



**Mitei & 2 others v Kilel & 4 others (Petition 001 of 2021)  
[2023] KEELC 16634 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16634 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
PETITION 001 OF 2021  
MC OUNDO, J  
MARCH 23, 2023**

**BETWEEN**

**RAYMOND K. MITEI ..... 1<sup>ST</sup> PETITIONER  
LAWRENCE LANGAT ..... 2<sup>ND</sup> PETITIONER  
GRACE CHEMUTAI KOECH ..... 3<sup>RD</sup> PETITIONER**

**AND**

**JOHN KIPTORUS KILEL ..... 1<sup>ST</sup> RESPONDENT  
TULO HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT  
COUNTY GOVERNMENT OF KERICHO ..... 3<sup>RD</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before me for determination are two similar applications dated the March 1, 2021 and May 11, 2021 which were consolidated to be heard as one being the Notice of Motion dated March 1, 2021. The same is a manmade application by the applicants/petitioners herein who seek a host of orders and declarations which cannot be dealt with at this interlocutory stage as it would determine the matter prematurely. To this effect I shall try and discern the orders that are relevant and/or applicable at this interlocutory stage to which I shall then give my determination.
2. The said application is brought under the provisions of articles 35, 46, 47, 10, 60, 69, (1) 75 & 232 of the *Constitution of Kenya 2010 (Land, Protection of Rights and Fundamental Freedoms) Practice and*



Procedure Rules 2013, and all other enabling provisions of the Law where the petitioners/applicants seek for orders that;

- i. Spent
  - ii. That pending the hearing and determination of this application and/or the Petition herein, the honorable Court be pleased to issue a temporary order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, its agents, servants, or any person claiming to act under its authority from causing any damage, claiming land-lordship, charge rent, converting the movable and/or immovable public property located in LR. No Kericho Municipality Block 1/223.
  - iii. That pending the hearing and determination of this Application and/or the Petition herein the Honorable Court be pleased to issue a temporary order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, its agents, servants, or any person claiming to act under its authority from interfering with any matter howsoever with ownership or the title of LR. No Kericho Municipality Block 1/223.
  - iv. The applicant also sought that the cost of the application be provided for.
3. The said application is supported by the grounds therein and a supporting affidavit of Lawrence K. Langat the 2<sup>nd</sup> applicant/petitioner herein on his behalf and on behalf of the 1<sup>st</sup> applicant/petitioner Raymond K. Mitei and Grace Chemutai Koech the 3<sup>rd</sup> applicant/petitioner both dated the March 1, 2021.
  4. The application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' replying affidavit dated the April 26, 2021 to the effect that the same was not merited, was frivolous, vexatious, scandalous, defective and an abuse of the court process. That the subject property was a private property contrary to the purport allegations by the Petitioners that it was a public land.
  5. That the 1<sup>st</sup> respondent had been allotted the suit property by the Government of Kenya as per the annexure marked as "CM 1", which was a copy of the allotment letter, wherein he had paid for the allotment and had been issued with a survey plan. That thereafter, he had applied for registration of the Grant as per the annexures 1(a), (b) & (c). That further, the 1<sup>st</sup> Respondent had been paying rent and rates to the National Government and the 3<sup>rd</sup> Defendant respectively. That subsequently, the 1<sup>st</sup> Respondent had sold the subject property to the 2<sup>nd</sup> Respondent who then obtained a certificate of lease herein annexed as "CM4".
  6. That the Petitioners had concealed material that there had been filed a civil suit being Kericho HCC No. 41 of 2008 which had been heard and determined and judgment (annexure "CK9") delivered in favour of the 1<sup>st</sup> Respondent. That the Petitioners were agents of the Defendants in Kericho HCC No. 41 of 2008 and were in occupation of the subject parcel of land.
  7. That this Petition offended the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' rights to private property which was well protected and recognized by the Constitution. That the Petitioners, in violation of the judgment in Kericho HCC No. 41 of 2008 had not exhibited documentary evidence that the suit land was a public Land hence not available for allotment and neither had they proved that the suit land had been unlawfully obtained. That the Application herein was an abuse of the court process and the same ought to be dismissed.



8. The application was further opposed by a replying affidavit of the 5<sup>th</sup> respondent dated March 30, 2021 to the effect that based on the allegation by the Petitioners, it was only the 3<sup>rd</sup> and 4<sup>th</sup> respondents who had the mandate over public land. That the 5<sup>th</sup> respondent had been mis-joined in the petition and therefore should be struck out from the proceedings.

### **Submissions by the Petitioners**

9. In support of their application, the Petitioners framed their issues for determination as follows:
  - i. Whether the suit land is public land meant for recreational facilities as such the same was not available for allotment
  - ii. Whether the allotment and subsequent transfer of land known as LR. No Kericho Municipality Block 1/223 to the 1<sup>st</sup> respondent and eventually to the 2<sup>nd</sup> respondent was illegal, constitutes abuse of office, discriminating, infringes on rights and is un-procedural.
  - iii. Whether the 1<sup>st</sup> respondent should be evicted form the suit land and whether the lease title relating to the suit land in favour of the 2<sup>nd</sup> respondent should be revoked.
10. On the first issue for determination, the Petitioners relied on the definition of public land as defined in article 62 (1) (e-n) of the [Constitution](#) to submit that they had demonstrated through the supporting affidavits of Lawrence Langat (for 1<sup>st</sup> petitioner at paragraph 3 and 4) that as early as 1974 through to 1995 it was the intention of the 3<sup>rd</sup> respondent to preserve the suit land for public use such as recreational facilities. Reliance was placed on the case in [Chemey Investment Limited v Attorney General & 2 others](#) [2018] eKLR. That the overriding public interest should thus take precedence.
11. On the second issue as to whether the allotment and subsequent transfer of land known as LR. No Kericho Municipality Block 1/223 to the 1<sup>st</sup> respondent and eventually to the 2<sup>nd</sup> respondent was illegal, constituted abuse of office, was discriminatory, infringed on rights and was un-procedural, the Petitioners submitted that the 1<sup>st</sup> Respondent having been nominated as the Kericho Municipal Councilor, had abused his political powers to grab the suit land which was initially public land for personal use within the meaning of article 260 of the [Constitution](#) and Section 46 as read with section 48(1) of [Anti-Corruption and Economic Crimes Act](#). Reliance was placed in the case of [Erick Otieno Oyare v Republic](#) [2022] eKLR.
12. On the third issue for determination as to whether the 1<sup>st</sup> Respondent should be evicted from the suit land and whether the lease title relating to the suit land in favour of the 2<sup>nd</sup> Respondent should be revoked, the Petitioners' submission was that since the suit land was irregularly, unlawfully and improperly acquired, the 2<sup>nd</sup> Respondent could not claim that it was an innocent purchaser and further were he to claim that, then it cannot hold as a good title as it was void *ab initio*. Reliance was also placed on the decision in [Republic v Minister For Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others](#) Mombasa HCMCA No 617 of 2003 [2006] 1 KLR (E&L) 563 as well as on section 26(1)(b) of the [Land Registration Act](#).
13. That the Petition tilted in favour of public interest in as far as it sought to entrench constitutionalism, the rule of law and good governance in the [Constitution](#) under article 40(1)(d) of the [Constitution](#). That the same was merited and properly before this court, and therefore should be allowed as prayed.

### **Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

14. That respondents' submissions was to the effect that in seeking injunctive orders there are three pillars which the relief was premised and the three must exist/or be established;



- i. A *prima facie* case
  - ii. Demonstrate irreparable loss /injury
  - iii. That a balance of convenience favors the party seeking the injunction.
15. That in the instant petition, it was not clear whether the petitioners were seeking the orders on behalf of the public or on their own behalf. That further, the petitioners had to demonstrate that they had a *prima facie* case on the face of the petition to warrant the court to issue an injunction.
  16. That the Petition herein was brought in manner to demonstrate that it was for the good of the general public and the orders of injunction to be directed unto the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were private citizens and the subject parcel of land is duly registered in the 2<sup>nd</sup> respondent having purchased it from the 1<sup>st</sup> respondent. That the suit land was private property and the petitioners were not in occupation.
  17. That the petitioners had not disclosed that there was any complaint over the lease certificate in possession of the 1<sup>st</sup> and 2<sup>nd</sup> respondents being a subject of investigation anywhere and therefore no *prima facie* case had been established.
  18. That further, the Petitioners had not demonstrated that they had a slim right over the subject property which the 1<sup>st</sup> and 2<sup>nd</sup> respondents had violated /infringed. That the provisions of section 26 of the [Land Registration Act](#) were explicit that any certificate of title or lease was *prima facie* evidence that the person named was the absolute and indefeasible owner. In the present Petition, no contrary documents had been placed in court challenging and/or contesting the 1<sup>st</sup> and 2<sup>nd</sup> respondents' certificate of lease.
  19. That nothing had been placed in court to demonstrate that the Petitioners had any registrable interest over the subject parcel of land hence no *prima facie* case had been established in their favour.
  20. Although the petitioners had not established a *prima facie* case, the respondents proceeded to submit on the second limb of irreparable loss or injury to wit that the 1<sup>st</sup> Respondent had duly obtained judgment against illegal occupiers and eviction notice. The said judgment had never been set aside, stayed or in any manner disturbed. That by the Petitioners seeking an order of injunction, they sought to restrain the carrying out of an enforcement order of the court without disclosing the existence of the judgment which thus amounted to concealment of material facts hence they are not honest and had not come with clean hands.
  21. That the Petitioners were not in occupation of the suit premises herein and therefore would not suffer any irreparable loss should the orders of injunction not be issued in their favour. That the since the two limbs herein above had not been complied with, injunctive orders were herein not tenable in favour of the Petitioners.
  22. That as it stood, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, being the registered lessees and owners of the suit properties which status had been supported by a valid judgment of the honorable court, the Petitioners had not satisfied the essential pillars of granting an injunction, hence the consolidated two (2) applications ought to be dismissed with costs.

### **Determination.**

23. It is worth noting that despite a warning by the court to the Petitioners herein to desist from filing numerous applications, the said warning, it seems fell on deaf ears as they have persisted to file pleadings despite the absence of leave. In this respect, the further affidavit filed on 7<sup>th</sup> March 2023 is herein expunged from the court record.



24. The often cited case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358 is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.
25. In the present case there is no dispute going by annexure marked “CM 1”, which was a copy of the allotment letter that the land in question had been allotted to the 1<sup>st</sup> respondent who had then obtained a certificate of Grant being LR No. 631/1673 herein marked as annexure “CM4”. The 1<sup>st</sup> Respondent then sold the land to the 2<sup>nd</sup> Respondent via a sale agreement herein marked as “CM 5” who was then registered as proprietor of the suit land being land parcel No. Kericho/Municipality 1/223 and was issued with a Certificate of lease herein annexed as “CM6”.
26. I have also taken note of the annexures marked as “CM 8”, “CM9A” and “CM9B” and the judgment annexed as “CK9” which are clear to the effect that there had been a previous civil suit filed at the Kericho High Court being Kericho HCC No. 41 of 2008 which had been heard and determined wherein judgment had been delivered in favour of the Plaintiff, the 1<sup>st</sup> Respondent herein and wherein eviction orders had subsequently been issued as against occupiers of the suit land herein being Kericho Municipality Plot No. 631/1673.
27. The issues that arise for determination herein are two;
- i. Whether an interim order of injunction should issue against the respondents.
  - ii. Whether this petition is *res judicata* Kericho HCC No. 41 of 2008.
28. The suit land having been registered in 2011, was governed by the repealed [Registered Land Act](#), cap 300 which then constituted the 2<sup>nd</sup> respondent as an absolute proprietor and conferred on him all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act (section 28).
29. The current land regime is set out in the [Land Registration Act](#), Act No. 3 of 2012, and the [Land Act](#), Act No. 6 of 2012. The rights of a proprietor are set out in section 25 of the [Land Registration Act](#), which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.



30. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship Section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

31. The Applicants have argued and asserted that the suit land herein was public land and any purported alienation, transfer of the same or registration to the 2<sup>nd</sup> Respondent herein was unconstitutional, illegal, irregular, null and void. They have however not presented any evidence that the Government has recalled and/or revoked the title. Both the *Land Registration Act* section 26 (1) that provide for the indefeasibility of title and article 40 (6) of the *Constitution* envisage that where a registered title is impugned on the grounds set out in the provisions, that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

32. The 2<sup>nd</sup> respondent having demonstrated that it was the registered owner of the suit property namely No. Kericho/Municipality 1/223 having been issued with a title which was confirmed by the court in Kericho HCC No. 41 of 2008 *prima facie* its title was indefeasible. The mere fact that the 2<sup>nd</sup> respondent holds a duly registered certificate which on the face of it was properly acquired, is sufficient to lead the court to hold that the Applicants/Petitioners have not established that there is a *prima facie* case.

33. I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella v Cassman Brown Ltd case (supra)* as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

34. The court of appeal in the case of *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya v David Kitu & another* [2014] eKLR observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

35. Consequently, the consolidated applications dated March 1, 2021 and May 11, 2021 seeking injunctive remedies lack merit and are dismissed.



36. On the second issue for determination, I find that the substantive law on *res judicata* is found in section 7 of the [Civil Procedure Act](#) which provides that:
- “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”
37. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;
- i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
  - ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
38. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
  - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
  - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
39. The test in determining whether a matter is *res judicata* as stated was summarized in [Bernard Mugo Ndegwa v James Nderitu Githae and 2 others](#) [2010] eKLR, as follows that:
- i. The matter in issue is identical in both suits;
  - ii. The parties in the suit are the same;
  - iii. Sameness of the title/claim;
  - iv. Concurrence of jurisdiction; and
  - v. Finality of the previous decision.
40. Looking at the circumstance of the present suit as well as the previous suit, this court finds that the decision of the court in the previous suit being Kericho HCC No. 41 of 2008 had been that the plaintiff therein, the 1<sup>st</sup> respondent herein had proved his case on a balance of probability that he was the registered proprietor as lessee of the said plot wherein the court had granted him the orders sought being an eviction of the defendants therein. This in my view was a decision of finality in the sense of *res judicata*.
41. I find that the issues in the previous suit which were substantially the same in the subsequent suit were determined and covered by the decision in the previous case.



42. The judgment was clear to the effect that:

“It is my finding that the plaintiff has established on the balance of probabilities that he is the proprietor as lessee of the said plot. It is also my finding that the Plaintiff has established that the defendants have trespassed on the said plot and that they have refused to vacate even after due notice to them to do so. I am satisfied that there is no justification for the trespass. I hold that the Plaintiff is entitled to the relief he seeks. Accordingly, I enter judgment in favour of the Plaintiff and against the Defendants jointly and severally. I also order eviction within thirty (30) days of the defendants, their agents, servants and/or employees and/or persons claiming through them from the parcel of land known as Kericho Municipality LR No. 631/1673. I award costs of this suit to the Plaintiff. As no evidence was adduced in respect of mesne profits, I make no orders with regard to mesne profits”

43. I also find that although the petitioners in the present case were different from the defendants in the previous case, yet they were estopped from litigating under the provisions on section 7 of the Civil Procedure Act.

44. Finally, I find that a court of competent jurisdiction in the previous case determined the issue of proprietorship/ownership of the suit land herein and the Petitioners cannot now cloth their claim as a Petition and seek to challenge the proprietorship of the same parcel of land.

45. The petitioners herein and/or defendants in the previous suit, being Kericho HCC No. 41 of 2008 did not challenge that decision on Appeal and therefore trial of the present suit would amount to this court sitting on appeal. I find that this court has no jurisdiction to overturn the decision of Justice G.B.M Kariuki as he then was.

46. Succinctly put, the Environment and Land Court has no jurisdiction to overturn the decision of a court of equal status or its own decision except on reviewing its own decision, a procedure that the Petitioners have not pursued. In the case of E.T v Attorney General & another [2012] eKLR it had been held that:

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others* [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and another* Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....”

47. The upshot of the foregoing is that matter in this case in as far as proprietorship to land parcel No. LR No. 631/1673 or R. No Kericho Municipality block 1/223 were conclusively decided *vide* Kericho High Court Civil Case No.41 of 2008 and therefore the present petition is *res judicata* and an abuse of the court process. The same is therefore struck out with costs to the respondents.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 23<sup>RD</sup> DAY OF MARCH 2023.**



**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

