



**Langat v District Surveyor, Kericho County & 44 others (Environment & Land Case E001 of 2022) [2023] KEELC 20267 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20267 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE E001 OF 2022  
MC OUNDO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**DAVE KIPKORIR LANGAT ..... APPLICANT**

**AND**

**DISTRICT PHYSICAL PLANNING OFFICER ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT SURVEYOR, KERICHO COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LANDS OFFICER, KERICHO COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PHYSICAL PLANNING ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEY ..... 5<sup>TH</sup> RESPONDENT**

**LILY CHEPNGENO SITIENEI ..... 6<sup>TH</sup> RESPONDENT**

**JANE CHEPKOSKEI SITIENEL ..... 7<sup>TH</sup> RESPONDENT**

**DUNCAN CHERUIYOT ..... 8<sup>TH</sup> RESPONDENT**

**CAROLYNE CHEPNGETICH ..... 9<sup>TH</sup> RESPONDENT**

**CHARLES LAGAT ..... 10<sup>TH</sup> RESPONDENT**

**WINNY CHEPNGETICH ..... 11<sup>TH</sup> RESPONDENT**

**DAVID TUEI NGASURA ..... 12<sup>TH</sup> RESPONDENT**

**S.K LANGAT ..... 13<sup>TH</sup> RESPONDENT**

**JOHN KIPKORIR BOIYON ..... 14<sup>TH</sup> RESPONDENT**

**DOROTHY T. CHEPKOECH ..... 15<sup>TH</sup> RESPONDENT**

**CARREN CHERONO RONO ..... 16<sup>TH</sup> RESPONDENT**

**MARY CHEPKIRUI KORIR ..... 17<sup>TH</sup> RESPONDENT**



ZEDDY CHEPKEMOI .....	18 <sup>TH</sup> RESPONDENT
STELLA CHERONO .....	19 <sup>TH</sup> RESPONDENT
REHEMA CHEROTICH .....	20 <sup>TH</sup> RESPONDENT
SARAH CHEPKORCH .....	21 <sup>ST</sup> RESPONDENT
EUNICHEBII BUSIENEI .....	22 <sup>ND</sup> RESPONDENT
VINCENT KIPROTICH KETER .....	23 <sup>RD</sup> RESPONDENT
RAELI SAWEK CHEMUTAL .....	24 <sup>TH</sup> RESPONDENT
LINA CHEMUTAI LILIAN .....	25 <sup>TH</sup> RESPONDENT
JOYCE CHELANGAT .....	26 <sup>TH</sup> RESPONDENT
JOHN MUTAL .....	27 <sup>TH</sup> RESPONDENT
ALICE CHEPNGETICH KORIR .....	28 <sup>TH</sup> RESPONDENT
LINAH CHEPKEMOI KAMOING .....	29 <sup>TH</sup> RESPONDENT
ALFRED KOECH KORIR .....	30 <sup>TH</sup> RESPONDENT
SIMION MUTAI .....	31 <sup>ST</sup> RESPONDENT
JANE CHEPCHUMBA CHEPKWONY .....	32 <sup>ND</sup> RESPONDENT
WESLY CHEPKWONY .....	33 <sup>RD</sup> RESPONDENT
GEOFREY KIPNGETICH SAWE .....	34 <sup>TH</sup> RESPONDENT
JOYCE CHEPKOECH .....	35 <sup>TH</sup> RESPONDENT
IRINE CHEPKOECH .....	36 <sup>TH</sup> RESPONDENT
WILLITER CHEPNGETICH .....	37 <sup>TH</sup> RESPONDENT
VERONICA KAMING CHEMELL .....	38 <sup>TH</sup> RESPONDENT
ALFRED KIPNGETICH MUTAL .....	39 <sup>TH</sup> RESPONDENT
SIMION BII .....	40 <sup>TH</sup> RESPONDENT
VIOLET CHERONO .....	41 <sup>ST</sup> RESPONDENT
JACKSON BLI .....	42 <sup>ND</sup> RESPONDENT
ELIJAH KEBENEI .....	43 <sup>RD</sup> RESPONDENT
MERCY CHEBET .....	44 <sup>TH</sup> RESPONDENT
BENJAMIN LANGA .....	45 <sup>TH</sup> RESPONDENT

## RULING

1. Before the court is the Plaintiff's Notice of Motion dated 30<sup>th</sup> June 2022 made pursuant to the provisions of Order 5 Rule 1, Order 36 Rule 1(a), Rule 2 of the Civil Procedure Rules, Section 3A



of the Civil Procedure Act and all enabling provisions of the law where the Plaintiff seeks a summary Judgment against the 6<sup>th</sup> to 46<sup>th</sup> Respondents, as per prayer 1(a) of his Plaintiff, by dint of the Judgment rendered on the 5<sup>th</sup> May 2015 in Kericho High Court Petition No.1 of 2013 Dave Kipkorir Langat vs. District Physical Planning Officer Kericho County & 4 Others where he had been 'adjudged as the legal owner' of land parcel LR No. Kericho Municipality Block 5/159 situate in Kericho town, that the 6<sup>th</sup> to the 46<sup>th</sup> Defendants were trespassers thereon and he, as per prayer 1 (b) of the Plaintiff, be entitled as a necessary incident of that ownership, to have full and exclusive possession of the suit land against the 6<sup>th</sup> to the 46<sup>th</sup> Defendants or indeed as against the whole world pursuant to which an eviction order do issue as against the 6<sup>th</sup> to 46<sup>th</sup> Defendants or to any person or persons, any third party or third parties deriving their occupation, title and possession from them over the said land parcel of land, and in default, the 6<sup>th</sup> to 46<sup>th</sup> Defendants and any other person or persons under them be evicted by the court bailiffs.

2. That the OCS Kericho Police Station, Kericho County and County Commandant of Police, Kericho to provide security, maintain law and order during the execution of the court orders herein.
3. The Plaintiff further sought for an order of permanent injunction do issue restraining the 6<sup>th</sup> to 46<sup>th</sup> Defendants by themselves, their servants, agents, employees of any other person or persons, any third party or third parties from occupying, from entering, from interfering, from cultivating, from constructing, from living from alienating, from charging, from selling, from leasing, from subdividing, from gifting and/or in any manner from interfering with his aforesaid parcel of land and or the plots thereunder.
4. The said Application was premised on the grounds on the face of it and supported by an affidavit sworn by the Applicant Dave Kipkorir Langat on the 30<sup>th</sup> June 2022.
5. Vide a Replying Affidavit by the 7<sup>th</sup> Defendant one Jane Chepkosgei Sitienei sworn on the 12<sup>th</sup> April 2023 on her behalf and with the consent and/or authority of the 6<sup>th</sup> to 46<sup>th</sup> Defendants, the said Defendant/Respondent had opposed the application wherein she had averred that the 6<sup>th</sup> to 46<sup>th</sup> Respondents were the bonafide owners of the properties now known as plots No 17, 18, 19-32, 163-172, 183-190 and 251-256 within Kericho Municipality regardless of having only been allocated (as per annexure JCS 2) the said parcels in the year 2013 as members of the Talai Community also known as Kipsigis Laibons. That they had been in occupation and had utilized the said parcels of land since time immemorial.
6. That the Applicant had never sued them or raised any claim in respect to the said plots of land hence the averment that they were re-litigating on issues that had been substantially heard and determined in Kericho High Court Petition No.1 of 2011 was unfounded and baseless and so was the averment that their settlement on the land was not only in contempt but also illegal, unlawful and in contravention of the Judgment in Kericho High Court Petition No.1 of 2013
7. That the said land was never alienated and/or allocated to third parties let alone the Plaintiff herein but the Government had formally caused the adjudication of their ancestral land by the Director of Physical Planning as per the extract of the Hansard setting out the proceedings of 16<sup>th</sup> November, 2011 and Notice dated 17<sup>th</sup> August, 2011, annexed as JCS 1(a & b).
8. That the Applicant had neither demonstrated that he took possession of the land, undertook developments therein nor paid any land rates and/or rent as required by law but had unduly procured Judgment against the Director of Physical Planning amongst other Government departments impugning the process invoked by the Government which invariably involved completion PDP NO.



R22/2011/01 and R22/2011/02 which covered their ancestral land being Laibon/Talai Reserve within Kericho Township also known as the Deferred Zone.

9. That the Plaintiff/Applicant had come to court with unclean hands as he deliberately concealed their existence, interest and circumstances surrounding their occupation of the subject property thereby misleading the court into issuing the impugned Judgment of 5<sup>th</sup> May, 2015.
10. That before a grant of Summary Judgment the court ought to satisfy itself that there are no triable issues raised by the Defendants, either in their statements of defence or in the affidavit in opposition to the application thereto and therefore the instant case was not suited for Summary Judgment as their filed Defence and Counterclaim raised triable issues that ought to be heard and determined by the Court because in the unlikely event that the orders sought were granted, it would occasion great injustice upon them.
11. That the Plaintiff/Applicant had never been in occupation of the suit property and coupled with his non-disclosure of material facts regarding the use and occupation of the subject properties, his pleadings did not disclose a prima facie case to warrant a grant of the orders of injunction sought. That his prayers would in effect be tantamount to issuance of eviction orders against them. That the Application should therefore be dismissed.
12. Pursuant to the filing of the Replying Affidavit by the Respondents/Dependents, the Plaintiff/Applicant filed his response sworn on 29<sup>th</sup> June 2023 to the effect that the Respondents/Dependents' response was a back and forth over an issue that had already been settled by the court where a Judgment was in place to the effect that he was the proprietor of the suit property. That the 6<sup>th</sup> to 46<sup>th</sup> Respondents had allowed the 1<sup>st</sup> to 5<sup>th</sup> Respondents litigate on their interest (if any) while they sat and watched with folded arms and therefore they were bound by the subsequent Judgment and that the current litigation was post Judgment to enforce the same.
13. That the Replying Affidavit herein was an attempt to reopen the case afresh and what the 6<sup>th</sup> to 46<sup>th</sup> Respondents termed as allocation and ascertainment on the ground were illegalities, null and void.
14. That indeed he had taken possession of the suit properties wherein he had developed the same but the structures had been destroyed by the Defendants/Respondents. That there were no triable issues raised by the 6<sup>th</sup> to 46<sup>th</sup> Defendants/Respondents to warrant them leave to defend the suit. Their draft defence was a sham as the issue on proprietorship had already been decided. That his application was for Summary Judgment namely eviction orders and had nothing to do with an injunction. That be as it may, he had been the first to be allotted the suit land wherein title was issued on 24<sup>th</sup> December 2007.
15. Parties took directions to have the application disposed of by way of written submissions wherein the Plaintiff/Applicant filed his submissions to the effect that he had initially filed a Petition before the court being Kericho High Court Petition No.1 of 2013 Dave Kipkorir Langat vs. District Physical Planning Officer Kericho County & 4 Others (1<sup>st</sup> to 5<sup>th</sup> Defendants/Respondents) in regards to land parcel known LR No. Kericho Municipality Block 5/159 situate in Kericho County where Judgment had been delivered on the 8<sup>th</sup> day of May 2015 in his favour where the issue on ownership and protection of the suit property in his favour had been resolved.
16. That he was thus entitled to have full and exclusive possession of the suit land as against all the Defendants/Respondents herein and particularly with the orders of eviction against the 6<sup>th</sup> to the 46<sup>th</sup> Defendants in pursuance to the provisions of Article 40 and 47(1) of *the Constitution*. Reliance was placed on the decision in the case of John Florence Maritime Services & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR, where the Court of Appeal had quoted with approval Lord Denning in the case of Nana Ofori Atta II vs. Nana Abu Bosra II 1957 3 all ER 559,



- to submit that since the 6<sup>th</sup> to the 46<sup>th</sup> Defendants/Respondents allowed their interests to be Litigated or fought for by the 1<sup>st</sup> to the 5<sup>th</sup> Defendants/Respondents in the Kericho High Court Petition No.1 of 2013 above while they watched folding “their arms”, they were bound by the dsaid Judgment rendered on the 5<sup>th</sup> May 2015 and the matter of contest in that litigation could not in law be re-opened. Reliance was further placed on the case of Cheruiyot vs Bartiony, Civil Appeal No.79 of 1986, and Ngugi vs. Kinyanjui & 3 others (1989) KLR
17. That a quick review of the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants/Respondents’ statement of defence dated the 10<sup>th</sup> March 2021 and the 6<sup>th</sup> to 46<sup>th</sup> Defendants’ statement of defence and counterclaim dated the 12<sup>th</sup> April, 2023 would reveal that the 6<sup>th</sup> to 46<sup>th</sup> Respondents were trying to re-litigate the issues that had been litigated and determined in Kericho High Court Petition No.1 of 2013 and therefore the doctrine of Res judicata would come live. That the Respondents entire response amounted to an invitation of the judge of equal or co-ordinate jurisdiction to sit on Appeal over the determination by another judge of equal jurisdiction. That their defence was therefore scandalous, frivolous, and vexatious and amounted to an abuse of the process of the court.
  18. The Plaintiff/Applicant relied on the decision in the Judgment of 8<sup>th</sup> day of May 2015 to submit that the issues surrounding the title to the parcel of land known as Kericho Municipality Block 5/59 had been adequately established, lawfully and regularly argued and material facts established therefore there would be no need for a trial which would only be a repetition of the discussion in the summary procedure.
  19. That the Judgment had not been appealed against and it still stood. The claims by the Defendants/ Respondents herein to the same land were res judicata. Reliance was placed on the decision in the case of Githunguri vs. Pan African Insurance Company Limited [1987] KLR pages 673-689.
  20. That there were no bonafide triable issues raised by the Defendants’ defence to entitle them to defend the suit. That the ownership of the land parcel in question having been decided, the claim and occupation of the land parcel in question by the Defendants was unlawful, illegal, trespass and as such the 6<sup>th</sup> to 46<sup>th</sup> Defendants/Respondents ought to vacate the said land or be evicted from thereon to enable the Plaintiff enjoy the fruits of his Judgment and/or Litigation. Reliance was placed on the decision in the case of Job Kilach vs. Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR at pages 4/7 and 5/7, to submit that a triable issue was said to exist if there was a dispute in the facts and which dispute could only be resolved after ventilation at a full hearing.
  21. That in the instant case, and in view of the Judgment in Kericho High Court Petition No.1 of 2013, there could be no real substantial questions to be tried in this case, that indeed there was no dispute as to the facts or law because they had been established and settled in the Judgment of the 5<sup>th</sup> May 2015 and there was absolutely nothing in this case that would require further interrogation by the court during the trial. That there must be an end to the litigation.
  22. That the issues surrounding the title to the parcel of land known as Kericho Municipality Block 5/159 and its existence and the preparation of PDP RefNo.R22/2011/01 and the advertisement of the above PDP on Standard Newspaper of the 14<sup>th</sup> September,2011, Taifa Leo of 15<sup>th</sup> September,2011 and Kenya Gazette of 9<sup>th</sup> September,2011 were issues which had been raised and litigated in the Kericho High Court Petition No.1 of 2013 and were heard and determined in the Judgment rendered on the 5<sup>th</sup> May 2015 and as such the issues raised in the Defendants’ defences were Res Judicata.
  23. That the Respondents’ arguments that they had settled in the land in the year 2012 remained unsupported, a matter which he had objected to in the year 2011 wherein everything went quiet until



June 2013 when the surveyors moved in to survey the land into small plots (Ref made to Page 6 paragraph 6 of the impugned Judgment).

24. That at the time when the Plaintiff/Applicant had moved the Environment and Land Court in the year 2013, the suit land had been vacant. That with the Judgments in place, the Respondents allotment letters were a nullity, null and void as was held in the case of Benjamin Leonard MacFoy vs. United Africa Co, Ltd [1962] A.C 152.
25. That as was held in the case of Republic vs. City Council of Nairobi & 3 Others (2014) eKLR and Ali Gadaffi & another –vs. Francis Muhia Mutungu & 2 others [2017] eKLR, where land had been allocated, the same land could not be reallocated unless the first allocation was validly and lawfully cancelled. That with this in mind, the 6<sup>th</sup> to the 46<sup>th</sup> Defendants/Respondents were trespassers and had no right to be on the suit land in the first place. Their settlement on the land was not only a matter of contempt of court but had also been done illegally, unlawfully, un-procedurally and in contravention of the Judgment in Kericho High Court Petition No. 1 of 2013 which had vested in him the absolute ownership of the land, together with all rights and privileges as provided for under Section 27 of the Registered Land Act.
26. That it could not be possibly be true that as members of Talai community (also known as Kipsigis Laibons) they had occupied or utilized that land since time immemorial because if that had been the case, then several homes could have been in existence, agricultural activities and livestock farming could have been in development since 1954 to 2013, a period of 59 years. That the Applicant’s land had never been part of these events and no historical background whatsoever linked the land to Talai Community. The narrative that the suit land was the 6<sup>th</sup> to 46<sup>th</sup> Respondents’ ancestral land was one without any solid foundation and was a pure conjecture, surmises and speculations.
27. That the 6<sup>th</sup> to the 46<sup>th</sup> Defendants/Respondents ought think of other remedies including suing the 1<sup>st</sup> to the 5<sup>th</sup> Defendants/Respondents (read the Government of Kenya) who brought them into the land in the first place knowing that a Judgment had been in place, the land had already been titled in favour of the Applicant and was no longer available.
28. That since the Plaintiff/Applicant had proved his case, he be granted the orders in terms of prayers a, b, c, d, e and f of the Notice of motion dated the 30<sup>th</sup> June 2022.
29. In opposition to the Application, the 6<sup>th</sup> to the 46<sup>th</sup> Respondents’ framed their issues for determination as follow;
  - i. Whether on the facts and circumstances of this case the court should enter summary Judgment in favor of the Plaintiff against the Defendants.
  - ii. Whether the Plaintiff has met the criteria for the grant of an order of permanent injunction.
30. After summarizing both the Plaintiff’s case and their case, the 6<sup>th</sup> to 46<sup>th</sup> Respondents’ submission on their first issue for determination was that based on the facts and circumstances of the present case, the Court should not enter summary Judgment in favour of the Plaintiff. That the Plaintiff’s claim that he had a Judgment binding on them despite the fact that he never sued them and/or raised any claim against them over their respective plots of land comprised in Kericho Municipality, could not be far from the truth. That they were bonafide owners of the properties now known as plots No. 17, 18, 19-32, 163-172, 183-190 and 251-256 and that even though they had only been allocated the land in the year 2013, as members of the Talai Community, they had been in occupation and had utilized the land since time immemorial which parcels of land comprised their ancestral land also known as Laibon Reserve within Kericho Township.



31. That the Government took steps to formally cause the adjudication of their ancestral land subsequent to which letters of allotment had been issued to them wherein the Plaintiff had deliberately concealed their existence, interests and circumstances surrounding their occupation of the subject property thereby misleading the court into issuing the impugned Judgment dated 5<sup>th</sup> May 2015.
32. That their defence was that despite the Plaintiff/Applicant's claim that the suit land was allocated to him, he had neither taken possession of the same and/or undertaken any developments therein nor had he ever paid any land rates and/or rent as required by law. That his purported Certificate of Lease to L.R. No. Kericho Municipality block 5/159 was therefore obtained irregularly and/or fraudulently. That their Defence and Counterclaim raised triable issues and as such, they should be granted a chance to defend the suit. They placed reliance on the decisions in the case of Kenya Trade Combine Ltd v N. M. Shah [2001] eKLR and in the case of JAM vs BOS [2019] eKLR to submit that since their Defence and Counterclaim raised triable issues, a Summary Judgment ought not to be granted in favour of the Plaintiff.
33. On the second issue as to whether the Plaintiff had met the criteria for the grant of an order of Permanent Injunction, their submission was in the negative. while placing reliance on the decision on the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others, CA No. 77 of 2012; [2014] eKLR, the Respondents submitted that the Plaintiff had not established the three conditions to wit, a prima facie case, irreparable injury if a temporary injunction is not granted, and that the balance of convenience lay in his favour which were the three pillars upon which rested the foundation of any order of injunction, interlocutory or permanent.
34. On the first condition as to whether the Applicant had established a prima facie case with chances of success, their submission was that it was apparent that there were competing claims over L.R No. Kericho Municipality Block 5/159 whereas on one hand, while the Plaintiff/Applicant claimed to be its registered owner as evidenced with a certificate of the lease issued to him on 1<sup>st</sup> June, 1988, on the other hand the 6<sup>th</sup> -46<sup>th</sup> Defendants/Respondents lay claim to having all along occupied the suit land which comprised part of their ancestral land even though they were only formally allocated the same by the Government upon completion of the of the Part Development Plan (PDP) PDP NO. R22/2011/01 earmarked for the resettlement of the members of the Talai Community, in the year 2013.
35. That their claim was supported by various documents including but not limited to, letter ref No L&O 4/1/2/206, letter dated 13<sup>th</sup> November, 1947, a copy of the Laibons Removal Ordinance No. XXX of 1934, copies of letters ref No's L&O 4/1/2/284 by the Colonial Provincial Commissioner, Nyanza, letter dated 20<sup>th</sup> April 1945, letter dated 5<sup>th</sup> July 1973 by the District of the Hansard containing commissioner, Kericho, extract parliamentary proceedings of 16<sup>th</sup> November, 2011, Notice dated 17<sup>th</sup> August 2011 and a bundle of photographs showcasing their homes on the suit land.
36. That on his part, the Plaintiff/Applicant relied on the copy of Judgment dated 5<sup>th</sup> May 2015 which ruled in his favour and copy of Ruling delivered on 2<sup>nd</sup> December, 2021 both in Kericho High Court Petition No.1 of 2013.
37. That further, the Defendants/Respondents were in occupation of the suit land notwithstanding the Plaintiff's claim that their occupation was tantamount to trespass having taken possession upon being allocated the same by the Government in the year 2013. That notably, the Plaintiff had not submitted any evidence of his use and occupation of the suit land from the year 1988, when he was purportedly allocated, to 2013 when the alleged trespass was committed.



38. That indeed the Plaintiff never sued and/or instituted any claim against the 6<sup>th</sup> to 46<sup>th</sup> Defendants upon their purported encroachment, nor disclosed their existence on the suit land thus the Defendants had set out a clear narrative supported by evidence, on their use and occupation of the suit property from the colonial era, to date. That indeed the Plaintiff/Applicant deliberately concealed material facts from the court relating to their existence, interests, use and occupation of the subject parcel of land thus misleading the court into issuing the impugned Judgment dated 5<sup>th</sup> May, 2015. These facts thus clearly showed that the Applicant had not established a prima facie case with chances of success.
39. On the second condition as to whether the Plaintiff stood to suffer irreparable harm, it was the Respondents' submission and while relying on the decision in the case of Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR that the Plaintiff/Applicant had failed to establish how he would suffer irreparable harm if the orders sought were not granted especially considering that he had never been in occupation of the suit property.
40. On the third condition as to where the balance of convenience lie, the Respondents urged the court to construe that the balance of convenience tilted in their favour considering their long use and occupation of the suit property. That noting the lower rather than the higher risk of injustice in considering where the balance of convenience tilted, that granting the orders sought by the Plaintiff, would cause them undue hardship as it would mean that they would have to vacate their respective homes in the subject property. Reliance was placed on the decision in the case of Pius Kipchirchir Kogo (supra) which defined the concept of balance of convenience. That granting the orders sought by the Plaintiff would occasion a miscarriage of justice as they would have been condemned unheard.
41. That in view of the foregoing, the Applicant was not entitled to the eviction order sought as they had demonstrated their long standing occupation of the suit land parcel whereas the Applicant on his part had not sufficiently demonstrated the same. Reliance was also placed on the decision in Julius L. Marten vs Caleb Arap Rotich [2021] eKR to seek that the Application herein be dismissed with costs.

#### **Determination.**

42. I have considered the Plaintiff's Application herein seeking orders of summary Judgment against the 6<sup>th</sup> to 46<sup>th</sup> Respondents herein namely eviction from parcel of land L.R No. Kericho Municipality Block 5/159. I have also considered the 6<sup>th</sup> to 46<sup>th</sup> Defendant/Respondents' response to the Application. Further I have also considered the submissions, the authorities cited herein and the law herein quoted by the parties in support and opposition of the Application.
43. It is not in dispute that the Plaintiff/Applicant filed the current application pursuant to Judgment that had been delivered by the court on the 5<sup>th</sup> May 2015 in Kericho High Court Petition No.1 of 2013 Dave Kipkorir Langat vs. District Physical Planning Officer Kericho County & 4 Others where he had sued the 1<sup>st</sup> to 5<sup>th</sup> Defendant/Respondents herein. In essence therefore it is not in contention that the 6<sup>th</sup> to 46<sup>th</sup> Defendant/Respondents were not party to the proceedings in the said Kericho High Court Petition No.1 of 2013.
44. It is further not in contention that the decision of the court in the said Judgment was that the 1<sup>st</sup> to 5<sup>th</sup> Respondents therein had contravened the Petitioner/Plaintiff's Constitutional rights as envisaged under Article 40 and 47(1) in regard to land parcel LR No. Kericho Municipality Block 5/159 situate in Kericho town. The issue of proprietorship was not in issue therein.
45. It is therefore pursuant to the holding of the court in the said Judgment that the Plaintiff/Applicant has filed the current suit and application seeking a Summary Judgment for eviction from the said suit property of the 6<sup>th</sup> to 46<sup>th</sup> Respondents and thereafter a permanent injunction be issued against



- them restraining them by themselves, their servants, agents, employees of any other person or persons, any third party or third parties from occupying, from entering, from interfering, from cultivating, from constructing, from living from alienating, from charging, from selling, from leasing, from subdividing, from gifting and/or in any manner from interfering with his aforesaid parcel of land and or the plots thereunder.
46. The Respondents on the other hand have put up a defence stating that as members of the Talai Community also known as Kipsigis Laibons, and having occupied and utilized the said parcels since time immemorial, they were the bonafide owners of the properties now known as plot Nos 17, 18, 19-32, 163-172, 183-190 and 251-256 within Kericho Municipality regardless of having only been allocated the said parcels in the year 2013.
  47. That the Plaintiff/Applicant had never sued them or raised any claim in respect to the said plots of land. That the said land was never alienated and/or allocated to third parties let alone the Plaintiff herein but the Government had formally caused the adjudication of their ancestral land by the Director of Physical Planning as per the extract of the Hansard setting out the proceedings of 16<sup>th</sup> November, 2011 and Notice dated 17<sup>th</sup> August, 2011.
  48. That the Plaintiff/Applicant had neither demonstrated that he took possession of the land, undertook developments therein nor paid any land rates and/or rent as required by law but had unduly procured Judgment against the Director of Physical Planning amongst other Government departments impugning the process invoked by the Government which invariably involved completion PDP No. R22/2011/01 and R22/2011/02 which covered their ancestral land being Laibon/Talai Reserve within Kericho Township also known as the Deferred Zone.
  49. That the Plaintiff/Applicant had come to court with unclean hands as he deliberately concealed their existence, interest and circumstances surrounding their occupation of the subject property thereby misleading the court into issuing the impugned Judgment of 5<sup>th</sup> May, 2015.
  50. That before a grant of Summary Judgment could issue, the court ought to satisfy itself that there were no triable issues raised by the Defendants, either in their statements of defence or in the affidavit in opposition to the application thereto and therefore the instant case was thus not suited for Summary Judgment as their Defence and Counterclaim raised triable issues that ought to be heard and determined by the Court.
  51. That the Plaintiff/Applicant had never been in occupation of the suit property and coupled with his non-disclosure of material facts regarding the use and occupation of the subject properties, his pleadings did not disclose a prima facie case to warrant a grant of the orders of injunction sought. That his prayers would in effect be tantamount to issuance of eviction orders against them. Their position was that they were not re-litigating on issues that had been substantially heard and determined in Kericho High Court Petition No.1 of 2011. That their settlement on the land was also not in contempt of the Judgment in the said Petition No.1 of 2013, but was legal and lawful and therefore the Application should be dismissed.
  52. The pursuant to the above arguments, I find the issues that arises herein for determination being as follows;
    - i. Whether an application for Summary Judgment for eviction filed against several persons not parties to the suit is tenable
    - ii. Whether the 4<sup>th</sup> to 46<sup>th</sup> Defendants/Respondents have a defence on record that raises triable issues



53. On the first issue for determination, it is clear as herein above stated that the Applicant herein had filed Kericho High Court Petition No.1 of 2013 Dave Kipkorir Langat vs. District Physical Planning Officer Kericho County & 4 Others where he had sued the 1<sup>st</sup> to 5<sup>th</sup> Defendant/Respondents only and had sought the following orders in relation to parcel of land known as Kericho Municipality Block 5/159;
- a. A declaration that the ‘actions of the Respondents complained of (the allegation that the Respondents arbitrarily re-amended the original survey plan, the original PDP, are resurveying and sub-dividing the suit property into small plots of 40 by 80 square feet plots with the aim of allocating it to third parties) are contrary to Article 40 and 47(1) of *the Constitution* of Kenya and to that extent null and void;
  - b. A declaration that his rights under Article 40 and 47(1) of *the Constitution* of Kenya were violated through the actions of the Respondents complained of.
  - c. An order directed at the Respondents, the Registrar of Titles, the Commissioner of Lands or any other person authorized on their behalf to cancel, delete and/or remove any entries or interference with the suit properties and/or stopping them from implementing in any way whatsoever the said plans of the Respondents;
  - d. An order restraining the Respondents from amending the original survey plan, the original PDP, resurveying and sub-dividing the suit property into small plots of 40 by 80 square feet and allocating them to members of the Talai community or to any other third party and from interfering with his rights in the suit property;
  - e. Damages for breach of his constitutional rights,
  - f. Costs of the petition;
  - g. Any other or further order that the court may deem fit and necessary to grant.
54. After a full trial the court had found as follows;

“The upshot of the foregoing is that the petitioner's case has merit and is allowed in terms of prayers (a), (b), (c), (d) and (f) ....

There being no prove of any damage sustained owing to the Respondents’ unlawful conduct, save for the costs incurred in prosecuting this petition, I decline to award the petitioner any damages for breach of his Constitutional rights as sought in prayer (e) in his petition.”

55. In essence therefore the impugned Judgment that had been delivered on the 5<sup>th</sup> May 2015 had recognized that the Applicant/Plaintiff’s constitutional rights as enshrined under article 40 and 47(1) of *the constitution* had been infringed by the 1<sup>st</sup> to 5<sup>th</sup> Respondents in as far as the said suit land was concerned but had not determined the issue of proprietorship.
56. It later turns out that the 6<sup>th</sup> to 46<sup>th</sup> Respondents are in possession and occupation of the suit land herein and therefore by filing the current application, in essence the Applicant/Plaintiff seeks to evict them from the suit property yet they were not parties to the aforementioned Petition/Suit. In a ruling delivered by this court on the 2<sup>nd</sup> day of December, 2021, in Constitutional Petition No.1 of 2013



reported as *Dave Kipkorir Langat v District Physical Planning Officer & 4 Others* [2021] eKLR, the court had pronounced itself as follows;

“secondly, the subject suit has since changed from its original status and now there are third parties in occupation therein who had not been parties to the suit. Given this scenario, and in the light of the provisions of Article 50(1) of *the Constitution* on fair hearing, the proper avenue for the Applicant to address the issue on eviction is for him to file a fresh suit for the eviction of the persons who are on land to which he obtained orders because the Applicant can only enforce orders against the persons he had sued. The case will then be decided on merits wherein upon a successful conclusion of the matter, that the Applicant can be entitled to an order of eviction.”

57. The holding still stands.
58. On the second issue for determination as to whether 6<sup>th</sup> to 46<sup>th</sup> Defendants/Respondents have a defence on record that raises triable issues. I find that it is not disputed that the Defendants have filed their defence and counterclaim to the Applicant/Plaintiff's Plaint to which they have claimed proprietorship to plots of land comprised in Kericho Municipality known as No's 17, 18, 19-32, 163-172, 183-190 and 251-256, as members of the Talai Community. Land which they claimed to have been in occupation and had utilized since time immemorial and which parcels of land comprised their ancestral land also known as Laibon Reserve within Kericho Township. That the purported Certificate of Lease to L.R. No. Kericho Municipality Block 5/159 held by the Applicant/Plaintiff was obtained irregularly and/or fraudulently.
59. It must be remembered that a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. The particular question that was decided in the impugned Petition was whether the state was liable for acts committed by its agents (the 1<sup>st</sup> to 5<sup>th</sup> Respondents/Defendants) while on duty since constitutional rights protect individuals from Governmental injury to their constitutional rights and regulate the discretion of the Government to inflict such injury.
60. The Respondents/Defendants' in their Defence and Counterclaim have raised issues on the aspect of proprietorship and fraud as well as occupation and possession of the suit land being Kericho Municipality Block 5/159 which issues in my humble view constitute triable issues which need to be determined by the court at a full trial and for which the Respondents/Defendants should be granted a chance to defend the suit notwithstanding that triable issues do not mean a defence that must succeed.
61. The Court of Appeal in *Osodo vs. Barclays Bank International Limited* (1981) KLR 30 had held *inter alia* that:-

“Where there are triable issues raised in an application for summary Judgment, there is no room for discretion and the court must grant leave to defend unconditionally.
62. Further in *Nairobi Golf Hotels (Kenya) Limited Civil Appeal No. 5 of 1997 (UR)* the Court of Appeal had made observations that

“it is now trite that in applications for summary Judgment under order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty is however limited to showing *prima facie* the existence of bonafide triable issue or that he has an arguable case. On the other hand it follow a Plaintiff



who is able to show that a defence raised by a defendant in an action falling within the provision of order XXXV is shallows or a sham is entitled to summary Judgment”.

63. Similarly, in Kenya Trade Combine Ltd v N. M. Shah [2001] eKLR, the Court of Appeal had held thus:

“In a matter of this nature, all that a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

64. I thus hold the view that pursuant to the defence and counter claim herein filed, as well as the Court of Appeal decisions herein above cited, that the court cannot grant Summary Judgment to the Plaintiff because I am satisfied that there are triable issues that need to be determined by the court at a full trial where the Defendants/Respondents who were not party to the impugned Petition ought to be given an opportunity to defend the suit after which that the Plaintiff/Applicant could be entitled to an order of eviction if successful.

65. The Application dated the 30<sup>th</sup> June 2022 is herein dismissed with costs to the 6<sup>th</sup> to 46<sup>th</sup> Respondents.

**Dated and delivered via Microsoft Teams at Kericho this 28<sup>th</sup> day of September 2023**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

