



REPUBLIC OF KENYA



Muungano wa Wanavijiji & others v Attorney General & 17 others (Environment & Land Case 288 of 2015) [2024] KEELC 3563 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 288 OF 2015**

AA OMOLLO, J

APRIL 11, 2024

BETWEEN

MUUNGANO WA WANAVIJIJI & OTHERS PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE MINISTRY OF LANDS 2ND RESPONDENT

**MINISTER OF STATE OFFICE OF THE PRESIDENT IN CHARGE OF
PROVINCIAL ADMINISTRATION 3RD RESPONDENT**

COMMISSIONER FOR LANDS 4TH RESPONDENT

**RETIRED PRESIDENT HIS EXCELLENCY DANIEL ARAP
MOI 5TH RESPONDENT**

WILSON GACANJA 6TH RESPONDENT

SAMMY MWAITA 7TH RESPONDENT

JAMES RAYMOND NJENGA 8TH RESPONDENT

JOHN JOSEPH KAMOTHO 9TH RESPONDENT

KUZA FARMS AND ALLIED LIMITED 10TH RESPONDENT

EMBAKASI DEVELOPERS LIMITED 11TH RESPONDENT

NASHI MOTORS LIMITED 12TH RESPONDENT

MIDWAY VENTURES LIMITED 13TH RESPONDENT

ORBIT CHEMICALS LIMITED 14TH RESPONDENT

AMSCO CHEMICAL LIMITED 15TH RESPONDENT

WOODCRAFT INDUSTRIES LIMITED 16TH RESPONDENT



JANDU INVESTMENTS (K) LIMITED 17TH RESPONDENT

OCEAN FREIGHT TRANSPORT CO LIMITED 18TH RESPONDENT

RULING

1. For determination is the 15th Respondents notice of motion application dated 19th October, 2023 and the 16th Respondent's preliminary objection dated 23rd October, 2023. The application sought the following orders;
 - a. The Petition filed herein as against the 15th Respondents be struck out with costs for offending the principle of res judicata and thus contravening the provisions of section 7 of the Civil Procedure Act.
 - b. The Petition be struck out for being defective in substance and failing to meet the threshold for constitutional petitions recognized in law.
 - c. The costs of this Application be awarded to the 15th Respondent/Applicant.
2. The Preliminary Objection raised the following grounds;
 - a. Vide a Judgment delivered on 7th September, 2017 in Milimani High Court, ELC Civil Suit No. 520 of 2013, Beta Engineering Co. Ltd. & Amsco Chemicals Limited versus Joseph Mbithi Nzau & 40 Others (the "former suit"), the 15th Respondent sought and were granted orders of eviction and vacant possession of L.R No. 209/10309 and damages for trespass against the Defendants therein, on whose behalf the Petitioners have filed this Petition, after the court made a determination that the 15th Respondent was the indefeasible owner of the subject property.
 - b. The issues in the Petition are directly and substantially similar to the issues raised in the former suit and have been adjudicated upon the Environment and Land Court, being the court of competent jurisdiction.
 - c. The legal status of Property L.R No. 209/10309 has been heard and determined by the Environment and Land Court being a court of competent jurisdiction and the Petitioners have not appealed and/or sought review against the Judgment in the former suit.
3. The Petitioners filed grounds of opposition dated 13th November, 2023 and 15th November, 2023.
4. The parties agreed to prosecute both the application and the preliminary Objection by filing of written submissions. The 16th Respondent filed a submissions dated 4th March, 2024 together with their list of authorities of even date. The Petitioners filed their submissions dated 8th January, 2024 together with a list of authorities to support. The 15th Respondent filed written submissions dated 13th December, 2023. I took time to read through all the three (3) sets of the submissions.
5. The main issues raised for determination by this court are;
 - a. Whether or not the amended petition is res judicata.
 - b. Whether or not the Petition is barred by the statute of Limitation of actions.
 - c. Whether or not the amended petition as filed (meets the threshold of a Constitution Petition)



- d. Whether or not the amended petition out to be dismissed/struck out.
6. The 15th Respondent avers that the petition as against it is res judicata because the issues were already determined vide Milimani ELC CC 520 of 2013, Beta Engineering Co. Limited & Amsco Chemicals Ltd Vs Joseph Mbithi Nzau & 40 Others. It is their submissions that the former suit determined the legal status of L.R No. 209/10309. The 15th Respondent enumerated the principles of res judicata as set out in Section 7 of the *Civil Procedure Act* and cited cases that elaborated on the principle. For instance, *Susan Gen. Trading vs Kenya Revenue Authority & 2 Others; Diplomatic Duty Free (Interested Party)* (2019) eKLR and *John Florence Maritime Services Limited & Another vs C. S Transport Infrastructure & 3 Others* (2021) KESC 39.
7. In relating the amended petition to the former suit, the 15th Respondent referred to paragraph 20 and 45 of the petition where it is pleaded thus;
- “20. The Petitioners filed this suit on their behalf and on behalf of the several villages in Mukuru Kwa Reuben slums whose authority and consent they do have.
45. The Petitioners aver that in privileging the 9th, 18th Respondents and issuing them grants of public land, and 5th, 6th, 7th and 8th Respondents discriminated against the Petitioners and Mukuru community members’ right at large on the grounds of their social status.”
8. The 15th Respondent added that the former suit proceeded undefended and a final judgment rendered on 7th September, 2017. That so far, the said judgment has not been reviewed, set aside or appealed. From the pleadings in the paragraphs cited above there is no dispute that the Petition is also brought on behalf of those occupying L.R 209/10309 owned by the 15th Respondent. One of the Principles of res judicata state that the issue must be directly and substantially in issue in the former suit and the issue was heard and finally determined.
9. I have perused the judgment delivered in ELC 520 of 2013 where the 15th Respondent had sought for vacant possession. On account of the 15th Respondent’s own admission that the suit was undefended means the only issue determined was their right to vacant possession. I am alive to the provision that failure to defend a suit does not grant permission to file a fresh suit on matters that could have raised in that suit.
10. However, the petition as filed raises other issues that could not have been determined in the claim by the 15th Respondent. For instance, at paragraph 52, the Petitioners aver that the allocation was unlawful and the 9th – 18th Respondents should be ordered to restitute the Kenyan public; and there is a claim on the right to housing. These are constitutional rights that could not have been determined in suit commenced by a plaint and It is on this basis that I decline to hold the current petition as res judicata.
11. In regard to the averment that the amended petition is barred by the provisions of the *Limitation of Actions Act* Cap 22, my answer is no. *The constitution* is the supreme law of the land hence it cannot be limited by statutory provisions limiting time for bringing claim. Where a claim is brought under the constitutional provisions such as this, the time bar set by statute is excluded.
12. Thirdly, in tackling the question of whether this petition meets the threshold of a constitutional petition as set out in the case of Anarita Karimi Njeru versus Attorney General (1979)KLR 154. In answering this question, I make reference to paragraphs 52, 55, 56 and 59 of the amended petition, which raise inter alia, the obligations of the 5 – 8th Respondents to the Kenyan public; alleged violations



of the Petitioners' rights to housing, life, dignity and property. Whether there is merit in the alleged violations, such proof are subject to determination during the hearing of petition. It is therefore my holding that this objection is also without merit.

13. In conclusion, I find no merit both in the notice of motion application dated 19th October, 2023 and the preliminary objection dated 23th October, 2023. Both are dismissed with costs to the Petitioners.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2024

A. OMOLLO

JUDGE

