



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CONSTITUTIONAL PETITION NO. E001 OF 2020

IN THE MATTER OF ARTICLE 22, (3), 23 AND 165 (3) (b) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONSTITUTION OF RULES UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013.

BETWEEN

DANIEL MUTEKI MWENDA.....PETITIONER

VERSUS

JOHN KATHENYA KAIBIRU.....1ST RESPONDENT

THE CABINET SECRETARY, LANDS AND

PHYSICAL PLANNING – (*SUED THROUGH*

THE DEPUTY COUNTY COMMISSIONER –

***THARAKA SUB COUNTY*)2ND RESPONDENT**

THE DISTRICT LAND REGISTRAR

(THARAKA SUB COUNTY).....3RD RESPONDENT

THE DISTRICT LAND SURVEYOR

(THARAKA SUB COUNTY)4TH RESPONDENT

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

RULING

1. The **Grounds of Opposition** (PO) in this matter state as follows:

2ND - 5TH RESPONDENT'S GROUNDS OF OPPOSITION

TAKE NOTICE the 2nd, 3rd 4th and 5th Respondents shall at the hearing of the Petition dated 18th November 2020 oppose the same on the following grounds:

1. **THAT** petitioner has not demonstrated how the actions of the respondents have infringed his right for fair hearing as he participated in the proceedings on the appeal to the minister
2. **THAT** the petitioner is challenging an administrative decision that was made over 6 months time limit provided by the law.
3. **THAT** the Land Adjudication Act has provided for all the mechanisms of dealing in land under an adjudication section. The respondents herein have adhered to all the provisions of Cap 284 Laws of Kenya.
4. **THAT** an appeal to the minister was justified and legal, and within the mandate of the law
5. **THAT** the respondent has not demonstrated the nature of injury caused by the respondents and the damage he has suffered.
6. **THAT** the Petition herein is fatally defective and void of substance.
7. **THAT** the petition is vexatious, frivolous, scandalous and an abuse of Court process.

REASONS WHEREFORE the Respondents pray for the dismissal of this petition with costs.

DATED AT MERU THIS.....6THDAY OF.....APRIL,....2021

J.M KIONGO

SENIOR LITIGATION COUNSEL

FOR: HON. ATTORNEY GENERAL

& DEPARTMENT OF JUSTICE

2. The **1st Respondent's affidavit** in opposition to the petition is pasted herebelow:

1ST RESPONDENT'S AFFIDAVIT IN OPPOSITION TO PETITION DATED 18/11/2020

I JOHN KATHENYA KAIBIRU, adult male of P.O Marimanti, in the Republic of Kenya, do hereby make oath and solemnly swear as follows.

1. THAT I am the 1st Respondent herein and I am competent to swear this affidavit.
2. THAT the Petition dated 18/11/2020 together with the supporting affidavit has been read and explained to me by my advocate on record herein I have understood the same

3. THAT the petitioner's petition and the supporting affidavit is full of falsehood and misrepresentation intended to mislead the court to issue undeserving orders.
4. THAT I am a lawful registered proprietor of all that parcel of land known as L.R. NO N. THARAKA/MARIMANTI/3342 and was registered in my favour on 31/10/2020 and a Title Deed issued to me. A copy of the title Deed annexed as JK I.
5. THAT the registration in my name was done after exhausting all the dispute resolution mechanisms set out in the Land Adjudication Act, including the appeal to the minister.
6. THAT the petitioner has not disclosed in his pleadings herein ,and he has sought to willfully withhold from this Honourable Court that he filed a suit at Marimanti Principal Magistrate's court, claiming the land from me vide Marimanti PM ELC NO 24 of 2017(formerly Marimanti PMCC NO 2 of 2016. A copy of the plaint and my counter-claim filed therein is annexed and marked JK II a & b.
7. THAT on the 8/10/2020, this suit was settled in my favour and a decree of the court was issued. A copy of the decree is annexed and marked JK III.
8. THAT the petitioner was also ordered to pay me the costs of the suit, which were assessed at Kshs 332,525/=. A copy of the Certificate of Costs annexed and marked JK IV.
9. THAT I am advised by my advocate on record, which I verily believe to be true that the dispute herein is res-judicata as the matter has been determined by a competent court.
10. THAT the petitioner herein did not appeal against the decision of the court in Marimanti PM ELC NO 24 of 2017 or seek its review as the judgment was entered by consent of the parties.
11. THAT in light of the decree issued in Marimanti PM ELC NO 24 of 2017, the petitioner has no cause of action against me as the matter has been settled by a competent court.
12. THAT I am advised by my advocate on record and I verily believe the same to be true that the petitioner's lamentations about the appeal to the minister having been filed out of statutory time are a mere afterthought as he did not seek to quash the decision of the minister through judicial review which was open to him.
13. THAT the registration of the suit land in my favour was not obtained through secrecy as the minister's award was within the knowledge of the petitioner and all that the 2nd and 3rd respondents did was to implement the minister's decision which had not been overturned by a court of law.
14. THAT indeed the petitioner is seeking to quash the minister's award through this petition instead of using the procedure authorized by the law to challenge such an award, which amounts to judicial fraud.
15. THAT I have no intention and I have expressed no wish to dispose off the suit land or any part thereof and the allegation by the petitioner is a figment of his own imaginations.
16. THAT after the consent was entered into on the 8/10/2020, the petitioner in total breach of the order of the court, has sought in various occassions to occupy the suit land and has used violence to stop me from entering the land, and I have made reports to the police.
17. THAT indeed my complaints to the police against the petitioner are not acts of harassment but legitimate as the petitioner is forcibly retaining my land which is a criminal offence.
18. THAT the petitioner does not deserve the orders sought herein as he has no cause of action against me.
19. THAT the petition herein does not raise any constitutional issue at all, according to the advice given to me by my advocate on

record, but the petitioner is seeking to use back door to circumvent a valid decree of a competent court.

20. THAT what I deponed herein is true and within my personal knowledge except where otherwise stated.

3. The 1st Respondent's submissions are pasted herebelow:

1ST RESPONDENT'S SUBMISSIONS ON THE P.O. DATED 2/4/2021

On the 28/4/2021, the Honourable Court gave directions that the 1st Respondent's preliminary objection contained in the notice date 27/4/2021 be disposed off on priority basis, by way of written submissions, hence these submissions.

THE FACTS

This petition was filed in court on the 24/11/2020 and together with it an application for an order of inhibition. The application was dispensed with by the court, holding the view that there is need to preserve the subject matter pending the disposal of the petition.

In this petition, the petitioner avers that the appeal preferred by the respondent to the Minister from the decision of the Arbitration Board was done out of time and therefore the minister in-charge of lands lacked jurisdiction to deal with the dispute. He seeks by this petition the quashing of the minister's award, in awarding the petitioner half of the land in dispute.

The 1st respondent filed an affidavit in which he states that the minister's award giving him half of the then L.R. NO S. Tharaka/Marimanti/1764 was good award, was final and was not challenged by way of judicial review as provided by the law. He further contends that the petition herein does not disclose any constitutional issue for determination by the court and that the matter is Res judicata the decision of Marimanti PM ELC NO 24 of 2017. In essence, the respondent contends that this court is deprived of jurisdiction to deal with the dispute in view of the decree issued by the magistrate's court, a decree that has not been appealed.

THE LEGAL AND STATUTORY PROVISIONS

What constitutes a preliminary objection has been subject of discussion by courts in this country and there are many authorities dealing with this subject.

In the case of **MUKISA BISCUIT CO. LTD –VS- WEST END DFIBTRIBUTORS (1969) EA. 696**, a preliminary objection was described as follows:-

“a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit.”

Applying the above definition, it is crystal clear that the notice dated 27/4/2021 contains facts of law, and are pleaded and if argued, will dispose of the entire petition. The respondent has in the preliminary objection raised the issue of Res judicata and that it is scandalous, vexatious, frivolous and an abuse of court process. In short, the respondent in this limb of objection contends that the petition is such that it does not raise any constitutional issue capable of being determined by this court.

Is the petition scandalous, vexatious, frivolous and abuse of the court process

We submit it is frivolous, vexatious and scandalous, and therefore raises no constitutional issue for determination by this court.

By a plaint dated 29/1/2016, the petitioner filed a suit before the Marimanti Principal Magistrate, against the respondent claiming the land subject of this petition. A copy of the plaint is annexed to the respondent's affidavit in opposition to the petition and marked JK I (a). The respondent filed defence and counter-claim, claiming half of the suit land. The suit was determined by the court on the 8/10/2020 and a decree was issued by the court. The decree is annexed to the respondent's affidavit in opposition to the petition and marked JK III. The determination was made by a competent court and has not been appealed against, and it was by consent.

Viewed from this obtaining legal position that is within the knowledge of the petitioner, the filing of this petition can only be frivolous and highly vexatious. He is simply being a nuisance to the respondent. In his petition he does not even mention the existence of this decree. What the petitioner has done is an abuse of the process of court.

In the case of **THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS –VS- ATTORENY GENERAL & TWO OTHERS (Supr Ct Cr. Application No 1 of 2012)** considered what constituted “*abuse of the process*’ and held

“The concept of abuse of the process of court bears no fixed meanings but has to do with the motive behind the guilty party’s actions and with a perceived attempt to maneuver the court’s jurisdiction in a manner incompatible with the goals of justice.”

The petition having been filed with the full knowledge that the dispute has already been adjudicated by a competent court and without disclosure of the fact to the court can only amount to an attempt to maneuver the jurisdiction of this court to obtain wholly undeserving orders not in pursuance of justice. There is a clear case of tell - tale abuse of court process. The attempt to maneuver the court’s jurisdiction in a manner that is incompatible with the goals of justice is clearly manifest and evident. Having participated in the proceedings at Marimanti, the petitioner is acting vexatious and being frivolous in filing this petition. As a consequence, the petitioner has raised issues which are not constitutional in nature, and denies this court sitting as a constitutional court the jurisdiction to deal with the matter. It is our submission that this petition does not meet the necessary threshold for it to be termed constitutional.

WHAT IS A CONSTITUTIONAL ISSUE

As legal practitioners, we are all alive to the fact that every case has a constitutional underpinning. However it is not every dispute which should be filed as constitutional reference, unless it raises constitutional issues. A constitutional issue is one that forces the court to consider constitutional rights and value, one that will deal with the interpretation of the constitution.

Hon Justice J. M. Mativo had the occasion to extensively deal with this issue in the case of **HAKIZIMAN ABDOUL ABDULKARIM –VS- ARROW MOTORS EA LTD & ANOTHER (2017) eKLR**. He thus stated

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

He applied with approval the holding illuminated in the South African case of **FREDRICKS & OTEHRS –VS- MEC for EDUCATION & TRAINING, EASTEN CAPE & OTHERS 9200) 23 (LJ.81)** where it was held

“The constitution provides no definition of constitutional matter. What is constitutional matter must be gleamed from reading of the constitution itself.....constitutional mattes must include disputes as to whether any law or conduct is inconsistent with constitution.”

A glean of the petition review that the petitioner is merely challenging then decision of the Minister of Lands to award the respondent half of the suit land, which is now registered in his (respondent) names. This is not a constitutional issue but a matter that ought to have been filed by way of Judicial Review seeking to quash the decision of the minister. In his own pleadings the petitioner has attached the award of the minister that he now seeks to challenge in this petition. He had the opportunity to do that through the provisions of Order 53 of the Civil Procedure Rules and under the Law Reform Act. There issues fall within the realm of the Law Reform Act, by way of Judicial Review proceedings. We refer the court to various holdings in the case of **R.C. –VS- KKR (2021) eKLR** that dealt at length with what constitutes constitutional issue, while quoting with approval the holding in the case of **TURKUNA COUNTY GOVERNMENT & 20 OTEHRS –VS- ATTORNEY GENERAL & OTEHRS (2016) eKLR** that:-

“claims of statutory violations can not give rise to constitutional violations.”

We urge your Lordship to hold that the petition herein is frivolous and has no useful purpose, raises no constitutional issues and proceed to strike out..

ON RES JUDICATA

Res judicata is a doctrine of law that bars and denies authority to court to deal with a matter that has been dealt with and determined by a competent court. It is a jurisdictional doctrine as it denies authority to deal with a matter already litigated before another court. The purpose is to stop multiple and repeat litigations over the same matter by same persons/litigants. A party seeking to invoke Res judicata must therefore establish that;

“the issues in dispute were in issue in the previous suit, that the issues were determined, that the parties were the same and that the court had jurisdiction.”

The doctrine is entrenched in Section 7 of the Civil Procedure Act which provides as follows:-

“No court shall try any suit or issue in which the matter directly or 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 the 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..”

There is sufficient evidence on record by the respondent which has not been controverted or denied that this matter was finally determined in Marimanti PM ELC NO 24 of 2017, the subject matter was the same, the parties were the same and the court was competent to deal with the dispute. There is clear foundation for the application of Res-judicata in the circumstances of this case.

It has been earlier submitted herein that the doctrine of Res-judicata goes to jurisdiction of court to litigate over a matter that has already been determined.

Jurisdiction is defined in Helisbury’s Laws of England 4th Edition, as

“authority which a court has to decide matters that are litigated before it or take cognizance of matters prosecuted in a formal way for decisions.”

Black’s Law Dictionary, 9th Edition, defines jurisdiction as the ***“court’s power to entertain, hear and determine a dispute before it.***

Clearly therefore, this court by dint of Section 7 of the Civil procedure Act is denied power to hear and determine a dispute that has been dealt with previously. The limitations of courts’ authority are limited and imposed by statutes, charter or commissions under which courts are constituted, and in this case Section 7 Civil Procedure Act, limits the authority of this court to deal with this dispute.

In view of the above, and borrowing from the words of **NYARANGI J**, in the case of **MOTOR VESSEL ‘LILLIAN’ S –vs- CALTEX OIL (K) 1989, KLR**, a court acting without jurisdiction acts in vain. All it engages in is nullity. Indeed Nyarangi J explained himself as follows:-

“jurisdiction is everything without it, a court has no powers to make one more step. Where a court has jurisdiction, there would be no basis for a continuation of proceedings.”

We urge you, Your Lordship to find that the matter is clearly Res judicata and that the court would have no authority to take a further step in these proceedings and terminate the same at this stage. We further urge you to find that the proceedings are frivolous, scandalous and do not raise any constitutional issue and to allow it to proceed further, would amount to entertaining legal chicanery.

We urge you to dismiss the petition with costs.

DATED AT MERU THIS.....3RDDAY OF.....MAY,....2021

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE 1ST RESPONDENT

4. On **19th May, 2021**, Advocate Mark Muriithi told the court that he would not be filing any submissions in opposition to the Preliminary Objection and intimated that he would leave the whole matter to the discretion of the court.

5. From the outset, it is pellucidly clear that the petitioner has not in any meaningful or unmeaningful or in any way whatsoever opposed this Preliminary Objection. This makes it easy for this court to uphold this Preliminary Objection.

6. I will however state that the Preliminary Objection is meritorious for the following reasons:

a) The Petitioner has not demonstrated in what way the respondents infringed upon his constitution right to a fair hearing as he fully participated in the Appeal to the Minister. The Minister acted in accordance with statutory law which law is anchored by the overriding umbrella of the constitution. To these extents, I find that the petition is vexatious, frivolous and borders on abuse of the court process.

b) I find that this petition is **Res Judicata Marimanti ELC No. 24 of 2017** whose decision was never appealed against. It is also clear that the plaintiff had willingly entered into a **consent** with the 1st defendant in Marimanti PM's Case No. 24 OF 2017 which consent was reduced to a decree which reads as follows:

DECREE

It is hereby decreed by consent that:-

1. The Petitioner be and is hereby allowed to withdraw the suit against the Respondent.
2. The counter-claim herein be and is hereby allowed and that L.R. No. N. Tharaka/Marimanti/3342 being a subdivision of L.R. No. N. Tharaka/Marimanti/1764 shall remain the property of the Respondent John Kathenya Kaiburu.
3. The Petitioner shall cease forthwith, to interfere, in any way, with the Respondents' use and occupation of L.R. No. N. Tharaka/Marimanti/3342.
4. The Petitioner shall pay the costs of the suit.

Given under my hand and seal of the court this **8th day of October, 2020**.

Issued at Marimanti this **28th day of October, 2020**

PRINCIPAL MAGISTRATE,

MARIMANTI LAW COURT.

7. Do I need to say more" The facts in this matter are plain and need no further interpretation. The matter is veritably res ipsa loquitur. I have no reservation in declaring that this Petition eminently fails the equivocality test.

8. In the circumstances, I issue the following orders:

- a) This Petition is hereby dismissed and, therefore, all the prayers it seeks are denied.
- b) Costs shall follow the event and are awarded to the Respondents.

Delivered in open Court at Chuka this **30th day of June, 2021** in the presence of:

CA: Ndegwa

Parties and their advocates are not in court

P. M. NJORGE

JUDGE.



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