



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO.54 OF 2016

SAMUEL NGIGI WAHOGO.....1ST PETITIONER

PETER NJURU KIMANI2ND PETITIONER

JOHN NGARI MACHARIA.....3RD PETITIONER

JOHN K. GATHIMBA.....4TH PETITIONER

NGIGE MUNGAI.....5TH PETITIONER

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

THE NATIONAL LAND COMMISSION2ND RESPONDENT

LAND REGISTRAR, NAKURU3RD RESPONDENT

SAMUEL CHEGE.....INTERESTED PARTY

RULING

1. The application before me is that dated 22 March 2017 filed by the respondents to this petition. It is an application said to be brought pursuant to the provisions of Section 3 and 3A, and Section 7 of the Civil Procedure Act, CAP 21 Laws of Kenya. It seeks the following orders :-

(i) That the application dated 8 November 2016 and the Petition as drafted and filed contravenes Section 7 of the Civil Procedure Act and hence should be dismissed.

(ii) That costs of the application be provided for.

2. The application is opposed and before I go to the gist of it, I think it is necessary to set down a little background to this suit.

3. The genesis of the petition is an award made by the Molo Land Disputes Tribunal (the Tribunal) in the case No. 8 of 2005. The complainant in that case was Samuel Chege Nganga, the interested party in this petition. The defendants before the Tribunal were Joseph Kibe and 4 Others. At the Tribunal, Mr. Chege

claimed to be a member of Mukinyai Farm, presumably a land buying company. He accused the directors of the farm, the defendants at the Tribunal, of converting various plots of land, which he claimed were public utility plots, into private hands by subdividing them into small plots and selling them to individuals. After hearing the case, the Tribunal held that all the named plots were public utility plots and should be surrendered to Mukinyai Farm members. The said plots were merely noted to be Plots Nos. 572, 1123, 571, 574, 575, 567, 627, 628, 890, 888, 895, 896, 897, 892, 894, 893, 891, and 899 but their full registration particulars were never indicated. The defendants before the Tribunal were aggrieved by the award and they filed an appeal at the Rift Valley Land Disputes Appeal Committee, being Appeal No. 22 of 2007. The Appeal Committee upheld the decision of the Tribunal and further ordered that "any title deeds irregularly issued to individuals authorising grabbing of public land should be cancelled forthwith."

4. Following the award of the Tribunal, a decree was extracted via the case Molo Principal Magistrate's Court, LDT Case No. 29 of 2008. The petitioners herein, who allege to be the owners of the plots in issue, and whose titles were held to be illegal and liable to be cancelled, on 5 July 2011, filed the case Nakuru High Court, Judicial Review Case No. 69 of 2011, wherein they sought orders of prohibition, to prohibit the implementation of the decree. The case was heard and dismissed by Odero J, on 31 October 2016, principally because the court was of the view that without an order of certiorari, seeking to quash the award and decree, the court could not grant an order of prohibition, as the decree would still remain alive and enforceable. It is then that the petitioners opted to file this petition on 7 November 2016.

5. In the petition, the petitioners aver that they are respectively the registered proprietors of the land parcels Elburgon/Elburgon Block 4/ 185, 893, 830, 829, 183, 1115, 1104, 1114, 1822 (Mukinyai). It is pleaded in the petition that on 21 March 2011, they received letters from the law firm of M/s Mirugi Kariuki & Company Advocates, giving them 21 days within which to vacate their parcels of land. The notice did not specifically quote their parcels of land but claimed that the plots that they occupy are public utility plots. After receiving the letter, they made inquiries and established that there had been the case before the Tribunal. They then sought legal redress and approached the law firm of M/s Mungai Lukorito & Company Advocates, who then filed the judicial review motion that was dismissed, without seeking orders of certiorari. It is their case that the decision of the Tribunal was arrived at without first giving them a hearing and that their rights to property are at stake.

6. In the petition, they have sought the following orders :-

(a) A declaration that the proceedings taken by the defunct Molo Land Disputes Tribunal and registered as Land Disputes Case No. 29 of 2008 were taken in contravention of the petitioners' right to be heard as guaranteed under the Constitution.

(b) A declaration that the appeal filed by the interested party at the Rift Valley Land Appeal Tribunal and registered as Land Disputes Appeal Case No. 22 of 2007 was heard and determined in breach of the petitioners' right to be heard.

(c) The adoption of the award by the Rift Valley Land Appeal Tribunal by the Magistrates' Court in Molo was done in contravention of the petitioners' right to be heard.

(d) The award by the Molo Land Disputes Tribunal and the Rift Valley Land Appeal Tribunal are all unconstitutional, null and void to the extent that they were made in breach of the petitioners' right to be heard.

(e) The decree and eviction order by the Magistrates' Court in Molo Land Disputes Case No. 29 of 2008 are unconstitutional, null and void to the extent that they are procedural derivatives of proceedings taken in breach of the petitioners' right to be heard.

(f) An order of certiorari be issued to quash the proceedings and orders in Molo Land Disputes Case No. 29 of 2008 and Rift Valley Land Disputes Appeal Tribunal No. 22 of 2007 as proceedings taken in breach of the petitioners' right to be heard.

(g) That costs of this petition be borne by the respondents and the interested party.

7. Through the subject application, the respondents contend that the case of the petitioners is res judicata and should be dismissed. The applicants have also averred that the petitioners also filed an application being Misc. Application No. 44 of 2011 and Civil Suit No. 470 of 2013 wherein an application for injunction was dismissed on 22 November 2013. In that ruling, the court (Waithaka J), ordered a stay of the said case No. 470 of 2013, pending hearing and determination of Judicial Review No. 69 of 2011.

8. In his written submissions, Mr. Kiprotich Kirui, learned State Counsel, for the applicants, inter alia submitted that res judicata not only covers what was placed before the court but also what the litigant, with due diligence, ought to have raised. He submitted that the petitioners were granted leave to file a judicial review motion for orders of certiorari, though Misc. Application No. 44 of 2011, but never proceeded to file the said motion. He submitted that the petitioners' piecemeal litigation is an abuse of the process of court. He further submitted that the petitioners are guilty of laches. He also submitted that the petitioners were aware of the proceedings touching on the parcels of land and they had opportunity to raise this issue when they first approached court seeking leave to file judicial review proceedings. He submitted that the parties in the previous litigation were the same, as the proceedings before the Tribunal, were against all persons in occupation of the subject parcels of land, and if they felt that they would not be adequately represented by the named defendants in the Tribunal, they had the option of seeking to be enjoined. He submitted that a competent court has heard the dispute before and the same issues raised and determined. He pointed out that in this suit, the petitioners seek to have orders of certiorari yet they had earlier been given leave to file a judicial review motion for the same orders but they did not file any. He submitted that the effect would be to overturn previous decisions of the courts. He finally submitted that the application is fatally defective.

9. On his part, Mr. Githui for the petitioners, inter alia submitted that for a plea of res judicata to be effective, there must have been a previous suit which was determined by a court of competent jurisdiction. He also submitted that it must be demonstrated that the litigation was between the same parties. He submitted that the petitioners were not parties in the cases before the Tribunal, and the subsequent case before the Magistrate's Court, where a decree adopting the decision of the Tribunal was issued. He submitted that the petitioners were therefore denied the right to be heard. He further submitted that the nature of the claim in the suit Nakuru ELC No. 470 of 2013 is distinct from this petition. He submitted that the case Nakuru ELC No. 470 of 2013, is an action based on the common law and Section 47 of the Evidence Act, whereas this petition is one concerning the right to be heard. He also pointed out that the case Nakuru ELC No. 470 of 2013 has never been heard and determined, and that for res judicata to apply, the case must have been heard and determined. He also submitted that Judicial Review Case No. 69 of 2011 is different from this petition.

10. Both counsel relied on various authorities which I have read and considered.

11. It is the position of the applicants in this application, that this suit is res judicata and should therefore be dismissed. There are no clear rules in the Constitution of Kenya, Enforcement of Fundamental Rights and Freedoms, Rules, 2013, relating to issues of res judicata. However, res judicata is a principle of general application and thus applicable even to constitutional petitions filed for the enforcement of fundamental rights and freedoms. The general principle of law is well pronounced in Sections 6 and 7 of the Civil Procedure Act, which provides as follows :-

6. Stay of suit

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

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a

suit in which the same matters or any of them are in issue in such suit in such foreign court.

7. 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.

12. It is discernible from the above, that a court is precluded from hearing a case which has been litigated before by the same parties, and I do not think that any of the parties herein contest that general principle. The applicants have contended that this petition is res judicata for the reason that various decisions over the same subject matter in issue in this case have been litigated before.

13. In the case of ***Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others (1996) eKLR***, the Court of Appeal elaborated that to avail one of the defence of res judicata, there must be :-

- (i) a previous suit in which the matter was in issue;*
- (ii) the parties were the same or litigating under the same title;*
- (iii) a competent court heard the matter in issue;*
- (iv) the issue has been raised once again in a fresh suit.*

14. The applicant, in pressing the point that this suit is res judicata, has referred me to the cases *Molo Land Disputes Tribunal Case No. 8 of 2005; Rift Valley Land Disputes Appeal Committee Case No. 22 of 2007; Nakuru High Court, Misc. Civil Application No. 44 of 2011 (JR) ; Nakuru High Court Miscellaneous Civil Application No. 69 of 2011 (JR); and Nakuru ELC No. 470 of 2013*. I need to determine for myself whether these cases meet the test that was laid out in the above case of *Uhuru Highway Development Limited vs Central Bank of Kenya Limited*.

15. First, I must knock off the suits *Molo Land Disputes Tribunal Case No. 8 of 2005; Rift Valley Land Disputes Appeal Committee Case No. 22 of 2007* and *Molo Magistrate's Court LDT Case No. 29 of 2008*, for the simple reason that the petitioners herein were not parties in those cases. It may be that their parcels of land were being litigated upon, but they were not enjoined in those suits, and the persons who were sued in those cases, were not persons under whom it can be said were litigating under the same title as that of the petitioners herein. They were neither Attorneys in Law, nor appointed agents of the petitioners, and it cannot be said that the petitioners herein litigated through them in the said suits. I am therefore unable to hold that these three suits would make the present litigation res judicata.

16. Let me now consider the cases *Nakuru High Court Misc. Application No. 44 of 2011* and *Nakuru High Court Misc. Application No. 69 of 2011*. These two cases were applications for the prerogative orders of judicial review. The case No. 44 of 2011, never proceeded for hearing, principally for the reason that no substantive motion for certiorari was filed despite leave having been granted. Without a substantive motion having been filed, it is as good as being in the position that no suit was filed for orders of certiorari, and it was therefore never determined whether or not the petitioners were entitled to orders of certiorari, to quash the award of the Land Disputes Tribunal and the resulting decree issued by the Magistrate's Court in Molo. For res judicata to apply, the issue, as noted in Section 7 of the Civil Procedure Act, must have been "*heard and finally decided by the court.*" This petition cannot therefore be said to be res judicata because of the suit *Nakuru HCC Misc Application No. 44 of 2011*.

17. The other suit, *Misc. Application No. 69 of 2011*, was a case seeking orders of prohibition. That case was heard and determined, and as I have mentioned before, the Honourable Judge was of the view that without first seeking orders of certiorari, it would be pointless for the court to issue an order of

prohibition. What was decided in that suit was whether or not the petitioners were entitled to orders of prohibition. The court never decided the issue of certiorari which was not before it. I do not think that the said decision precluded the petitioners from ever seeking orders of certiorari before any other court. The issue in that case was whether or not the petitioners were entitled to orders of prohibition. The issue was not whether the petitioners were entitled to orders of certiorari. The issues in that case and in this petition are therefore different and I am unable to hold that this petition is res judicata because of judicial review case No. 69 of 2011.

18. That now leaves the case Nakuru ELC No. 470 of 2013. That case was filed on 17 July 2013 and was stayed pending the finalization of Judicial Review Case No. 69 of 2011. The case is therefore still pending. In that suit, the petitioners have asked for the following orders :-

(a) A declaration that the award made by the Molo Land Disputes Tribunal was procured through fraud, deception and concealment of the proper parties to the action.

(b) A declaration that the award made by the Land Disputes Tribunal Molo was made by a court without jurisdiction to hear and determine the matter before it.

(c) A declaration that the award of the Land Disputes Tribunal Molo and subsequent adoption by the Principal Magistrate, Molo is void for fraud, deception and concealment of the proper parties to the case.

(d) The award of the Tribunal in Molo and the order of the Principal Magistrate Molo be set aside on grounds of fraud, deception and concealment of the proper defendants to the cause.

19. When I look at the orders sought in the above suit, and the orders sought in this petition, I really do not see much difference. At the end of the day, what the petitioners want in this suit and in the case ELC No. 470 of 2013, is to have the award of the Tribunal set aside. That is indeed prayer (d) in the plaint, which to me, is more or less the same effect that one would have through an order of certiorari which is sought in prayer (f) of this petition. In both cases, the basis of the case of the petitioners is that the Tribunal did not have jurisdiction, and they were never heard for the reason that they were not parties before the Tribunal. The issues to me are similar, because, if say, the civil suit is heard first, would the petitioners still need this petition; and vice versa, if this petition is heard first and the petitioners succeed in it, will they still need to pursue the civil suit? I think the answer will be that they will already have obtained what they wanted if either suit proceeds first and they succeed. It will also be absurd for the court to hear one case fully on merits, dismiss it, and then the petitioners to proceed and succeed in the other case, for the issues raised are similar, and the two cases are in the same court. In essence, it is an abuse of the court process to have two suits raising more or less similar issues, existing at the same time. One cannot relitigate issues that have been heard by a competent court, or that are pending before a competent court, by disguising it as a constitutional petition. Every court applies the constitution, even in ordinary civil suits, and one does not need to file a constitutional petition where he has similar issues pending in a civil suit or if the civil suit is dismissed, such person cannot be allowed to relitigate the same issues, but now under a constitutional petition.

20. However, none of the two suits have been heard so far and the same are still pending. The two suits cannot remain pending, for as I have explained, that will be playing lottery with the court process, which cannot be allowed. The petitioners cannot be allowed to proceed in one case, see what its outcome will be, then if they fail, proceed with the other case. To avoid an abuse of the court process, I will ask the petitioners to make an election of which of the two cases they wish to proceed with. They have to choose whether to proceed with Nakuru ELC No. 470 of 2013 or to proceed with this petition. If they choose to proceed with this petition, then they must withdraw Nakuru ELC No. 470 of 2013. If they elect to proceed with Nakuru ELC No. 470 of 2013, then they must withdraw this petition. That election will need to be made immediately after delivery of this ruling.

21. For the above reasons, I will not allow the subject application as framed, but instead, will order the petitioners to make an election, as I have explained above.

22. I make no order as to costs.

23. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 23rd day of November 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Kiprotich Kirui for the Applicants

Mr. Kambo holding brief for Mr. Githui for the respondent

Court Assistant: Carlton Toroitich