REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 14 OF 2021

NABAKWA FARMERS CO-OPERATIVE

SOCIETY LIMITED.....APPLICANT/PLAINTIFF

VERSUS

LOIS HOLDINGS LIMITED.....1ST RESPONDENT/DEFENDANT

ESTATE OF JACKSON KIAMBA KIMBUI.....2ND RESPONDENT/DEFENDANT

RULING

(Whether to Grant a Temporary Order of Injunction)

INTRODUCTION

1. On **1/3/2021**, the Applicant filed a Plaint dated **24/2/2021** together with a Notice of Motion dated **26/2/2021**. The defendants filed a Memorandum of Appearance on **23/4/2021** but did not respond to the Application. The Court prepared a ruling which it delivered on **5/5/2021** in respect of the application. By it, the Court granted a temporary injunction restraining the defendants from evicting the Plaintiff's members from the suit land parcels **LR. No. 6485** and **LR. No. 5335/2** pending the hearing and determination of the suit. Further, the Court directed the parties to comply with the filing and serving of their bundles of documents on each other. It fixed the matter for mention on **7/6/2021** to confirm compliance and take a hearing date.

2. On **7/6/2021**, parties did not attend Court. But on **10/6/2021** the defendants' counsel filed an Application wherein he sought an order for setting aside the *ex parte* ruling delivered on **5/5/2021** (in respect of the application dated **26/2/2021**). They claimed that the Application was not served on them. They also sought an order requiring the plaintiff to serve the Application, and leave to respond to it. The Court delivered a ruling on the latter Application on **30/9/2021** by which the Court allowed the one filed on **10/6/2021**. Then the parties complied as ordered, particularly on service of the application dated **26/2/2021**. Therefore, the Application was set for hearing afresh. This is the Application I am required to determine now.

The Application

3. The Notice of Motion was brought under **Section 3A** of the **Civil Procedure Act** and **Order 40 Rule 1** of the **Civil Procedure Rules** and **"all the enabling provision of Law" (*sic)***. The Plaintiff/Applicant sought the following specific prayers, namely:

> **a) …spent**
>
> **b) …spent**
>
> **c) That a temporary injunction do issue , restraining the defendants from evicting the Plaintiff's members from the suit land parcels L.R. No. 6485 and LR 5335/2 until the hearing and final determination of this suit.**
>
> **d) Costs of this application be in the cause.**

4. The Application was premised on fourteen (**14**) grounds which were on its face and supported by the affidavit of one **Robert Nyongesa Makhanu.** The depositions in the supporting affidavit were basically a repetition of the contents of the grounds. The affidavit was sworn on **26/2/2021**. The deponent described himself as the Secretary of the Plaintiff Co-operative Society. He swore that on **10/2/2021**, the Decree Holders' Advocate served on the officials of the Plaintiff with an Eviction Order dated **2/10/2015** together with an Eviction Notice dated **9/02/2021** by which they gave them **21 days'** notice to vacate from land parcels **LR. No. 6416/6** and **LR No. 6485** or the face eviction. To the Affidavit he annexed a copy of the eviction order and the vacation notice and marked them as **RNM 2 (a)** and **RNM 2 (b)** respectively.

He stated that the area Chief and Police Officers from Endebbes Sub-County visited the suit land for reconnaissance and asked the Applicants to vacate it although the eviction was in respect of only two land parcels namely **LR No. 6416/6** and **LR No. 6485** and not **LR No. 5335/2**. He stated further that out of the two land parcels in the eviction order, **LR No. 6485** was the subject of a sale agreement entered into on **4/11/2015**. He averred further that the Plaintiff entered into the Agreement with the **1st** defendant and which the Plaintiff in this suit sought to legally enforce as a legally binding contract and that the other parcel was **LR No. 5335/2**. He attached a copy of the sale agreement and marked it as **RNM 3**.

5. His case was that if the intended eviction proceeded the Plaintiff's members together with their families and over **2000** people would lose their property and be rendered landless and suffer irreparably. He stated that the suit had high chances of success and if the orders were not granted it would be rendered nugatory and be a mere academic exercise. He deponed further that the eviction order stemmed from this Court's judgment in **Kitale HCCC No. 77** of **2004**. He was particular that in the judgment, the Court declared that land parcel numbers **LR No. 6416/6, LR No. 6485** and **LR No. 5335/2** belonged to Lois Holdings Ltd but allowed the parties to negotiate a sale so that the said company could sell the suit lands to the defendants who were members of the Plaintiff herein. He gave the brief facts of **Kitale HCCC No. 77** of **2004** which I summarize here below.

6. The facts of **Kitale HCCC No. 77** of **2004** case were that the Plaintiffs' members were squatters on land parcels **LR NO. 6485** and **5335/2** which belonged to ITE FARMERS CO-OPERATIVE SOCIETY. Later in the year **1985** it was secretly acquired by JASON KIAMBA KIMBUI through his company Lois Holdings Ltd when he was the General Manger of Cooperative Bank. The squatters approached the said JASON KIAMBA KIMBUI who advised them to register a Co-operative Society so that they would access a loan to buy the land. They registered NABAKHWANA FARMERS CO-OPERATIVE SOCIETY LIMITED, the plaintiff herein, and applied for financing from Co-operative Bank. He deponed further that in betrayal, the said JASON KIAMBA KIMBUI took advantage of his position and shortchanged the poor squatters and secretly without informing them, obtained the same financing and bought the said land parcels through his company, LOIS HOLDINGS LTD. He stated further that the company filed a suit against the said squatters seeking for eviction against them from the said land.

7. It was his contention that from the judgment in the above mentioned suit, the court found that the said JASON KIAMBA KIMBUI was in breach of trust and gave orders allowing the squatters to stay on the said land and negotiate a purchase of part of it from the said company. Following the judgment, the parties entered into an agreement of sale of land where they mutually agreed for the sale of **531** acres comprising of parcels **No. 6485** and **No. 5335/2** at a price to be determined by a valuer. The agreement was signed by JASON KIAMBA KIMBUI on behalf of LOIS HOLDINGSLTD - the vendor - and by the Plaintiff's registered officials for the purchaser Nabakhwana Farmers' Co-operative Society Limited.

8. The deponent further stated that valuation was done on **23/2/2016** as agreed. However, Jason Kiamba Kimbui died before payment could be made despite the agreement being valid and binding contract. That upon the demise of the director of Lois Holdings Ltd, the plaintiffs' officials learned that one Douglas Kimbui became the administrator of the estate. The family of the deceased had since refused to honor the sale agreement and are now in the process of evicting them from the land.

9. According to them, the adverse party obtained the eviction order on **2/10/2015** without their involvement whereas negations of the sale were ongoing, and the same had not been served upon the plaintiff in a period of **five (5)** years when the order was obtained. They insisted that the court order as irregularly obtained. Then they stated that they only became aware of the Order on **10/2/2021** when its officials were served during their Executive Committee meeting. He was specific that the notice gave them **21** days to vacate or face eviction and that one of the parcels of land being **LR No. 6485** was the subject of the sale agreement dated **4/11/2015**. Finally, he prayed that the court issues the injunction to protect their interest on the land as purchasers and against illegal eviction.

The Response

10. The Application was opposed strongly. The Respondents filed a replying affidavit sworn on **11/11/2021** on **16/11/2021**. It was sworn by **LOIS NYEGERA KIMBUI** who described herself as the director of the **1st** defendant and an administrator of the **2nd** defendant. Her response was that the application was misconceived, made in extreme bad faith and ought to be dismissed with costs. She stated that in its judgment delivered on **24/9/2014** ***(sic)*** the court held that the suit lands i.e. **LR No. 6416/6, No. 6418** ***(sic)*** and **No. 5335/2** belonged to the Plaintiff in the relevant suit and ordered the defendants to vacate **LR Nos. 6416/6** and **6486** ***(sic)*** within **3 months** of the judgment. Further, the court allowed the defendants to remain in **LR No. 5335/2** pending mutual agreement of the parties as to the sale of the land. She referred to the judgment in **Kitale ELC No. 77** of **2004** delivered on **29/9/2014.** By the judgment, the Plaintiff therein was also given the liberty to move Court for appropriate orders if no agreement was reached. She annexed to her Affidavit a copy of the agreement and marked it as **LNK1** which she said was entered into in good faith between **Nabakhwana Farmers' Co-operative Society** and the **1st Defendant** for the sale of **LR Nos. 6485** and **5335/2** measuring **313** and **218** acres respectively totaling to **513 acres**. The price was to be determined by a government valuer and the consideration to be agreed was to be paid within **four (4)** years with the first installment becoming due on or before **30/1/2016**. By the agreement, the defendants in suit No. **77 of 2004** who are said to be members of Nabakhwana Farmers Society Limited were allowed to remain in occupation of the **513** acres.

11. Her further response was that valuation was done by the County Lands Officer and a report was availed to the parties. According to her, the land was valued at **Ksh.99, 000,000/=**. She annexed a letter for valuation and a copy of the valuation report marked them as **LNK2** and **3** respectively. She averred that the **1st** installment of the consideration was to be paid on or before **30/1/2016** according to the agreement but the same was never paid to date despite the defendants enjoying occupation of the land as well as cultivating it for gain.

12. In respect to the agreement dated **14/11/2015,** she stated that the same was revoked on **4/10/2016** by a letter addressed to the District Commissioner Endebbes by the Respondents herein for failure on the part of the plaintiffs herein to pay the consideration as agreed. She further contended that the land in question was agricultural and six months it was made it became null and void for lack of consent of the Land Control Board and in terms with **Section 22 of Cap 302**. For her, it therefore could not be enforced as an order for specific performance cannot issue in relation to a void contract and the same cannot be adopted as judgment of the court as the applicants herein have breached it. Further she contended that there was no further agreement that was executed between the parties herein over the judgment of

29/9/2014.

13. According to her, there was no need for the plaintiff to commence a fresh suit (*emphasis mine*) whereas there was a subsisting judgment against the members of the applicant herein, namely, the judgment of **29/9/2014** in **Kitale HCCC No. 77** of **2004.** That to date, two installments have fallen due without any payments made by the **1st** respondent herein and that the **1st** respondent has incurred huge loss for non-user of the land for **six (6)** years since **2014** when judgment was delivered.

14. She then pointed out that the judgment of the court dated **29/9/2014** awarded vacant possession of the land comprised of **Nos. 6416/6** and **6485** whereas there was a pending application dated **26/4/2021** seeking for eviction of the members of the applicant who are in occupation of **LR NO. 5335/2.** She summed it up by indicating that the application is devoid of merit and the same ought to be dismissed with costs to the respondents.

Submissions

15. The parties agreed to dispose the application by way of written submissions. However, as at the time prepared this ruling, only the respondents' submissions were on record. That notwithstanding, this court determined the Application basing on the pleadings before it. Furthermore, submissions do no amount to evidence: they are, as held by the Court of Appeal before in ***Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR***, "a marketing language of the parties" hence their absence or presence does not change the merits of the application. Again, it has been held by courts in a number of cases that submissions are not pleadings and their lack on record does not have alter the merits of a matter and the conclusion of a court as was seen by the same Court in the same matter where it stated that there are many cases which are decided without hearing (relying on) submissions. Lastly, the Court of Appeal has held in ***Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997*** that a judgment based on submissions would be a nullity since they are not a mode of receiving evidence. Therefore, this Court being alive to that important position of the law proceeded to determine the instant Application purely on the evidence on it as given by the pleadings - the Application and the Affidavits both in support and opposition to it.

Analysis, Issues, Determination

16. I have carefully considered the Application, the rival affidavits together with the annextures thereon as filed by the parties herein, the submissions on record and the authorities cited as well as statutory law relied on. I find the following issues commending themselves for determination before me. They are:-

a) Whether the applicants satisfied the principles for the grant of a temporary injunction.

b) Whether the existence of a valid judgment on the issues raised in this matter should be a bar to proceeding with the Application and suit

c) What orders should issue and who to bear the costs of the application.

17. Whereas it would be natural to analyze the issues sequentially as they are, it is prudent to start with the one that, if merited, would go to the root of the Application and suit and therefore determine them. This is because if it were to be merited and determine the suit, findings on the others would be rendered meaningless or academic. Therefore, I am of the view that I begin with the second issue, namely, *Whether the existence of a valid judgment on the issues raised in this matter should be a bar to proceeding with the Application and suit*.

18. The Plaintiff brought the instant suit and Application against the Defendants praying for orders of injunction. In its main prayer of the Application dated **26/02/2021** they did not mention anything to do with an existing or determined suit. However, in grounds **2, 3, 5** and **6** they stated that they brought this suit following the service of an eviction order dated **2/10/2015** and an eviction notice on **9/02/2021** on the officials of the Plaintiff. At paragraphs **8** and **9** of the supporting affidavit sworn by one Robert Nyongesa Makhanu on **26/02/2021**, the Plaintiff identified the suit in respect of which the eviction orders were issued. It was **Kitale HCCC No**. **77** of **2004**. He then annexed a copy of the eviction order and the judgment delivered on **29/9/2014** in the said suit. This fact was also brought out by the Defendants who faulted the filing of this suit when there was a valid judgment on the issues in the said referred suit.

19. The facts above led this Court to analyze keenly the parties and issues in this suit in comparison with the parties and issues **Kitale HCCC No. 77 of 2004**. A careful perusal of the records of the two shows clearly that the parties in the two suits are the same, they litigated over the same issues under the same title as they are doing in the present suit. This point was raised by the Defendants in the replying Affidavit sworn by one Lois Nyegera Kimbui on **20/04/2021** and their submissions. Their main contention is that this matter was determined by the Court in **Kitale HCCC No. 77** of **2004** hence it should not have been brought up by the Plaintiff's in this suit. What that imports is the point that the matter is *res judicata*.

20. Before I look at the concept of *res judicata*, it is important to note that once a Court has delivered judgment or a ruling on merits in a matter or application respectively, it becomes *functus officio* at that point save for post judgment issues and clerical adjustments regarding errors that may have arisen in the court of the proceedings and final decision of the Court. This point is vital to consider in relation to position of the Court in **Kitale HCCC No. 77 of 2004** after the **29/09/2014**. It is not in dispute that on that following the judgment delivered on **29/09/2014**, neither an appeal nor an application for review was made to challenge its validity. It has neither been varied not overturned by any Court. Thus, in terms of its finality as at time of tiling the instant suit or making this determination, it is clear that it cannot be questioned. This turns me to restating the meaning of the phrase *functus officio*.

21. The phrase simply means that the Court has ended its business on the matter. Once that occurs, the Court downs its tools. It cannot relook into the merits or otherwise of the same matter. It may be said at that point, in the ordinary language, that the Court has moved on. Therefore, it cannot revisit the matter unless on the exceptions that the law permits but not the merits of the issues that went on in the matter.

22. In ***Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR***, the Court of Appeal explained the Concept by stating as follows:

> ***"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;***
>
> ***"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."***

23. Also, in ***Petition 5, 4 and 3 of 2013 (Consolidated) - Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 Others [2013] eKLR*** the Supreme Court held:

> ***"That order has not been acted upon or perfected,… We are, therefore, satisfied, and accordingly hold, that the Court is not functus officio, and that we do have jurisdiction to entertain the proceeding before us."***

24. Essentially, the Supreme Court demystified the circumstances that warrant the same Court that made the decision to get involved in it. That is only when the order has not been perfected or executed. It is the same position that was indicated in the persuasive case of ***Bellevue Development Company Limited v Vinayak Builders Limited & another [2014] eKLR*** where the Court stated that:

> ***".....care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgement has already been rendered by the court".***

24. The Defendants swore an Affidavit that there was an Application that had been made in **Kitale HCCCC No**. **77** of **2004** in respect of the land parcel No. **LR. 5335/2** which was pending before the Court. That application was made pursuant to the judgment of the Court as delivered on **29/09/2004** (see Annexture **RNM 4** of the Affidavit by one Robert Nyongesa Makhanu) and directed in it at paragraph **27 (iii)**. It was to the effect that if there parties in that suit did not reach an agreement over the purchase of the parcel of land on which they were permitted to remain subject to reaching an agreement then the Plaintiff would be at liberty to move the Court for appropriate orders. While this Court is not making a finding on the merits or otherwise of that application, which in any event is not before me, it is the humble view of this Court that the Application is a post judgment step in that matter and does not affect the position of the Court in it that the Court became *functus officio* therein vis-à-vis the judgment. For that reason, it leaves me to determine the next point which is whether or not the suit herein is *res judicata*. I begin by its legal basis in our legal system and definition.

25. The concept of *res judicata* is provided for under **Section 7** of **the Civil Procedure Act**. It stipulates 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."***

26. This concept has been analyzed by Courts from time to time. The English decision in ***HENDERSON VS HENDERSON (1843-60) ALL E.R.378***, is the best starting point in understanding the concept. In it the Court stated:

> ***"…where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."***

27. It is defined in Black's law Dictionary 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…"***

28. In explaining the specific elements of the concept the Court, in ***Christopher Kenyariri v Salama Beach (2017) eKLR***, emphasized as follows:

"... the following elements must be satisfied...in conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit

b) Former suit between same parties or parties under whom they or any of them claim

c) Those parties are litigating under the same title

d) The issue was heard and finally determined.

e) The court was competent to try the subsequent suit in which the suit is raised.

29. In **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR,** the Supreme Court stated as follows:

"Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories,… The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

30. The Court of Appeal has summed it up on another occasion in ***John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*** as follows:

"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

31. I have carefully analyzed the pleadings herein and the facts as given in the affidavits in support and opposition to the Application before me. I have perused annexture **RNM4** particularly at paragraphs **26** and **27**. The paragraphs refer to a conclusive judgment delivered on **29/09/2014** in respect to land parcel numbers **LR. Nos. 6416/6**, **6485** and **5335/2**. The issues on ownership of those parcels of land were settled in that matter and this Court became *functus officio*. Whereas the Plaintiffs in this suit would in paragraph **7** of the Plaint have this Court to believe that the late Jason Kiamba Kimbui filed **Kitale HCC. No. 77 of 2004** through Lois Holdings Ltd, it is absolutely false. Lois Holdings Ltd was and must be considered a different entity from its owners or shareholders (for an exposition of the doctrine of separate entity in Company Law I call on the parties herein to refer to the seminal case of ***Salomon v Salomon and Company Ltd [1897] AC, 22***). I have also anxiously considered the agreement made on **4/11/2015**, particularly in regard to the parties thereto. The parties to the agreement were Lois Limited and the Plaintiffs herein. It appears that they entered into the agreement, whose validity or otherwise I do not determine at this instance, based on the terms and advise of the Court in **Kitale HCC No. 77** of **2014**. I am convinced that the issues in this Suit which forms the basis for the instant Application fall squarely on the mischief the concept the doctrine of *res judicata* sought to remove in practice. It is clear from **Paragraph 7** of the Plaint that the Plaintiff's members were defendants in the Kitale High Court Suit, **No. 77** of **2004**. The issues are similar and relate to the decision of the Court therein, and they have been determined by a Court of competent jurisdiction. Lest one thinks that I misunderstood the similarity of the parties, I am alive to the fact that in **Kitale HCCC No. 77** of **2004**, the late Jason Kiamba Kimbui was neither a party nor adjudged to be owner of the parcels of land in dispute herein. It was the **1st** Defendant herein which was the Plaintiff therein and was found to be the owner of the land parcels. The Estate of the late Jason Kiamba Kimbui was sued in this matter over an agreement entered into by Lois Holdings Ltd, the **1st** Defendant herein of whom the deceased was a director and he is said to have signed it in that behalf. Thus, in my humble considered view, by the Plaintiffs joining the Administrators of his Estate in this matter it is an error and a design for embarrassing his Estate and aimed at cleverly sneaking it into the issues herein so as to prolong this matter. As I stated above Lois Holdings Ltd is not and can never be the same as the late Jason Kiamba Kimbui. The Court found in **Kitale HCCC No. 77** of **2004** that Company, which sued the Plaintiff's members, was the owner of the subject parcels of land herein. Thus, in terms of **Order 1 Rule 10(2)** of the **Civil Procedure Rules**, I strike out, with costs (to them), the **2nd** Defendants from the proceedings herein as their presence does not add value and it embarrassing to them and increasing costs on their part for no apparent reason. Having remained with the Plaintiffs and the (now former 1st) Defendants and having found as I did above that the issues in this matter revolve around and are the same as and stem from those **Kitale HCC No. 77** of **2004**, it is my humble view that the instant suit is *res judicata*.

32. In the event that I am wrong in my finding that this matter is *res judicata*, I then hold that for the reasons that the subject matter is squarely the same as and the parties herein acknowledge as much and the fact that the issues thereon are essentially the same as those in **Kitale HCCC No. 77 of 2004**, then this matter is *sub judice* in so far as there is any pending issues in, and can only be stayed pending the determination of any post judgment issues in the said **Kitale HCC No. 77** of **2004** and therefore the Application dated **26/02/2021** would fail on that account.

b) What orders should issue and who to bear the costs of the application?

33. Having made the finding that this suit is ***res judicata***, I make no further findings the instant application. The upshot is that both the Application dated **26/02/2021** and the entire suit are hereby dismissed with costs to the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF FEBRUARY, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.