the Ex-parte Applicants Prayers as follows:-

(a) An order of prohibition be issued against the 1st and 2nd Defendants herein, the National Land Commission and the Land Adjudication Department to prohibit both Parties from carrying out or proceedings with the exercise of demarcation of all that unregistered land within Manda Island of Lamu County until all legal measures are put in place including but not limited to the appointment of the sub-county selection Committee.

(b) An order of certiorari be issued against both defendants for the removal to the High Court of any records of any demarcation exercise that may have been conducted so far in disregard of the

existing law.

16. Arising from the foregoing, it is clear that in the previous suit an order was sought to halt the same adjudication process which the Respondent had commenced on the Island. A perusal of the Judgment reveals that the Honourable Justice Angote declined to halt the adjudication process having found no fault in the manner in which the Respondent was undertaking the same. At paragraphs 51 to 55 of the Judgment, the Learned Judge held as follows:-

“51. In any event, the ex-parte Applicants also sued the County Government as an Interested Party in this matter. The County Government did not file any Affidavit to support the Applicant’s contention that it has not been involved in the process of settling people on the suit property.

52. It is trite that under the Fourth Schedule, Part 2(8) of the Constitution, the County Governments are the ones in charge of County Planning and development, which includes land survey and mapping. This is a function that the County Government took over from the National Government with effect from the date when the final announcements of results of the first Election were made, which was in March 2013.

53. The Survey and Mapping of Manda Island was done before the County Government was established. In my Judgment of 24th April 2015 in Misc Application No. 13 of 2013, I held that the 1st respondent should put in place a sub-County Selection Committee” to complete the identification of beneficiaries of land on the Island with a view of completing the process that seems to have been commenced by the 2nd Respondent under the old legal regime.”

54. In the circumstances, it cannot be right to state that it is the County Government of Lamu that should do the survey and mapping of the area that had already been mapped and surveyed before it was established.

55. The prayer by the Applicants to prohibit the Respondents with “the exercise for demarcation” cannot therefore issue”.

17. The above being the case, it cannot be disputed that one of the issues the Court made a determination on was the role of the County Government of Lamu in the Survey, Mapping and demarcation of the Manda Island Adjudication and Settlement Scheme. As it were, the Petitioner herein sat through the proceedings but chose not to file any affidavit to support the ex-parte applicant’s contention that it had not been involved in the process, the very same complaint that now forms the substratum of the Petition herein. Similarly the Petitioner despite being a party in the previous proceedings has not filed any appeal against the determination made by the Honourable Judge that “It cannot be right to state that it is the County Government of Lamu that should do the Survey and Mapping of the area..”

18. In my considered opinion the cause of action in the Judicial Review application and in this Petition are substantially the same, being the issue of the roles of both the Petitioner and the Respondent in regard to the survey, mapping, and demarcation of the Manda Island Settlement Scheme. The main respondent against whom the orders were sought and would have been executed is the National Land Commission, the Respondent herein. The decision was in my view rendered on the merits of the facts as presented before the Court and if the Petitioner did not out of their own negligence or inadvertence make their case, they can only have themselves to blame.

19. In conclusion, Learned Counsel for the Petitioner contended that this being a Constitutional Petition, this Court should be very slow in involving the doctrine of res judicata as “Constitutional rights keep on evolving, mutating and assuming multifaceted dimensions.” In answer, I am guided by the very same decision of the Court of Appeal cited by counsel, that is ***John Florence Maritime Services Limited (Supra)*** where the Learned Judges of Appeal considered that proposition and observed as follows:-

“In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is

raised are Constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the Court, may be raised as a valid defence to a Constitutional Claim even on the basis of the Court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

.....We accordingly do not accept the proposition that Constitution – based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in Constitutional litigation in the clearest of cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating and assuming multi-faceted dimensions.

20. Having considered all the circumstances of this case, I have no doubt in my mind that the issues brought up in this Petition are res judicata. In any event, I am unable to see under what provision of the law the Respondent should be required to seek the written consent of the Petitioner before undertaking its mandate as set out under Article 67 of the Constitution.

21. The upshot is that I dismiss the application dated 16th January 2017 and strike out this Petition with costs to the Respondent.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J. O. OLOLA

JUDGE