Lonyala & 26 others v Lodio & 11 others; Cabinet Secretary Ministry of Lands and Settlement & 11 others (Respondent) (Environment & Land Petition 2 of 2014) [2023] KEELC 19249 (KLR) (10 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19249 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND PETITION 2 OF 2014

FO NYAGAKA, J

AUGUST 10, 2023

BETWEEN

CHRISTOPHER KURUTYON LONYALA & 26 OTHERS & 26 OTHERS ..... PETITIONER

AND

EKTELA EKAI LODIO & 11 OTHERS ..... INTERESTED PARTY

AND

CABINET SECRETARY MINISTRY OF LANDS AND SETTLEMENT & 11 OTHERS ..... RESPONDENT

RULING

1. The 11th interested party, one Wilfred Ogutu, moved this court to determine a notice of notion dated December 23, 2022. He brought it under rule 3(2) of the High Court Vacation Rules, sections 3 & 3A of the *Civil Procedure Act*, order 40 rules 1, 2, 3, 4, 5 & 10 and order 51 rule 1 of the *Civil Procedure Rules, 2010* and what he called "all enabling provisions of the law". He sought the following orders:-

    a. ...spent

    b. ...spent

    c. That a temporary order of injunction do issue restraining the respondents herein whether by themselves, their agents, servants, employees, assigns, associates, family members and/ or any person(s) claiming through them from trespassing, constructing, wasting, alienating, damaging, fencing, cultivating, leasing, selling, disposing and/ or in any other ways and/ or manner interfering with the suit land known as phase ii of Chepchoina Settlement Scheme in

the area that was planned, surveyed and allocated by the government through ADC in 1997, 1998 to 2000 and not by SFT in 2012 whatsoever until further orders.

d. That a temporary order of inhibition do issue prohibiting the respondents whether by themselves, their agents, servants, employees, assigns, associates, family members and/ or any person(s) claiming through them from trespassing, constructing, wasting, alienating, damaging, fencing, cultivating, leasing, selling disposing and/ or in any other ways and/ or any manner interfering with the suit land known as Phase Ii of Chepchoina Settlement Scheme in the area that was planned, surveyed and allocated by the government through the ADC in 1997, 1998 to 2000 and not by SFT in 2012 whatsoever until further orders.

e. ...spent.

f. That a temporary order of injunction do issue compelling the respondents to compensate all the victims of illegal eviction in Phase II of Chepchoina Settlement schemes in reparations for the loss and damages caused by the respondents.

g. That a temporary order of injunction do issue directing that all settlement plot-letters offer issued by the Director Land Adjudication and Settlement of respect of Chepchoina Phase II Settlement Scheme in Trans Nzoia County for payment of 100% outright purchase offer be cancelled in favor of ADC allocation of land at Chepchoina Phase II plot allotment letters saying that the government will revert to ADC land allottees soon informing them of the mode of payment and other disbarment in an open ended contract and without further supporting orders the SFT letters of offer are inconsistent with the negative decree issued by Hon. Justice Mwangi Njoroge, judge in the absence of a positive order to execute by the respondents until further orders.

h. That a temporary declaratory order of injunction do issue declaring that the court did not award the negative decree issued by Hon Justice Mwangi Njoroge, judge to any of the parties to become the decree holders and the respondents execution of negative orders without obtaining further orders by recourse to court for vesting eviction orders the respondents are in continuous breach of the law by illegally evicting the settlers without a court order from Phase II of Chepchoina Settlement Scheme.

i. That the Officer Commanding Endebess police station be ordered to ensure the enforcement and compliance of this honorable court order.

j. That cost of this application be in the cause.

2. The application was based on fifteen (15) grounds and supported by an affidavit sworn on December 23, 2022 by the 11th interested party. The grounds for the application were that that the applicant was the 11th interested party. The respondents were not the decree holders in the judgment issued by the honorable judge on May 29, 2020. The decree issued in the judgment was a negative decree and in the absence of a positive decree given the respondents by the court the respondents without a vesting court eviction order had no legal capacity to execute illegal eviction in phase II Settlement Scheme and until further orders. That the respondents without any color of right had unlawfully trespassed to the settlers' suit land and thus illegally evicted them without a vesting court order obtained by recourse to court and denied the settlers access and use of their lands which they had acquired automatically through their procedure prescriptive and overriding rights as bona fide squatters whose title to the land are indefeasible. That the Respondents were continuing to breach the law by constructing, wasting, alienating, damaging, fencing and in many other ways and/ or manner interfering with the settlers and the Settlers suit land known as Phase II of Chepchoina Settlement Scheme in the area and

that was planned, surveyed and allocated by the Government through the Agricultural Development Corporation (ADC) and Allotment Letters, Survey Scheme Plan Map and ADC Area List of 2000 with 1632 Land Allottees Certified Register issued by the Regional Manager ADC North Rift Region at Kitale.

3. He contended further that the negative decree of the honorable judge issued on May 29, 2020 was largely misunderstood, misinterpreted and misconstrued by the respondents in this matter, resulting in illegal eviction of the settlers in the ground without a court order which act was considered unconstitutional. That priority was given to registration of land or interest in land and not execution of land and that a title deed document was conclusive evidence of proprietorship whereas unregistered instruments of land were invalid and no unregistered instrument of land should be effectual to transfer any right of land or interest in land and by unregistered instruments no land could be made available to covenants in any unregistered instruments until registered and the unregistered instruments held by the respondents and used to evict the settlers on the ground are either void or unenforceable as the respondents have not obtained the necessary title deeds for the land in the Phase II of Chepchoina Settlement Scheme.

4. Further grounds were that that allocation of land in 2012 by the Government through the Settlement Fund Trustees (SFT) in the same area which was first planned, surveyed and allocated by the Government through ADC 1997, 1998 to 2000 was an act of super imposition, double allocation and multiple allocation of land and which was extinguished upon the court issuing a negative order to the government through the respondents and in which negative decree was a revocation action order against the government as the negative order maintained status quo ante of the parties as at the time of delivery of the judgment. That by prescriptive and overriding rights the evicted ADC land allottees had by automatic acquired titles to phase II Settlement Scheme land even without registration and which title the land were indefeasible requiring an order of injunction to debar fraudulent and/or improper dealings with the land to prohibit any dealings. The respondents had failed to consider that the evicted ADC land settlers of Phase II Chepchoina Settlement Scheme already had prescriptive and overriding rites interest in the land as bona fide squatters to be protected by the law. That illegal eviction of bona fide settlers in Phase II of Chepochoina Settlement Scheme without obtaining vesting court orders is discriminatory, contravened the*Constitution*, and was in human and inconsistent with the title of the settlers.

5. That the respondents' continued misunderstanding of the provisions of the Land and Adjudication Act before them was leading them to wrongly misinterpret and misapply the provision of the Land and Adjudication Act before them. That the settlers stood to suffer irreparable injury harm damage such as was not compensable if the respondents were not debarred, restrained and/or prohibited from their continuing illegal eviction and breaches of the law. Further, the application had a prima facie case with high chances of success on balance of probabilities. Lastly, that the demand of justice favored grant of the orders sought.

6. The applicant repeated much of the contents in the grounds as depositions in the supporting affidavit he swore on December 23, 2022. He deponed that he was resident on a portion of the land known as Chepchoina Phase II Settlement Scheme which is the suit property. That the area was planned, surveyed and allocated by the government through ADC in 1997, 1998, to 2000 to 1631 land allottees. In support of the fact he annexed a copy of a confidential letter in relation to plot 274A which was marked as 'WO-1' belonging to one Joseph Wekesa who was one of the employees of ADC and a bona fide squatter in the settlement scheme allocated land by the managing Director Dr W. K Kilele through the Estates Manager of ADC Kitale office.

7. Besides annexure WO-1, he filed a separate list of documents dated the December 23, 2022 to which he annexed a set of seven documents. He titled the document "applicant's list of documents". He attached to it copies of the decree of May 29, 2020, order of status quo given on October 3, 2019, letter dated April 7, 1998 issued by ADC, an area list dated May 17, 2000, letter dated September 17, 2012, letters of offer dated February 6, 2012 and December 15, 2017, and an undated area list for Chepchoina Settlement Scheme Phase II.

8. The applicant also filed an "applicant list of witnesses" dated the same date, the December 23, 2022 in which he listed himself as a witness and "any other with leave of (the) court."

9. The applicant's application received support from the petitioners through the affidavit of one of the petitioners, being the 1st petitioner, Christopher Kurutyon Lonyala. He swore the same on January 31, 2023. In it he deponed that the injunction sought by the applicant was in order and proper within the provisions of section 34 of the *Civil Procedure Act*. He deponed that he was alive to the provisions of articles 22, 27, 40, 47, 64 and 67(2)(e) of the *Constitution* with regard to the acquisition of property. He also deponed that he was aware of the provisions of the *Land Adjudication Act* on the process of land allocation through settlement schemes.

10. He then deponed how the Chepchoina Settlement Scheme was initiated through an Executive Order by the former President, H. E. Daniel Moi in 1984 and that the administration was done in three phases, with Phase 1 being completed in 2010. He agreed with the interested parties' application that the government was in breach of a duty primarily fixed by the *Land Adjudication Act* through the Settlement Fund Trustees and that it was therefore acting immorally by illegally evicting the genuine squatters and needy cases in phase ii without orders of the court.

11. He deponed that the 2020 judgment of the court did not stop the Government from completing the Chepchoina Settlement Scheme land allocation project and that genuine squatters and needy cases already settled were not stopped from carrying out developments, use and occupation of the land nor did it direct parties to do or stop doing anything except the payment of costs. He deponed that the dismissal of the petition was a negative order incapable of execution and not appealable from except for costs. Further that by the judgment the petitioners lost nothing except they were to stay in the situation they were before hence their eviction did not arise unless there was a court order to that effect.

12. He deponed that the applicant was only seeking remedies for wrongs and breaches of the law hence the injunctions and damages that he sought against threatened. He supported the injunctions sought. He deponed further that the squatters had acquired title by prescription even without issuance of title hence the injunction sought was proper as the court issued no order to do or not do anything. He supported the view that the applicants had shown that the respondents were in the process of continuing with carrying out illegal evictions and without a court order that was null and void.

13. He stated further that the respondents' actions were therefore offensive to law, public policy and morality, in breach of the law, and contrary to articles (sic) 155, 156 and 157 of the National *Land Act* (sic). He swore further that the SFT land allottees (sic) had been allocated several individuals without identification and vetting by the appointed vetting committee of Chepchoina Settlement Scheme Phase II as indicated in the terms of reference for the Committee in liaison with the DLASO's Office. He deponed that the application had *prima facie* high chances of success since the interested parties had demonstrated that there was intended eviction of people.

14. He swore that the genuine squatters and the needy cases in Chepchoina Phase II who were allocated land by ADC stood to suffer prejudice yet there were several mechanisms to redress the claimants' claim as provided under the *Land Adjudication Act* and only the order of injunction and damages could give

the remedy to the wrongs already committed by the respondents who were using their land cartels to sideline the vetting committee. That issuance of injunctive orders would serve the convenience of the genuine squatters and the very needy cases in Chepchoina Settlement Scheme since the application raised pertinent and valid constitutional grounds which called for the court to look into natural justice, public interest and the scale of justice to grant the reliefs and remedies sought.

15. The respondents opposed the application through the affidavit sworn by one Francis Kapchanga on February 22, 2023. In it he deponed that the honorable court dismissed the orders sought by the 11th interested party when it entered judgment delivered on May 29, 2020. That by the judgment the court found that the claims in the petition were unsubstantiated, lacked merit hence dismissing the petition. He deponed further that there were no orders issued hence none to be executed. That the applicants had not demonstrated any prejudice they would suffer hence the application was an abuse of the process of the honorable court. He prayed that the application be dismissed with costs as it was misconceived and had no chance of success.

16. In addition to the respondent's relying affidavit, learned counsel, one Karani O. Aggrey, for the 11th and 12th respondents purported to swore an affidavit on March 8, 2023. But a careful perusal of the same shows that it was signed "for" the said learned counsel. It is not indicated appended the signature on behalf of the deponent of the affidavit. Clearly, if the affidavit was sworn by someone before the commissioner for oaths who administered the oath, it was not the said Mr Karani Advocate.

17. Be that as it may, whoever may have appeared before the commissioner for oaths deponed that he was an advocate of the High Court of Kenya and was in conduct of the matter and conversant with the facts therein. He stated that the same was sturck out with costs on May 29, 2020 and the said costs assessed by the taxing master at Kshs. 56,508,091/- on December 15, 2020. That two years after the taxation of the costs and there being no appeal by way of a reference the applicant purported to move the court yet under rule 11(1) of the *Advocates' Remuneration Order* a reference should have been filed in the High Court within 14 days of the decision.

18. He deponed that the proper forum for the challenge of the costs was for the applicant to file a miscellaneous application in the High Court and not in the Environment and Land Court and seek a review and stay of the orders therein. That there was no formal appeal by way of reference against the taxation of costs to warrant the orders sought hence the court lacked jurisdiction to entertain the application. Lastly, he deponed that the application was frivolous, vexatious and a total abuse of the process of the court.

Submissions

19. The application was disposed by way of both oral and written submissions.

20. In the oral arguments, on his part, the 11th interested party stated in court that the reason for his application dated December 23, 2023 was in relation to the negative order issued in the petition on May 29, 2020. He contended that the court dismissed the petition and the parties went back to where they came from in the initial point, that is before filing the petition. Further, that the petitioners were squatters and landless people. He prayed for an injunction on the claim that there was an illegal eviction being carried out without an order of the court. He based his argument on the letter dated January 25, 2011 in which the terms of reference in the letter was not part of the eviction but by it the committee was required to identify the genuine squatters.

21. He argued again that the respondents ought to get back to court to get an order for eviction. He argued further that he looked at the court order dated May 29, 2020 and it showed that the court dismissed the petition and gave costs. It did not state that the petition lacked merit. That the relief granted was

dismissal of the petition and the parties were left where they were. He prayed that his application be allowed, it being the second application in the matter. He prayed that he be relived of the costs as he had the *locus standi* to bring the suit as an activist.

22. In addition, in the written submissions dated 30/0/2023, he began by giving a brief summary of the facts of the case and repeated the list of documents that he referred to as "exhibits attached to the application". Then he listed sixteen (16) issues. They mainly reproduced the grounds in support of the application. But most of the issues, for instance, numbers i, iii, v, vii, viii, ix, x, xiii, xiv were either dealt with in the petition, already determined or should have been raised by the applicants or petitioners in the said petition when it was alive. Thus, I will not summarize them here.

23. The other issues were, whether the execution of the orders of court in evicting squatters and needy cases without a court order was a fair or unfair administrative action act taken by the settlement fund trustees on behalf of the government; whether articles 43, 47 and 50 of the *Constitution* 2010 had been complied with; whether the evictions carried out by the government through the respondents had an adverse or negative action carried in violation of articles 47 of the *Constitution*; whether in the absence of a positive order, the order (of dismissal of the petition) was an implication that the government was given a negative liability duty to perform or a revocation action order against the government duties in regard to Chepchoina Phase II Settlement Scheme; whether the negative order of court "negatived" (sic) the petition and precluded it to be brought to court prematurely before exhausting the land adjudication mechanisms and negative action contravened administrative action; and whether under order 52 of the *Civil Procedure Rules* in regard to the *Advocates Act* the application for taxation by the third parties the summons should be served on the advocate and on the party chargeable with the bill of costs.

24. After that he submitted that he relied on the *Land Adjudication Act*, the *Fair Administrative Action Act*, Public Participation Bill, 2017, the *Government Proceedings Act*, the *Civil Procedure Act* and rules, and the letter of appointment of committee members of Chepchoina Settlement Scheme Phases II & III. He cited articles 22 ,23, 43, and section 107 of the *Evidence Act*, before summarizing the reliefs he sought.

25. In opposing the application, the learned state counsel acting for the respondents submitted that the application was a clear abuse of the court process by individuals who were on a wild goose chase. Further, that the court should not hesitate to take a stern action against such individuals who continue to mislead innocent Kenyans and even solicit money from them promising them success in a matter already dead.

26. He argued that the application sought orders of injunction to restrain an alleged interference with land Phase II Chepchoina Settlement Scheme and the issue for determination was whether the matter had met the threshold for an injunction. He relied on the case of *Giella v Cassman Brown & Co Ltd* (1973) EA, 358. He further stated that the judgment delivered on May 29, 2020 was negative and what prompted them to come to court was a desire to stop an eviction initiated by a government agency. And that since the judgment had been delivered there was no matter before court for trial that there was no *prima facie* case before court and an injunction cannot be granted in vacuum as an injunction was an interlocutory relief that must be based on a suit pending trial. Further, that the land in dispute was public land owned by the SFT and that the applicants would suffer no irreparable loss as they were not the owners of the land.

27. The 11th and 12th interested party through learned counsel Mr Karani stated that the application was naked. He asserted that the orders sought were similar to the ones the court had already determined and therefore the court should down its tools. He argued that among the applications that were deemed

similar were the ones dated June 23, 2020 dismissed on September 25, 2020, the one dated March 19, 2019 and the one dated November 20, 2020. He stated further that this court had no basis to reopen the judgment as the petitioners were invaders and had no letters of allotment and the applicant having brought this application in his individual capacity he did not have authority to plead on behalf of other interested parties. He concluded that the applicant, one Mr Ogutu, had been notorious in moving the court over frivolous matters thus he should bear the costs of this application and be forbidden from making any further attempts to waste the court's time.

Issues, Analysis And Determination

28. I have considered the application, the supporting affidavit together with the annexure, the affidavits in reply thereto, the law and case law cited, and the submissions by the parties. I am of the view that the issues for determination are:-

    a. Whether the application is *res judicata*.

    b. Whether the application meets the conditions for grant of an injunction (as sought)

    c. What orders to make and who to bear costs.

29. First and foremost is for this court to determine a few preliminary issues. It is worth noting that only the 11th interested party is the one who moved this court for the orders sought. It means that the other interested parties were satisfied with the decision of the court. While that does not prejudice the merits or otherwise of the application it is worth of note that should the application fail, only the applicant should personally meet the costs of the same and not the other parties.

30. Secondly, the applicant moved this court under rule 3(2) of the High Court Vacation Rules. The application of this provision was been overtaken by events since the application was not heard during the court recess. In regard to sections 3 and 3A of the *Civil Procedure Act*, apart from applying in regard to prayer (j) about the order, if any, to be issued to the Officer Commanding Station (OCS) Endebess, they have their relevance in other situations than the instant one hence they are inapplicable while order 51 rule 1 of the *Civil Procedure Rules, 2010* is on the form of the application hence it does not affect the substance thereof. However, by virtue of article 159(2)(d) of the *Constitution* of Kenya, this court will consider their irrelevance as being of no consequence and decide the application on merits.

31. While at order 51 rule 1 of the *Civil Procedure Rules, 2010* this court notes that the applicant submitted on the application of the same on to the *Advocates' Act* and service of the bill of costs on a party chargeable thereto. The court finds the issue, as listed among the ones for determination, and the submission thereof immaterial as there was no prayer in the application on whether or not service of a bill of costs on an advocate or party. The applicant ought to have pleaded by way of a prayer and placed before the court facts thereon by way of an affidavit in order for them to be an issue for determination. As was stated in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR:

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented".

32. That said, the relevant provisions for the instant application are order 40 rules 1, 2, 3, 4, 5 and 10 of the *Civil Procedure Rules* because all the outstanding substantive prayers in the instant application are on temporary injunctions and an order of prohibition sought to be issued against the respondents, for various reasons and against them doing certain things. I will address these shortly.

33. In terms of the supporting documents to the application, this court notes that only annexture WO-1 was the document whose copy was presented before the commissioner for oaths as he commissioned the affidavit of one Wilfred Ogutu on December 23, 2022. It is the only document that complies with the law and therefore worth considering in the determination of the instant application. This is because, under rule 9 of the *Oaths and Statutory Declarations Rules* made under section 6 of the *Oaths and Statutory Declarations Act*, chapter 15 of the Laws of Kenya,

> " All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification."

34. This means what any exhibits referred to in an affidavit commissioner in terms of section 7 of the act must be attached to the affidavit and be presented to the commissioner for him/her to affix his/her seal to each of and mark them using serial letters in order for them to form part of the affidavit. Anything outside of that, be it the deposition on the contents of the purported exhibits or the purported exhibits themselves, is inadmissible in evidence and must be disregarded by the court. Thus, any deposition on the contents or import of a document not presented before a Commissioner for oaths and a Notary Public for that matter is bare and inadmissible hearsay. This all the documents filed on December 23, 2022 as "applicant's list of documents" are rejected as evidence herein.

35. In regard to the opposition to the application, learned counsel for the 11th and 12th respondents purported to swear an affidavit and file the same. This court has noted above that the purported affidavit was signed "for" the deponent. It means that the deponent, named as Karani O. Aggrey, was not the one who took the oath before the commissioner for oaths in terms of rule 7 of the *Oaths and Statutory Declarations Rules* (supra). The rule stipulates that

> " A commissioner for oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same, and that such person is outwardly in a fit state to understand what he is doing".

36. There are two possibilities in regard to the replying affidavit purportedly sworn by Mr Karani Advocate on December 23, 2022. First, it was not signed by him hence it was actually not sworn by him. And if in the circumstances the said appeared before the commissioner as the rule requires, then the oath was not taken as required by law because the document was signed on his behalf by another person and therefore the oath was not his. Second, the said advocate neither appeared before the commissioner for oaths nor took the oath before him but sent someone to just commission the affidavit and it was done and that was why the document was signed "for" the advocate. If the latter is true, then there was no oath taken and the document was purported to be commissioned but done on contravention of the law. Whichever of the two scenarios or more, the purported affidavit by Mr Karani filed herein on December 23, 2022 was no oath and is therefore a nullity. The court cannot rely on it as a basis for opposing the application.

a. Whether the application is *res judicata*

37. The 11th and 12th respondents argued that the applicant was similar to three that the court had determined earlier. That points to an argument that the application is res judicata. The substantive law on *res judicata* is found in section 7 of the *Civil Procedure Act*, chapter 21 Laws of Kenya 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"

38. Bryan A. Garner (2019) *Black's Law Dictionary* 11th Edition, St. Paul MN, p. 1567 defines "res judicata" as:

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

39. In order therefore to decide as to whether or not an issue in a subsequent application is res judicata, a court always looks at the decision claimed to have been decided on earlier, the parties, the issues in question, the competency of the court, the nature of the determination and the entire application in comparison with the subsequent one.

40. In *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] the Court quoted the case of *E.T v Attorney General & another* (2012) eKLR the court noted thus:

> " 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 curt, then I do not see the use of the doctrine of res judicata....."

41. In is not in dispute that the applications determined by the court earlier were filed in the instant suit hence the parties were the same and litigating under the same title. The applications were heard and decided by this court hence the competency of the court is not in issue. By comparison, the earlier applications, especially the one whose ruling was delivered on May 29, 2020 sought prayers that were similar and or substantially the same as the ones in the instant one. It does not require rocket science to find that the instant application is res judicata. To my mind for the applicant to bring back to court the same issues that had been determined on merits between the parties goes against the principle of res judicata hence the application was such and was an abuse of the court process.

b. Whether the application meets the conditions for grant of an injunction (as sought)

42. Assuming that the court were to have made a wrong finding as above, turning to the issue, being whether the applicant satisfied the conditions for the grant of orders of injunction, it is worth restating the relevant provision of the law on the same. And it is clear that the application was anchored on order 40 rule 1 of the *Civil Procedure Rules* which provides on grant of injunctions. It provides that:-

> 1. Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) ..... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

43. Going to the issue in the instant application, it must be borne in mind that the remedy of grant of orders of injunction is an equitable one. It is granted in discretionary manner. That direction is and will always have to be exercise judiciously, meaning the court has to consider all issues in it and apply its mind and reason to it and arrive at a decision that is not plainly wrong.

44. It is not to be gainsaid that the principles on the grant of a temporary injunction are now settled. The locus classicus of *Giella v Cassman Brown* [1973] EA, 358 brings out the principles to be satisfied. In it the Court of Appeal of East Africa stated follows:

a) The applicant must first establish a prima facie case with a probability of success.

b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.

c) Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.

45. The first principle is that an applicant must show that he has a *prima facie* case with a probability of success. In *Mrao Ltd v Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case as:

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

46. It goes without saying then, and I agree with the respondents' submissions that there must be a pending case before the court so that the test in the first principle would be whether or not the case had likely chances of success although it does not have to succeed. A *prima facie* case cannot hang on nothing: it cannot be existent in vacuo. There must be in existence an issue, case or matter to be tried after the *prima facie* case has been found to exist. Order 40 rule 1 provides that:

> " Where in any suit it is proved by affidavit or otherwise-
>
> a. that any property in dispute in a suit is in danger of...
>
> b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction..."

47. Clearly, the purpose of a temporary injunction is to preserve the property or character thereof pending the conclusion of a dispute. Therefore, there must be a pending dispute. In the instant case, there is

no petition or suit pending: the instant one has been determined. The court record is clear, and it is admitted in the submissions of both the applicant and the respondents, that the petition was lost. It is not pending at all, except for post judgment procedures. A *prima facie* case cannot hang on nothing. Thus, there is no *prima facie* case herein. With this finding, I am not obligated to consider the other limbs because if there is no prima facie case then the issue of suffering irreparable harm or not is neither here nor there. But I need to say a little about the second limb.

48. On the second principle which is about irreparable harm, it means that the result of the actions of the adverse party of left unattended to by a court order halting them will be such that the other party was not likely to be compensated by damages. Put differently, the payment of money in form of damages cannot put the injured party back into the position he should have been had the actions of the adverse party not taken place. Thus, it is not enough to show a prima facie case. The applicant must demonstrate that the effect of the actions of the respondent is so grievous that when all is said and done, he will not be in the same position as he was originally. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR the learned trial judge stated that irreparable harm means that:-

> "...the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

49. In *Pius Kipchirchir Kogo* (supra), a balance of convenience was described:

> "The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

50. I have found, and it is indeed correct, that there is no Petition pending herein. The argument by the applicant that upon dismissal of the petition the parties went back to their original position is correct save that the said original position ought to be brought clearly to the mind of all. At first the respondents herein had embarked on evicting the petitioners and the interested parties. The Petitioners moved the court for declaratory orders and among other prayers that they be not evicted from the parcels of land in question. At first the status quo was maintained, by virtue of the order of the court, as the petition progressed for determination. the status quo was that the petitioners and interested parties were not to be evicted because that was the process that had almost taken place and the petitioners moved the court through the petition. Ultimately, the petition was dismissed. The status quo lapsed with the dismissal.

51. Having dismissed the petition the court did not have to give specific orders that the respondents had the right and leeway to carry out the acts they had commenced as against the squatters before the petition was filed. That means that they could and are free to carry out the evictions of the people who are illegally occupying the public land in issue. They did not require a 'positive' order as argued by the

applicant. Additionally, the applicant or the people on whose behalf he purported to bring the instant application cannot claim acquisition of title by prescription over public land.

52. Again, the fact that the petition was dismissed means that it did not have merits. There is a difference between dismissal of a matter and striking out. The former means a determination on merits and when the court is not satisfied as to the merits of the same it dismisses it. This is in contradistinction with striking out which means the matter does not succeed but on a technicality. Thus, I do not find tenable the contention and submissions of the applicant that the petition was not determined on merits. It was.

53. While the application was premised under sections 3 and 3A of the *Civil Procedure Act* which sections empower the court to facilitate the overriding objective of the *Civil Procedure Act* which is to ensure just, expeditious and proportionate determination of the matters before the court, I find the actions of the applicant in keeping the file alive in court for no apparent reason flying past the face of the said provisions.

54. Lastly, I agree with the learned counsel for the 11th and 12th respondents as well as the learned state counsel that the applicant herein is an individual who is fond of bringing to court baseless, frivolous and vexatious applications. For this reason, this court orders and directs that the applicant is hereby prohibited from filing any application in this matter or in any other matter touching on the suit land herein, except with the leave of court being sought and granted prior to doing so.

55. The upshot is that the instant application is absolutely baseless, frivolous and vexations. I can do no better than to dismiss it with cost to the respondents who opposed it. The costs shall be borne personally by the 11th interested party, one Wilfred Ogutu.

56. Orders accordingly

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 10TH DAY OF AUGUST, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE