Njenga v Cabinet Secretary, Ministry of Land, Housing & Urban Development & 4 others (Civil Appeal 65 of 2017) [2024] KECA 1849 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1849 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 65 OF 2017

MA WARSAME, SG KAIRU & FA OCHIENG, JJA

DECEMBER 20, 2024

BETWEEN

HANNAH WANGUI NJENGA ..... APPELLANT

AND

CABINET SECRETARY, MINISTRY OF LAND, HOUSING & URBAN DEVELOPMENT ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT ..... 2ND RESPONDENT

NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

.DIRECTOR OF SURVEY ..... 4TH RESPONDENT

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

(An appeal from the Judgment and Order of the Employment and Land Court of Kenya at Nakuru (Munyao, J.) dated 28th June, 2017 in ELC Petition No. 26 of 2016)

JUDGMENT

1. In this appeal, the appellant Hannah Wangui Njenga, has challenged the judgment of the Environment and Land Court (ELC) (Munyao Sila, J) delivered on 28th June 2017 dismissing her constitutional petition against the respondents being Nakuru Petition No. 26 of 2016, with costs.

2. In dismissing the petition, the learned Judge of the ELC after referring to the appellant's previous suit in Nakuru High Court Civil Case No. 85 of 2010 stated as follows:

> " The petitioner now wants to re-litigate the very issues that he 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 not 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."

3. The appellant through learned counsel Mr. Kipkoech, B. N. submitted in support of the appeal that the Judge erred in arriving at the decision that the petition was res judicata without any evidence having been tendered before him and failed to appreciate that the issues raised in the petition were completely different from the matters in Nakuru High Court Civil Case No. 85 of 2010.

4. It was submitted that for the doctrine of res judicata to apply, the matters in issue must be similar and the same should have been determined on merits. The decisions in Njue Ngai vs. Ephantus Njiru Ngai & another [2016] eKLR; and Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 others [2017] eKLR and Henderson vs. Henderson (1843-60) ALL E.R 378 were cited in support. Moreover, it was urged, the parties in the High Court suit and in the Petition were not the same.

5. It was submitted that the respondents in this case illegally and unlawfully entered and detained the appellant's parcel of land without due process of compulsory acquisition under the *Land Act* and that the prayers in the petition should therefore be granted.

6. Although the respondents were duly served with notice of hearing, there was no appearance during the hearing of the appeal. However, the Attorney General filed written submissions on behalf of 1st, 2nd, 4th and 5th respondents dated 7th June 2024 in which it was submitted that the appeal is wholly without merit; that the appellant's petition was caught up and barred under by Section 7 of the *Civil Procedure Act*; that as pronounced by the Supreme Court of Kenya in Dina Management Limited vs. County Government of Mombasa & 5 others [2023] KESC 30 (KLR), there must be finality to litigation.

7. We have considered the appeal in keeping with our mandate to re-appraise the evidence with a view to drawing our own conclusions. The single question for determination is whether the learned Judge erred in dismissing the appellant's petition based on the doctrine of res judicata.

8. The record of appeal shows that in 2010, the appellant (Hannah Wangui Njenga) instituted Nakuru High Court Civil Case No. 85 of 2010 naming the District Land Registrar, Commissioner of Lands, Director of Survey and the Attorney General as the 1st to 4th defendants respectively. Although the pleadings in that suit do not form part of the record before us, the reliefs that the appellant sought in that suit and the basis on which she sought those reliefs are clearly set out in the judgment of Emukule, J. delivered in that suit on 15th March 2013. The appellant's case in that suit as discernible from that judgment was that she is the registered proprietor of the property known as Title Number Nakuru/ Cedar Lodge/41 within which was located a borehole; that a dispute arose over the use of that borehole with the area Assistant Chief and elders insisting that the borehole was for the common use and not for the exclusive use of the appellant.

9. The appellant sought orders in that suit for declarations that: the creation of Nakuru/Cedar Lodge/116 within her property Cedar Lodge/41 was illegal, null and void; that her parcel of land Cedar Lodge/41(4 acres) comprise and is inclusive of the area of the borehole (now known as Nakuru Lodge/116). She also prayed for an order directing the Director of Survey to amend Sheet No. 1 Cedar Lodge Settlement Scheme to cancel or remove parcel No. 116; an order directing the District Land

Registrar and Commissioner of Lands to rectify the register to cancel parcel No. 116; and an order restraining all the defendants in that suit from interfering with her property Nakuru/Cedar Lodge/41.

10. The learned Judge noted in that judgment that the borehole is surrounded by the appellant's land and that there was no evidence that she had been denied access to it or the use of its waters. Emukule, J stated that while the appellant was "correct in seeking the orders in the plaint":

> " Despite the technical righteousness of the plaintiff's cause, an order granting exclusivity of access to the borehole ... 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 declined to issue the orders sought."

11. Instead, the learned Judge issued:

> " A prohibitory order to be noted on the register of plot 116, as against the [the Commissioner of Lands] from allocating the said plot 116, and against the [Land Registrar] from registering any other person as the proprietor of the said plot 116 (Nakuru/ Cedar lodge/ 116) without first giving the [appellant] option to consolidate it as part of the suit land."

12. The appellant was dissatisfied and filed an application dated 26th March 2013 seeking review of that judgment. The fate of that application is not clear from the record.

13. The matter did not end there. The appellant then filed constitutional petition dated 13th May 2016, being Petition No. 26 of 2016, which culminated in the judgment the subject of this appeal. In the petition, the appellant named Cabinet Secretary, Ministry of Land, Housing and Urban Development, Cabinet Secretary, Ministry of Interior & Coordination of National Government, National Land Commission, Director of Survey and the Attorney General as the 1st to 5th respondents respectively.

14. In the petition, she sought a declaration that the actions of the respondents of interfering with the parcel of land known as Nakuru/cedar lodge/41 were illegal, discriminatory and null and void for violating her right to property; An order of mandamus compelling the State "to provide security against reckless individuals within the Government"; A declaration that she is the legal owner of the whole of said property Nakuru/cedar lodge/41 measuring 4 acres; and a declaration that the Government of Kenya had "abdicated its role and has become an escapist".

15. She pleaded that the respondents had violated her constitutional rights under various articles of *the Constitution*. The factual background pleaded in the petition was that she is the registered owner of all that parcel of land known and fully described as Nakuru/Cedar Lodge/41, measuring 4 acres; that the said land was a subdivision of a parcel of land registered and owned as part of the larger Cedar Lodge Settlement Scheme; that prior to subdivision the settlement scheme had 3 boreholes, which subsequently became private properties of those who were allocated the portions which they were in. In the petition, she referred to the judgment delivered on 15th March 2013 in Nakuru High Court Civil Case No. 85 of 2010 thus:

> " ... on the 15th March 2013 the court determined a judgment and even admitted that the petitioners cause is righteous but however fell in error by allowing the use of the borehole by the public."

16. The Attorney General on behalf of the respondent filed grounds of opposition to the petition asserting, among other things, that it was an abuse of the process of the court. Thereafter the learned

Judge of the ELC issued directions in the petition directing the parties to file written submissions to include specific submissions on whether the petition is res judicata.

17. Having considered the submissions, the learned Judge, as already noted, was not in any doubt that the appellant was seeking to re-litigate a matter which had already been determined in judgment delivered on 15th March 2013 in Nakuru High Court Civil Case No. 85 of 2010. Did the learned Judge err in so holding?

18. The doctrine of res judicata is captured in Section 7 of the *Civil Procedure Act* which provides:

> " 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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

19. As stated by the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & Another vs. Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR), the doctrine of res judicata is a pillar upon which our judicial system is founded and is based on the principle of finality which is a matter of public policy and prevents a multiplicity of suits which would ordinarily clog the courts and ensures that litigation comes to an end.

20. In the same case, the Supreme Court encapsulated the elements that should be demonstrated for the doctrine of res judicata to be invoked in a civil matter, namely, that there was a former judgment or order which was final; that the judgment or order was on merit; that the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and that there had to be identical parties, subject matter and cause of action in both actions. The Supreme Court re-affirmed the position it had expressed earlier in the case of Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & Another, Motion No. 42 of 2014 [2016] eKLR that the doctrine of res judicata applies in respect of matters of all categories, including issues of constitutional rights.

21. In the often cited English case of Henderson vs. Henderson (1843) (1843) 67 ER 313, Wigram, V-C expounded on the doctrine of res judicata as follows:

> " 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 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 the parties to form an opinion and pronounce a Judgment, 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."

22. With those principles in mind, the subject matter of the appellant's suit in Nakuru High Court Civil Case No. 85 of 2010 as already noted was her property Title Number Nakuru/Cedar Lodge/41 in respect of which she sought, among other reliefs, a declaration that it "comprises and is inclusive of the area of the borehole known as Nakuru/Cedar Lodge/116". It is the same subject matter in her petition giving rise to the present appeal.

23. Furthermore, and as demonstrated above, a final judgment on merits was rendered by the High Court (Emukule, J) on 15th March 2013 in Nakuru High Court Civil Case No. 85 of 2010 wherein the court issued an order to be noted on the register of Nakuru/Cedar Lodge/116 prohibiting dealings with it without first giving the appellant the option to consolidate it with her title over Nakuru/Cedar Lodge/41. There is no suggestion that the High Court was incompetent or lacked jurisdiction in making those orders.

24. As for the parties, all the defendants in Nakuru High Court Civil Case No. 85 of 2010, namely, the District Land Registrar, Commissioner of Lands, Director of Survey and the Attorney General and all the respondents in the subsequent petition, apart from National Land Commission, are state organs that were represented by the Attorney General. Although all the parties are not common in both actions, they are clearly "litigating under the same title" (see John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR).

25. As the learned Judge of the ELC stated in his judgment, the totality of the appellant's prayers in her petition "are encapsulated by the prayer for a declaration that the [appellant] is the legal owner of the whole of the parcel of land known as Nakuru/Cedar Lodge/41 measuring 4 acres". The Judge went on to say that there is really no difference between the prayers in the petition and the prayers she sought in High Court Civil Case No. 85 of 2010 before stating:

> " 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."

26. We respectfully agree. In the result, we are fully in agreement with the holding by the learned Judge that:

> " ...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 the court."

27. Therefore, the appeal fails and is hereby dismissed with costs to the 1st, 2nd, 4th and 5th respondents.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR