REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 24 of 2012

KENYA HOTEL PROPERTIES LIMITED..APPLICANT

VERSUS

WILLISDEN INVESTMENTS LIMITED...1st RESPONDENT

KENYA REVENUE AUTHORITY..2nd RESPONDENT

AND

THE HON. THE ATTORNEY GENERA...1ST RESPONDENT

WILLESDEN INVESTMENTS LIMITED..2ND RESPONDENT

KENYA ANTI-CORRUPTIONCOMMISSION...3RD RESPONDENT

KENYA REVENUE AUTHORIT..4TH RESPONDENT

THE COMMISSIOENR OF LANDS...5TH RESPONDENT

CITY COUNCIL OF NAIROBI..1ST INTERESTED PARTY

DEVELOPMENT BANK OF KENYA LIMITED...................................2ND INTERESTED PARTY

**(*Application for stay of proceedings and an injunction pending the hearing and determination of the appeal against the ruling of the High Court of Kenya at Nairobi (Musinga, J.) dated 27th January 2012*

in

H.C. Petition No. 13 of 2011)

****

RULING OF THE COURT

1. Kenya Hotel Properties Limited (applicant) moved this Court once again seeking inter alia an order of injunction to restrain the 1st respondent (**Willesden Investment Limited**) from executing the decree in Milimani H.C.C.C. No. 367 of 2000, a stay of any proceedings, by way of execution in Milimani H.C.C.C. No. 24 of 2008 until the hearing and determination of the appeal or petition No. 13 of 2011 between the applicant the Attorney General and others.

2. This application is brought under the provisions of **Rule 5(2) (b)** of the Court of Appeal Rules. It is supported by the affidavit of **Marion Ndegwa Jordan** sworn on 31st January, 2012, the grounds stated on the body of the application and the numerous documents annexed thereto. The application was opposed by the 1st respondent vide the replying affidavit sworn by **Ben Muli** on 20th March 2012. Although the other participating parties did not file replies to the application, during the hearing they addressed the Court on points of law. **Mr. Mwangi** appeared for the Commissioner of Lands (5th respondent), **Mr. Martin Macharia** appeared for the Kenya Anti Corruption Commission (KACC), (3rd respondent), appeared for the Kenya Revenue Authority, (4th respondent) and **Mr. Odoyo** for the City Council of Nairobi the 1st interested party. The 2nd named interested party did not appear.

3. This matter has a protracted history that began with a suit that was filed by the 1st respondent (**Willesden**) being; **Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel properties Limited**. The outcome of that suit is a judgment dated 14th December, 2006 by **Mutungi, J**. where the following orders were made:

"In the result I hold that the plaintiff has proved its claim on the balance of probabilities. Accordingly, I enter judgment in favour of the plaintiff, and against the defendant.

(a) ***Mesne profits from January 1994 to February, 1999, both months inclusive, in the sum of Kshs. 54,902,400/- with interest at the court rates from January, 1994 till payment in full.***

(b) ***General damages for trespass for Kshs. 10,000,000/- with interest from the date of judgment, at court rates till payment in full.***

(c) ***Kshs. 6,000,000/- damages for loss of business opportunity, with interest at court rates from the date of this Judgment till payment in full.***

(d) ***Cost of this suit, with interest at court rates from the date of filing of the suit till payment in full."***

4. The above orders were appealed against in **Civil Appeal No. 149 of 2007** and in a judgment of **O'Kubasu, Onyango Otieno** and **Aganyanya, JJ.A** their lordships made the following conclusions:-

In view of the foregoing the award for general damages for trespass in the sum of Kshs. 10 million and the award of damages for loss of business opportunity in the sum of Kshs. 6 million cannot stand. Consequently the awards are set aside.

The award of Kshs. 54,902,400/- is reduced to kshs. 22,729,800/- with interest at court rates from January, 1994 to the date of future payment.

The appellant shall have half the costs of this appeal and half the costs in the superior court."

5. As regards the second case (H.C.C.C. No. 24 of 2008) **Willesden Investment Limited** sued the City Council of Nairobi, claiming damages for trespass and orders were made in favour of **Willesden**. There is also High Court Civil Suit No. 35 of 2010 instituted by KACC (3rd respondent) against **Willesden**. **Ben Muli** (2nd defendant), **Jatin Patel** (3rd defendant), **Hitesh Ratchand** (4th defendant), **Martha Kamwele** (5th defendant), the applicant as 6th defendant, and **Wilson Gachaga** as the defendant. The City Council of Nairobi was joined as an interested party.

6. In that case, KACC alleged that the suit property was previously part of Kaunda Street, a public road which was not available for allocation. Wilson Gachanja was accused of making an illegal allocation of public land to an entity known as Centre Park Limited and for issuing a grant to **Willesden**. It was claimed that the allocation and issuing of the grant offended the provisions of the Local Government Act, the Physical Planning Act and the Government Lands Act. Prior to the filing of the suit KACC contended that it had investigated the issuance of the title over the suit land to **Willesden** and established the following:-

(a) **The suit land was a public road that was illegally and fraudulently allocated to a non-existent entity.**

(b) **Despite the illegal allocation to a non-existent entity, the grant was subsequently issued to Willesden which was neither an applicant for allotment nor the allotee of the suit land.**

(c) **The allotment of the suit land and eventual issuance of title to Willesden was therefore irregular, illegal and fraudulent.**

(d) **The suit land is a public road that was allocated in breach of the provisions of the Local Government Act cap 265 laws of Kenya, the Physical Planning Act cap 286 and the Government Lands Act cap 280 laws of Kenya.**

(e) **The suit land was at all material times public property.**

KACC sought for a declaration that the allocation and the grant to **Willesden** was null and void and sought cancellation and its revocation. That application was heard by **Muchelule, J.** and after considering it, he ordered the suit be struck out. KACC filed Civil Application No. Nai 131 of 2010 before this Court seeking for stay of proceedings but they were unsuccessful as the application was dismissed with costs by **O'Kubasu, Keiwua** and **Nyamu, JJ.A**. by a ruling delivered on 28th January, 2011.

7. On 31st January 2011, the applicant filed **Petition No. 13 of 2011** before the High Court, Milimani against the 1st to the 5th respondents and naming the City Council of Nairobi and the Development Bank of Kenya Limited as the 1st and 2nd interested parties respectively. The applicant made various allegations of breaches of its fundamental rights as enshrined under **Articles 20, 22, 23, 25, 48, 50, 67** of the Constitution of Kenya. As regards **Milimani HCCC No. 367 of 2000,** the applicant contends that the overriding objective of upholding and giving effect to the provisions of the Constitution as spelt out under A**rticles 68, 159 and 259** were not taken into consideration. The applicant sought in that Petition the following orders:-

(i) A permanent injunction be issued preventing the 2nd respondent, its servants or agents or any other respondents from executing the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited in any manner whatsoever or by enforcing the bank guarantee held by the 2nd interested party pending the determination of proceedings that shall be lodged by the petitioner over the revocation of the 2nd respondents Certificate of Title in respect of L.R. No. 209/12748 I.R. No. 66986 before the soon to be established National Land Commission under Article 67 of the Constitution that shall be guided by legislation to be enacted under Article 62 of the Constitution to investigate illegally acquired public land.

(ii) A declaration that it would be against public policy and the Constitution for the 2nd respondent to derive any benefit from the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited until after the determination of the legality of the issuance of the certificate of title over L.R. No. 2029/12748 I.R. No. 66986 by the National Land Commission under Article 67 of the Constitution.

(iii) A declaration that the petitioner is entitled to protection under the Constitution to safeguard its property from attachment.

(iv) An order directing the 3rd to 5th respondents investigate what taxes and land rents have not been paid by the 2nd respondent to the government regarding L.R. No. 209/012748 I.R. No. 66968.

8. Subsequently, the applicant filed an application seeking for interim orders principally to prevent the Development Bank of Kenya from releasing the sum of Kshs.61,979,918.37/- which was held as security. That application was heard by **Musinga, J.** (as he then was) and he delivered a ruling on 27th January, 2012. The application was dismissed with costs as the judge made the following conclusions:-

"While I entertain some doubt as to whether the suit property is not actually part of Kaunda Street that was illegally carved out before it was allocated, in light of the Court of Appeal decision, I cannot grant the injunction sought on the speculative argument that the National Land Commission, as and when it becomes operational, may favourably determine the intended complaint by the petitioner regarding legality of Willesden's title to the suit land. The new Constitution does not envisage a situation where Kenyans ought to be stopped from enjoying vested proprietary rights over their land until the National Land Commission is formed and investigates whether those rights were lawfully acquired. We can only cross the bridge when we get there. Prayers 4 and 5 of the petitioner's application must therefore fail.

Prayer 6 and 7 cannot be granted because K.R.A. has already taken action and made a tax assessment against Willesden. It is demanding sum of Kshs.37,567,717/- tax. Under section 52(b)(1) of the Income Tax Act, every individual chargeable to tax under the Act is required for any year of income to furnish the Commissioner of Income Tax a return of income including a self assessment of his tax. It was the responsibility of Willesden to demonstrate that it has complied with the provisions of the law. There was an attempt by Willesden to backdate some of its tax assessments.

Willesden also sought to rely on a letter dated 24th May, 2011 from K.R.A. to the effect that all its taxes had been stood over and therefore the entire decretal amount ought to be paid to it. However, the said letter referred to a company known as Willesden Holdings Limited and not Willesden Investments Limited. That letter cannot therefore afford Willesden any defence herein. The agency notice that was issued by K.R.A. remains valid.

In the circumstances, even after refusing to grant prayers 4 and 5 of the petitioner's application, the entire decretal sum cannot be paid to Willesden. I order that out of the decretal sum secured by the Bank Guarantee issued by Development Bank of Kenya Limited, a sum of Kshs. 37,567,717/- be paid out to K.R.A. to hold the same until the issue of Willesden's tax assessment is finalized. The balance of the decretal sum should be paid forthwith to Willesden.

In the event that Willesden succeeds in its objection to the tax assessment, K.R.A. will be obliged to refund the sums of Kshs.37,567,717/- or such other amount as will be found to be refundable under Section 105 of the Income Tax Act.

Save for the specific orders that I have made regarding the claim by K.R.A. I find no merit in the petitioner's application dated 31st January, 2011 and dismiss the same with costs to Willesden."

9. It is against the above orders that the applicant filed a notice of appeal and the present application. During the hearing, Mr. Gichuhi learned counsel for the applicant made extensive submissions and referred to several authorities in his bid to demonstrate that the intended appeal is arguable and unless the orders sought are granted, it will be rendered nugatory. He pointed out that since the application was filed, the National Land Commission Act was passed on 2nd May, 2011 and the Commissioners were appointed, therefore the issue is no longer speculative. He made reference to a South African case;- **Parbhoo v Getz [1998] 2 LRC 159** where the Constitutional Court of South Africa issued extra ordinary orders to preserve a status quo while awaiting the enactment of a legislation to put into force the provisions of the Constitution. The court held *inter alia*:

"The procedural vacuum arising from the fact that the legislation and rules contemplated by ss 167(5)

and 172(2)(c) of the Constitution had not yet been passed constituted an extraordinary situation which justified the exercise of such power. Pending the enactment of the necessary legislation and promulgation of the necessary rules, the court would adopt a procedure that followed as closely as possible the intended purpose of sec. 167(5) and 172(2).”

10. The National Land Commission is mandated to investigate the present and historical land injustices; it has exclusive jurisdiction to determine the legality or the illegalities of titles. The suit property is a parking lot between the old Nyayo House and Uhuru Park whose ownership must be determined. All the allegations touching on the acquisition of a public land were never determined on merit by any court in all the suits. The issue of public interest and the fact that the public had been denied access of a public road were never considered. The Commissioner of Lands, KACC and the City Council of Nairobi, all of them public bodies agree that the title of the suit land was illegally acquired. On the appeal being rendered nugatory, there is no proof by the 1st respondent that it will be able to refund a whooping sum of about Kshs.62 million should the appeal be successful.

11. This application was opposed. Mr. Nowrojee learned Senior Counsel teaming up with Mr. Oyatta for **Willesden**, persuaded us to find that the appeal is not arguable for reasons that the ownership of the suit property was variously addressed in the suits before the High Court and finally it was determined by the Court of Appeal in Civil Appeal No. 149 of 2007 and Civil Application No. 131 of 2010; the issue of ownership is now *res judicata* and it cannot be reopened through this application; the prayers sought in the present application are substantially similar with what was sought in Civil Application No. NAI 131 of 2010; it is therefore an abuse of the court process disguised to stay execution in other cases.

12. Mr. Muchira, learned counsel for **KACC** supported the application. He referred to an affidavit sworn by **Ngaah Jairus** on 11th February, 2011 that shows the suit property was excised from a public road and was allocated to a non existing body. Since the matter is of public interest, **KACC** has powers to investigate loss and damage to public property and that is why they filed HCCC No. 35 of 2010 which was struck out before it was heard on merit by Muchelule, J. KACC filed CA No. 171 of 2010 which is still pending before this Court. Similarly, **Mr. Odoyo** learned counsel for the City Council of Nairobi supported the application also confirming that the suit land was meant for public utility and also supporting the fact that the issue over the ownership was never determined on merit.

13. Mr. Ontweka learned counsel for the Kenya Revenue Authority also submitted that the incorporation of **Willesden** as an entity was suspect since they have never been issued with a PIN Number; that an arguable point regarding public interest of how a transaction over public property was carried out without PIN with Government agencies should be interrogated in the appeal and lastly, that the applicant is partly owned by the government and supported by tax payers, out of which the decretal sum of almost Kshs. 62 million is supposed to be paid. In the interest of justice the orders should issue to wait the determination of the appeal or the petition.

14. This application invokes the jurisdiction of this Court provided under **rules 5(2) (b)** of the Court of Appeal Rules. The guiding principles when exercising this jurisdiction have been set out in a long line of case law. First, the intended appeal should not be frivolous, or as otherwise put, the applicant must show that it has an arguable appeal, and secondly, this Court should ensure that an appeal if successful should not be rendered nugatory. From the brief background of the matters stated above, we discern three issues for our determination.

15. The first issue is whether the matter is *res judicata* thatis whether the matters raised in this application have substantially been in issue and have been fully decided. If the answer to the above is in the negative, then we will consider whether the appeal is arguable and if the orders are not granted, the appeal will be rendered nugatory.

Res judicata, is a doctrine of law founded on public policy and aimed at ensuring two objectives, namely, there must be a finality to litigation and that parties who have gone through litigation should not be subjected to the same tests. See the provisions of 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 the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. (See also Mulla the Code of Civil Procedure 16th Ed. Vol. pg 161.”***

16. This doctrine has been explained by the Court of Appeal in a number of cases. See the case of **James Katabazi and 21 Others v The Attorney General of the Republic Of Uganda** **EACJ** where the Court stated that for the doctrine to apply: -

- the matter must be **‘directly and substantially’** in issue in the two suits,

- the parties must be the same or parties under whom any of them claim, litigating under the same title; and

- The matter must have been finally decided in the previous suit (**See also the case of Wille Versus Michuki & 2 others (2004) KLR 357** wherein the court reiterated the afore set out principles and stressed that for the doctrine of Res judicata to apply three basic conditions must be satisfied namely that there was a former or proceeding in which the same parties as in the subsequent suit; litigated the matter in issue in the latter suit must have been directly and substantially in issue in the former suit and lastly that a court competent to try it had heard and finally decided the matter in controversy between the parties in the former suit.

We agree with the aforesaid construction that the doctrine of *res judicata* is aimed at achieving firstly finality to litigation and secondly that an individual should not be harassed on account of the same litigation more than once.

17. Are the matters raised in this application directly and substantially determined in previous suits and applications? We have revisited the documentation presented to us and we note that in **Milimani H.C.C.C No. 367 of 2000 Willesden Investments Limited – v- Kenya Hotel Properties Limited** (hereinafter referred to as the first suit), the Plaintiff **(Willesden**) sued the applicant herein claiming damages for trespass. **Civil Appeal No. 149 of 2007 Kenya Hotel Properties -v- Willesden Investments Limited** was an appeal against the judgment of the High Court in the 1st suit. The Court of appeal reduced the damages for trespass that were awarded to **Willesden**. In the Kenya Anti-Corruption Commission (KACC) filed **H.C.C.C No. 35 of 2010** (hereinafter referred to as the 2nd suit)against the 1st respondent herein (who was the 1st defendant therein), **Ben Muli** (as the 2nd defendant), **Jatin Patel** (as the 3rd defendant) , **Hitesh Rathood** (as the 4th defendant), **Martha Kimwele** (as the 5th defendant), the applicant herein (as the 6th defendant) and **Wilson Gachanja** (as the 7th Defendant). The City Council of Nairobi was joined in that suit as an interested party.

18. KACC sought declaratory orders to the effect that **Willesden’s** title over the suit property was null and void and sought its revocation on the ground that it had been unlawfully allocated to the 1st defendant. In contrast with the issue in the first litigation, the issue herein related to the legality and the root of the title acquired and held by the 1st respondent. **Civil Application No. Nai. 131 of 2010 Kenya Hotel Properties -v- Willesden Investments Limited** was filed by the 1st applicant after the High Court struck out the 2nd suit and its interlocutory application therein on the grounds that the application by the 1st applicant and the 2nd suit were *res judicata.*

Thereafter, the applicant herein filed **Petition No. 13 of 2011 *(***the Petition), against theHon. Attorney General**,** the 1st respondent, KACC, Kenya Revenue Authority and the Commissioner of Lands. City Council of Nairobi and Development Bank of Kenya were joined in the Petition as interested parties.

19. Upon comparing the causes of action in the aforesaid suits, we are satisfied that whereas, the subject matter namely the suit property is the same, the causes of action in each case involved different parties

and approaches. As to whether there was final determination of the matters raised in the present application and the previous litigation, we can do no better than refer to the case of **Wanguhu -vs- Kania [1987] KLR 51** where this Courtobserved that:-

"..the first application was not decided upon its merits. It was dismissed after an application for adjournment was refused and neither side was heard upon the merits. It was therefore not a res judicata. A matter is not res judicata if it was not decided upon its merit"

We are satisfied the issue introduced in the application before us as to whether the **Willesden's** title to the suit property was acquired fraudulently or not as an issue intended to be investigated as a matter of Public interest by the Land Commission has never been determined in the previous afore mentioned litigation. In the premises we are satisfied that all the ingredients required in sustaining the doctrine of *res judicata* stand ousted.

20. Turning to the issue of whether the appeal raises an arguable point of "*public interest"*, we wish to pause a question as to when public interest is put in motion. In the case of EAST AFRICAN CABLES LIMITED VS. THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW & APPEALS BOARD AND ANOTHER [2007] eKLR the Court of Appeal indicated situations where public interest should take precedence in the following words:-

"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"

Further in the case of; **Kenya National Examination Council – v- R exp. Kemunto Regina Ouru Nairobi Civil Appeal No. 127 of 2009** and **Kenya Power & Lighting Co. –v- NMG Limited & 2 Others, Nairobi Civil Application No. 27 of 2010**, it was stated that public interest overrides private individual's interest.

21. Being guided by the above case law, we have identified the following issues which in our view are arguable; whether a court of law can fail to investigate an allegation regarding fraud over public property; whether the suit land is in fact a public land in which the public have an interest; whether interlocutory proceedings previously determined can be taken to have finally determined, the root and or legitimacy of the acquisition of the suit property; whether the court can ignore the persistent allegations, that the property is public land; whether the anticipated investigation by the Land Commission can be said to have been fore stalled by the previous interlocutory proceedings which recognized the title holding of the suit land as having been vested in the 1st respondent; whether the current Constitutional provisions mandating the Land Commission to investigate present or historical land injustices has primacy over previous court pronouncements in **Civil Appeal No. 149/2007 and Civil Application No. Nai 113 of 2001**.

22. Whether failure to reopen the matter on public interest to be litigated will amount to adhering to a technicality contrary to Article 159 (a) and 162 (b) of the current Constitution 2010; whether pursuit of the issue of public interest in the suit property in the wake of all the circumstances displayed herein is in fact an abuse of the due process of the law; whether the first respondents' title to the suit land sought to be faulted stands affected by the provisions of Article 40(6) of the Constitution 2010 which provides:-

"**The right under this Article does not extend to any property found to have been unlawfully acquired.**

And lastly whether the 1strespondent is entitled to receive funds held pursuant to an order made in CA 149/2007 at this point in time considering the existence of an intended challenge to the legality of the title

on the basis of which the 1st respondents is intended to benefit from those funds.

23. With regard to the demonstration of existence of the likelihood of the intended appeal being rendered nugatory, we note that the suit title is currently registered in the name of the **Willesden**. We cannot however lose sight of the fact that there are payments of money involved, and the beneficiaries and their respective entitlements have already been identified by this court in Nairobi CA No.149/2007. The foregoing state of affairs notwithstanding, the applicant urged this Court to grant stay orders on the basis that the 1st respondent may be unable to refund any monies should part of the decretal sum be paid to it considering the 1st respondent is no longer paying rates nor is it a trading entity in Kenya.

24. In the case of **ABN AMRO Bank, N.V**. Vs. Le Monde Foods Limited Civil Application **No. NAI.15 of 2002**, this Court emphasized that once the applicant in an application for stay expresses doubts on the respondent's ability to refund the decretal sum, the burden shifts to the respondent to rebut that assertion. The Court stated:

*"In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on." See also Kenya Posts and Telecommunication Corporation **V** Paul Gachanga Ndarua, Civil Application No. NAI. 367 of 2001.*

25. We are satisfied that **Willesden** has not discharged the evidential burden shifted to it by the applicants allegations that it is not a rate payer or a trading entity in Kenya by failing to show what assets it has that would make it be in a position to refund the decretal sum if it is paid out to it. For this reason **Willesden** has not demonstrated that it is capable of refunding this sum if the appeal or petition is successful.

26. The rule is that even where only one arguable point has been demonstrated to exist, stay should be granted. Herein we are satisfied that there are numerous arguable points capable of being raised on appeal. This coupled with **Willesden's** failure to demonstrate its ability to refund funds held if paid out to them, fortifies the applicants entitlement to the relief sought on account of the applicant having established the existence of both ingredients on arguability of the intended appeal and the intended appeal being rendered nugatory should stay not be granted.

27. Accordingly, the Notice of Motion application dated 31st January 2012 is allowed in terms of prayers 1 and 2. We hereby issue an injunction restraining the respondents, their servants or agents from executing the decree in Milimani High Court Civil Case No. 367 of 2001 and calling up the bank guarantee issued by Development Bank of Kenya Limited pending the determination of the intended appeal arising from the decision of **Musinga, J. (**as he then was) dated 27th day of January, 2012.

Costs shall follow the event in the appeal or the Nairobi Petition No. 13 of 2011.

DATED and DELIVERED at Nairobi this 4th day of April 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK (PROF.)

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR