



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**

Misc Appli 310 of 2006

**GICHUHI KIMIRA.....PETITIONER**

**Versus**

**SAMUEL NGUNU KIMOTHO.....1<sup>ST</sup> RESPONDENT**

**MAAKA MUKUHI MUGWERU.....2<sup>ND</sup> RESPONDENT**

**RULING**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Samuel Ngunu Kimotho and Maaka Mukuhi Mugweru filed a Notice of Preliminary Objection to the Petition that was filed by the Petitioner, Gichuhi Kimira. The Preliminary Objection comprises the following grounds:-

- 1) That the issues raised in the suit are res judicata;
- 2) That the Plaintiff's suit is an abuse of the court process as another case on the same subject matter has been heard fully and determined both in the High Court and by the Court of Appeal.

The Petition under challenge was filed on 8<sup>th</sup> June 2006, pursuant to Sections 70 (a), 79 (9) and 84 (1) of the Constitution of Kenya. The Petitioner sought the following declarations and orders:-

- (a) A declaration that the Petitioner's fundamental right to the protection of law under S 70 (a) and the right to a fair hearing within reasonable time under S. 77 (9) have been breached;
- (b) The Deputy Registrar of the High Court be directed to take accounts of terms of the decree of the Court of Appeal in lieu of the proper person;
- (c) An order that the Petitioner be paid damages;
- (d) An order that the Petitioner be paid costs of this Petition;
- (e) Any other order that the court deems fit to grant.

The Petition is grounded on an affidavit sworn by the Petitioner, grounds found in the body of the Petition and skeleton arguments that are dated 6<sup>th</sup> November 2006 and filed in court on 7<sup>th</sup> November 2006.

In arguing the Preliminary Objection, Mr. Munyu Counsel for the Respondent relied on the

Respondent's Replying Affidavit dated 6<sup>th</sup> October 2006 and filed in court on 9<sup>th</sup> November 2006 and skeleton arguments filed in court on 29<sup>th</sup> November 2006.

The dispute between the parties is a protracted land dispute. It relates to a property which was the subject matter of HCC 880/1977 as consolidated with HCC 908/1977 in which the Petitioner was the Defendant and Respondents were Plaintiffs. The property is LR 13041. The case was heard and determined by the High Court and the court ordered the property to be divided into 3 equal parts. The Petitioner appealed against the High Court orders and it was determined in Court of Appeal case 186/1995. What was outstanding was the dissolution of the partnership and the execution process. It is Mr. Munyu's submission that the protection of law that is sought in this Constitutional Reference relates to execution process of the court's decree and the Court of Appeal's amendment of the decree and it is not therefore a new cause of action. That the rights of the parties were determined by the High Court and Court of Appeal.

It is also Counsel's contention that this whole suit is an abuse of the court process. Counsel considered the prayers sought, in the Petition, that the Deputy Registrar be directed to take accounts of the decree of the Court of Appeal which prayer counsel says is not properly made in this Petition. He urged that since the order emanates from the Court of Appeal decision, that prayer can only be made and enforced in the original suit where the decree was made.

Counsel urged that the Petitioner also challenges the appointment of the proper person appointed in HCC 880/1997 and yet that case was determined and the Application challenging that decision was dismissed.

Thirdly, Mr. Munyu urged that the Attorney General has not been enjoined to these proceedings and yet the Applicant seeks to enforce Constitutional rights that can only be enforced against the state which should be represented by the Attorney General. Counsel relied on the cases of **RICHARD NDUATI KARIUKI V LEONARD NDUATI KARIUKI & ANOTHER MISC APPLICATION NO. 7/06** and **HON MARTHA KARUA V RADIO AFRICA t/a KISS FM RADIO STATION HCC 288/04** where the courts held that it is the State that guarantees the individual's Constitutional rights and freedoms and those rights can only be enforced against the State.

Counsel also exhibited the ruling of the Hon. the Chief Justice dated 15<sup>th</sup> October 2004 in which he ruled that there were no Constitutional issues raised by the Petitioner but what was pending was the execution process. Counsel urged the court to strike out the Petition.

In reply, Mr. Imanyara Counsel for the Petitioner urged that what Mr. Munyu has argued is not a Preliminary Objection because he has referred the court to a Replying Affidavit, and court decisions. He urged that a Preliminary Objection is a matter of law which is determined without looking at the substance of the Application and therefore that there are issues that need to be canvassed at the hearing.

In regard to the plea of Res judicata, Mr. Imanyara urged that the appeal partially succeeded and part of it has not been conclusively determined and the issues should be heard and determined at the full hearing.

As regards whether or not the Attorney General should have been a party to these proceedings the Counsel urged that the court can give directions as to who should be joined to these proceedings as a party and they can then be served and brought into the case and that non-joinder of the Attorney General is not fatal to the Application.

Mr. Imanyara further submitted that under S. 84 of the Constitution, the party alleges and it is left to the court to enquire or investigate the allegations on the basis of the affidavits filed. It was Counsel's submission that since they have complied with the procedure by citing the Sections violated and nature of violations, the Petition should be determined on merit.

It is Mr. Imanyara's contention that what the defendants have raised is not a Preliminary objection as it is not a pure point of law. What then is a Preliminary Objection? The case of **MUKISA BISCUITS**

**MANUFACTURING CO LTD. V WESTEND DISTRIBUTORS LTD 1969 E A 969** sums up what a Preliminary Objection is. Justice Law JA said as follows; page 700-

“in so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a Preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold had this to say of a Preliminary Objection:-

“ A Preliminary Objection is in the nature of what used to be a demurrer. It is a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In this case the Respondents contend that the suit is res judicata. S.7 of the Civil Procedure Act bars any court from trying a suit or issue in which the matter was directly and substantially in issue in a former suit between the same parties or between parties under whom they claim or any of them claims and the issue has been heard and finally decided by that court. That is a pure point of law. To ascertain whether a matter is res judicata or not, one needs to look at the pleadings in the former suit or suits, the judgment or ruling. I find that Counsel for the Respondent has properly invited this court to look at the said pleadings and judgments in the former suits. That is not irregular. That is the only way that this court will establish whether or not the suit has been heard and determined and whether issues are similar to those in this case and whether parties are the same to the previous suit. Even on that point alone, the Preliminary Objection is properly raised before this court for its consideration.

It is not denied by the Petitioner that the dispute between the parties over LR No. 13041 was heard in HCC 880/1977 and a judgment rendered. The Petitioner filed an appeal and the same was delivered by the Court of Appeal dismissing the Appeal save for a minor amendment regarding the effective date of dissolution of the partnership which was to be with effect from 20<sup>th</sup> April 1977 and the parties were supposed to appoint a ‘proper person’ to do the winding up of the partnership. This must be what Mr. Imanyara refers to as the Appeal being allowed in part. It is evident that the Petitioner’s Applications for stay of the court’s orders have been dismissed by both the High Court and Court of Appeal. The rulings are exhibited and it is not disputed by the Petitioner.

It is also not disputed that on 15<sup>th</sup> October 2004 the Honourable the Chief Justice dismissed an Application by the Petitioner in which he held that no fundamental rights had been violated as alleged. He held that the proceedings out of which the Petitioner’s Notice of Motion was raised had been finalized on 6<sup>th</sup> October 1989 and what was pending was execution proceedings under S.34 of the Civil Procedure Act S. 34 (1) provides as follows:-

**“All questions arising between the parties to the suit in which the decree was passed, as their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit”**

I am satisfied and find that from what is on record that the courts have determined the issues of ownership of the disputed land and what is left is the execution process which the Applicant complains that is the Deputy Registrar High Court has failed to put in motion. As Section 34 Civil Procedure Act clearly puts it, that issue of execution should be dealt with in the same proceedings and therefore the execution proceedings should be in HCC 880/1977 not a fresh suit as the Applicant has done in this case.

So, does the Petition raise any Constitutional issues?

The Applicant pleads at paragraph 8 of his affidavit that the Deputy Registrar High Court has violated his rights in that he has failed to enforce the Court of Appeal decision to wind up the partnership and has also failed to tax his bill of costs and enforce the decree thus violating his constitutional rights to protection of

the law under S. 70 (a) and to a fair hearing by an independent and impartial court under S. 77 (9) of the Constitution. Section 70 provides as follows:-

**“70 whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely;**

**(a) life, liberty, security of the person and the protection of the law;**

**(a) .....**

**(b) .....**

**The provisions of this chapter shall have effect for the purpose of affording protection to these rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”**

Apart from S. 70 of the Constitution declaring the individual’s rights and freedoms, it at the same time limits the said rights and freedoms and subjects them to the respect for the rights and freedoms of others and the public interest. In the instant case, though the Petitioner claims that his right to protection of the law has been violated, the Respondents too have rights protected under that provision of law and it would be in their interests that the execution proceedings do proceed to their conclusion because infact it is the Respondents who have suffered as a result of the delay in the execution process. If the petitioner’s rights have been violated, the Respondents have been violated even more as they have not fully realized the fruits of their judgment in 880/1977 and 908/1977. S. 77 (9) of the Constitution provides as follows:-

“(a) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

Firstly, from a reading of the Court of Appeal judgment, it was the parties who were to appoint the ‘proper person’. It seems the parties did not do so. Further to that, the evidence on record shows that the Petitioner has filed Application upon Application challenging the decision of the court till in his ruling dated 16<sup>th</sup> October 1996, Justice Aganyanya described the Petitioner as a vexatious litigant who was trying to stop the Respondents from enjoying the fruits of their judgment. Similarly Justice Akiwumi had observed in his earlier ruling of 7<sup>th</sup> July 1992 that the Petitioner was trying to block the Respondents from enjoying the fruits of their judgment. Upto 2004 the Petitioner was still attempting to challenge the court’s order in one way or another as evidenced by the ruling by the Honourable the Chief Justice. One wonders whether it is the Deputy Registrar who has been the cause of the delay or is it the Petitioner himself? On the other hand, there is no allegation that the Defendants who have been sued in this suit had a hand in the delay if any. All the blame is levelled against the Registrar of the High Court. The Registrar is not a party to these proceedings. The Defendants cannot therefore be held responsible. The only allegation against the Respondents is that they have forged subdivision certificates from Nairobi City Council and allegedly partitioned the farm. The issue of subdivision into 3 equal parts was determined by the High Court decision. The only issue revisited by Court of Appeal was the date of winding up of the partnership. That issue of subdivision is res judicata and cannot be revisited in this suit.

In the case of case **BOOTH IRRIGATION V MOMBASA WATER PRODUCTS LTD (BOOTH 2) HCC MISC 1652/04** Justice Nyamu held that Res judicata applies in Constitutional matters.

It is only the Deputy Registrar who can control the manner in which the execution proceedings will be conducted in the court. So has the Applicant’s right to protection by the law and right to a fair hearing within a reasonable time in accordance with S.70 (a) and 77 (9) of the Constitution been breached?

From what I have considered above, all that is left is execution proceedings and it is evident that it is the Applicant who has caused the delay to finalization of the proceedings by the numerous Applications filed by him in the various courts and there is no evidence of violation of his rights under the above provisions.

Even if the Applicant had a right to enforce, can it be enforced against the Defendants? The answer must be in the negative. Firstly, the applicant blames the Deputy Registrar of the High Court for not performing his duties to ensure the execution proceedings are determined fairly and in good time. Yet the Registrar is not enjoined to these proceedings as a party. The defendants are not to blame for the delay and there is really no case against them as regards violation of the Petitioners rights as alleged. It was the Defendants submission that this Petition is fatal in so far as it has not enjoined the Attorney General to these proceedings. In the case of **KENYA BUS LTD & OTHERS V A G & OTHERS HC 413/05**, Justice Nyamu adopted the reasoning of the court in the decision in the case of **TEITIWNANG ARIONG & OTHER (1987) LRC (CONST) 517** in which the court said:-

“Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of Fundamental rights provisions of the Constitution. The rights and duties of individuals are regulated by Private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It follows therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution.”

The above reasoning was endorsed by Justice Nyamu in the **KBS CASE**, and the case of **RICHARD NDUATI KARIUKI V THE HONOURABLE LEONARD NDUATI KARIUKI & ANOTHER HC MISC APPLICATION 7/06 (OS)**. In the later case of **HONOURABLE MARTHA KARUA V RADIO AFRICA LTD t/a KISS FM STATION & OTHERS HCC 288/04** Nyamu and Emukule JJ held that the failure to join the Attorney General to an Application under the (Chapter V of the Constitution), fundamental rights and freedoms provisions of the Constitution is fatally defective. That court said:-

“In addition, the fundamental rights and freedoms apply vertically not horizontally and are secured, guaranteed and protected by the state and the Plaintiff as a person in the suit is articulating her individual right to a fair hearing and cannot under the Constitution be liable to the defendant for any violation of the Constitution.”

In this case the Defendants are private individuals and cannot guarantee any of the rights allegedly violated to the Plaintiff. It is the State that guarantees, secures and protects these rights and freedoms under the Constitution and it was mandatory that the Attorney General be enjoined to these proceedings as a party. The fact that the Plaintiff blames the Deputy Registrar of the High Court for not performing his duty was enough indication that the Attorney General should have been enjoined because the Deputy Registrar can only be sued through the Attorney General.

It was Mr. Imanyara’s submission that failure to join the Attorney General to these proceedings is not fatal to this case because this court can give directions for the Attorney General to be enjoined. That is not possible. This was a fresh matter filed by the Petitioner against the Respondents. If the Attorney General was to be enjoined to the suit, the mandatory notice issued under Section 13 A of the Government proceedings Act prior to the filing of a suit against the Government or Attorney General would have been necessary. The situation would be different if this was an Application filed within an on going suit, then this court would have found the notice to the Attorney General unnecessary. In the case of **JAMES ORENGO VS ATTORNEY GENERAL & WILLIAM WELOBA HCC 207/02** Justice Visram held that failure to notify the Attorney General under S. 13 A of Government Proceedings Act rendered the suit incompetent and struck it out. The result would be that this suit is fatally defective for non joinder of the Attorney General to the suit as a party as the rights allegedly breached could not have

been enforced against the Respondents anyway.

As properly held by the Hon. the Chief Justice in his ruling of 15<sup>th</sup> October 2004, that the Constitutional Application are execution proceedings falling under S.34 of the Civil Procedure Act, prayer (a) and (b) of the Petition do bear this out. Prayer (b) of the Petition seeks that the Deputy Registrar be directed to take accounts of terms of the decree. That can only be done in the case in which the decree was made (S. 34 of Civil Procedure Act). As was held in the case of **HARRIKISSON V AG OF TRINIDAD & TOBAGO (1980) AC 265** the mere fact that an allegation that a human right has been or is likely to be contravened is not sufficient to entitle an Applicant to invoke the jurisdiction of the Constitutional court. This is because the Constitution has to be construed in harmony with other laws and procedures in other Acts of Parliament in resolution of disputes. Bringing all manner of Application under the Constitutional Provisions when they could lie under other Provisions of other statutes would render the other statutes superfluous and would diminish the value of the Constitutional provisions.

I accordingly uphold the Preliminary Objection raised by the Respondents to the effect that the suit is res judicata, and therefore an abuse of the court process and that even if there were any violations proved, the orders sought would not be enforced against the Respondents and failure to join the Attorney General to the suit renders the suit incompetent and fatally defective and it is hereby struck out.

Costs of the Petition and Preliminary Objection be borne by the Petitioner.

Dated and delivered this 29<sup>th</sup> day of March 2007.

**R.P.V. WENDOH**

**JUDGE**

Read in Presence of:-

Mr. Munyu - Respondent

Daniel: Court Clerk