



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 56 OF 2021**

**EVANS SIMIYU SUNDWA AND 97 OTHERS.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**TAWAI LIMITED & 16 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

**THE APPLICATION**

1. The Applicants moved this Court under Certificate of Urgency vide a Notice of Motion dated 17/11/2021. The Application was brought under **Order 40 Rule 1, Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 1A, 1B, 3, 3A** of the **Civil Procedure Act** as read with **Articles 40 and 159** of the **Constitution of Kenya 2010** and other enabling provisions of the law. They prayed for the following specific orders:-

a) ...spent

b) **THAT this Honourable Court be pleased to issue an order of injunction restraining the 13<sup>th</sup> Defendant/Respondents (Eldoret Express CO. Ltd), their agents, directors, servants or assignees from in any way interfering with their possession, or by evicting, invading, trespassing, fencing off, and/or executing any orders till the plaintiffs/Applicants are heard judiciously pending the hearing of this Application inter-parties.**

c) **That this Honourable Court be pleased to issue an order of injunction the Defendant/Respondent (Eldoret Express Co. Ltd), their agents, directors, servants or assignees from in any way interfering with their business, evicting, ejecting, invaliding, trespassing, fencing off and/or executing any orders till the plaintiffs/Applicants are heard judiciously pending the main suit.**

d) **THAT an order do issue to the effect that the Plaintiffs/Applicants have been condemned unheard and adverse orders issued to their detriment vide ELDORET ELC CASE NO. 87/2015 (Formally (sic) KITALE HCC NO.18 OF 2008).**

e) **THAT an order to issue directing the 14<sup>th</sup> and 15<sup>th</sup> Defendants/Respondents (Chief Land Registrar and Director of Survey) to ascertain the existence and authenticity of parcel titles namely L.R NO. 5707 (R) and 5707(6) as per the survey plan and file report in court.**

f) **THAT cost of this application be provided for.**

2. This Court shall determine the Application by adopting the use of a simple format in the structure of the ruling. Thus, the Court breaks the structure into and discusses the Application under various heads as follows:-

**a) The Supporting Affidavit and Grounds**

3. The Application was based on a number of grounds and supported by the Affidavit of one **Evans Simiyu Sundwa**. The grounds were that the Plaintiffs/Applicants are innocent purchasers, members, occupiers and/or shareholders of part of the suit parcel of land namely **L.R. No. 5707** measuring **646** acres situated within Trans-Nzoia County. On diverse dates between the year **1995-2015** the Applicants purchased or bought shares from the **1<sup>st</sup> Respondent** through its directors, being the **2<sup>nd</sup> to 12<sup>th</sup> Respondents**. The Applicants contended that the directors of the **1<sup>st</sup> Respondent** never involved the Plaintiffs/Applicants in their case wrangles between themselves and the **13<sup>th</sup> defendant/Respondent**. They argued that there exist splinter groups within the **1<sup>st</sup> Defendant's** management and operation which resulted in

wrangles between the 1<sup>st</sup> Respondent Company and the 13<sup>th</sup> defendant to the detriment of the Applicants.

4. The Applicants contended that they were been condemned unheard (in **Eldoret ELC No. 87 of 2015**, as it became clear upon further analysis of the documents presented in support of the Application) because adverse orders issued against the 1<sup>st</sup> Respondent without their participation and/or involvement. They argued further that due to their non-participation in the suit land adversarial orders were issued contrary to the tenets or principles of natural justice. Their case was that on **23/06/2021** the Court issued orders of the eviction against the 1<sup>st</sup> Respondent (which means it applied to its members), in favor of the 13<sup>th</sup> Respondent without the 1<sup>st</sup> Respondent disclosing that it had more than **1000 occupiers** on the suit parcel of the land.

5. They argued further that the 1<sup>st</sup> Respondent did not disclose the existence of the Applicants and the 13<sup>th</sup> defendant did not enjoin the Plaintiffs as interested parties or trespassers. Their case was that they were innocent and *bona fide* members of the 1<sup>st</sup> Respondent, and they risked being evicted thereby causing a major humanitarian crisis to the general public. They thus posited that the restraining orders sought were of urgency.

6. The Applicants stated also that there was a high chance of chaos erupting, skirmishes and/or bloodshed due to the intended eviction thereby endangering the lives of those who were in occupation or possession on the suit land. They then argued that it was incumbent upon the 1<sup>st</sup> Defendant and 13<sup>th</sup> Respondents to ascertain the contested title parcel **L.R. 5707(R)** and **L.R. No. 5707(6)**. Their case was that it was proper and just that the Director of Survey prepares a report based on the Deed Plan of **No. 5707 IR No.18551** hence the interest of justice demanded that the orders sought be granted.

7. The Application was supported by the Affidavit of one **Evans Simiyu Sundwa**, sworn on **17/11/2021**. He deponed that he had sought authority to represent the Applicants and he was conversant with the issues raised in the suit hence competent to swear the affidavit. Although he did not annex the authority to the Affidavit, the Court record shows that the said authority was filed on **24/11/2021** together with the Plaintiff.

8. The deponent then reiterated the contents of the grounds of the Application. First, they argued that they were innocent purchasers of the land in issue, namely, **L.R. No. 5707(R)** measuring (... - some information missing here) acres, curved out of the whole parcel of land namely **L.R. No. 5707 IR No.18551** measuring **746** acres. To support this fact, he annexed to the Affidavit a copy of the title and marked it as **ESS '1'**. He then annexed to the Affidavit and marked as **ESS '2'** a bundle of copies of share certificates and marked them as **ESS '2'**.

9. His deposition was that he and the others had been in lawful possession and occupation of the suit land, cultivating and ploughing it, and had developed their respective plots thereon. The parcel was curved out from parcel of the land **LR No. 5707(R)**. He annexed to the Affidavit and marked as **ESS '3'** bundles of photographs showing the Plaintiff's homestead.

10. He deponed further that the 1<sup>st</sup> Respondent, Tawai Limited and the 13<sup>th</sup> Respondent have had acrimonious wrangles between themselves over the suit land but they did not involve the shareholders who were the Plaintiffs herein. As a result, the Plaintiffs were condemned unheard. Although he did not state wherein that happened, it came out clearly that it was in **Eldoret ELC No. 87 of 2015**. Theirs was an argument that they were neither enjoined as parties nor sued as interested parties or trespassers by the 13<sup>th</sup> Respondent.

11. The deponent put it further that they came to know that they were condemned unheard and adverse orders issued, in form of an eviction, against the 1<sup>st</sup> Respondents to the detriment of the Applicants. He pointed out that it happened in **Eldoret ELC Case No. 87 of 2015**, in which case they did not participate, contrary to the rules of natural justice. He swore that the Applicants being innocent and *bona fide* members of the 1<sup>st</sup> Respondent company's farm land comprising of thousands of occupiers they risked being evicted and a major humanitarian crisis ensue. He annexed and marked as **ESS '5'** a copy of the eviction notice issued in **Eldoret ELC 87 of 2015**.

12. He emphasized on oath that there 1<sup>st</sup> Respondent had management wrangles with a splinter group's fraudulent transactions which adversely affected them. He annexed and marked as **ESS '6'** a copy of a letter dated **22/01/2017** in which the Registrar of Companies referred to the revocation of an erroneous **CR 12** issued on **08/12/2016**. He then deposed that the directors of the 1<sup>st</sup> Respondent had subdivided land parcel, namely, **5707/R (sic)** being registered as **Kiminini/Kiminini Block 7 (0-297)**. He annexed and marked as **ESS '7'** copies of correspondence of the sub-division. Finally, he deponed that the Plaintiffs had demonstrated a *prima facie* case as provided in the case of **Giella-Vs-Casman Brown** warranting the court issue the injunctive reliefs sought, and he prayed for.

#### **b) The Response the 1<sup>st</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> Respondents**

13. The Respondents opposed the Application through the Replying Affidavit of one **George Mubichakani Malanga**. It was sworn on **08/12/2021** and filed on **09/12/2021**. In it he deponed that he was the Chairman of the Board of Directors of the 1<sup>st</sup> Respondent, Tawai Ltd. He also stated that he was sued as the 8<sup>th</sup> Respondent hence competence to swear this affidavit. He admitted that he and the 4<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> Respondents were both members of the 1<sup>st</sup> Respondent and its Directors of the Board of Management. He stated the parties had duly instructed him to swear the Affidavit. He termed the Application as frivolous vexatious and an abuse of the court process.

14. He stated that the suit was incompetent, bad in law and fatally defective for multiplicity since the application ought to have been filed in **Eldoret ELC No. 87 of 2015** (Formerly, **Kitale HCC No. 18 of 2008**). He deponed that if at all the Applicants were genuine members of the 1<sup>st</sup> Respondent, they were bound by the orders made by the courts of law for and against the 1<sup>st</sup> Respondent which was given an adequate right to be heard, in the Eldoret case. He termed them as busybodies and non-members of the 1<sup>st</sup> Respondents. Again, he stated that the Applicants were not purchasers as alleged.

15. The deponent stated further that the 1<sup>st</sup> Applicant was a stranger to the 1<sup>st</sup> Respondent since he was neither a shareholder nor purchaser.

He then swore that the 1<sup>st</sup> Applicant had forged the signature of **Rajab Kilwake Wanyonyi** because her known signature was very different from the purported signature as appearing on her receipts numbers **151, 153, 155, 159, 125, 0462, 163, 170, 172, 173, 174, 175, 176** and **177** copies of which he annexed to the Affidavit and marked them as **GMM-1(a), (e), (f), (h) & (i)**.

16. He then gave the company policy or principle which was that the company requirement was that any company money earned whether by sale of shares or other income generating activity would be deposited into the company Bank Account. Otherwise it would be presumed as not being the 1<sup>st</sup> Defendant's but for individual recipients for their private transactions.

17. He discounted the photographs exhibited as annexures to the supporting affidavit since they did not indicate who took them, the date and place he did so and the type of structure photographed. He then argued that the photos had no evidential value.

18. He also deponed that the purported allotment letters produced were not of the 1<sup>st</sup> Defendant. Instead they were forgeries. He swore that the Board of Directors had reported the matter of Kiminini Police Station and the station officers were in hot pursuit of the culprits who were likely to be arrested any time soon. He annexed copies of complaint letters written by the 1<sup>st</sup> Respondent to the Officer Commanding Station (OCS) Kiminini and marked them as **GMM-2**.

19. Of curiosity was that the deponent stated further that he had met and interacted with some of the people listed as Plaintiffs and he was shocked to learn that they were not even aware of the instant suit and some purported that their signatures were forged. Further to that he deponed that some of the purported Plaintiffs were dead. He indicated that the defence would be insisting that each of the purported Plaintiffs attend Court at the appropriate time. He gave an example of one **Rosemary Nakhumicha Simiyu** who is said to have died on **25/08/2018** but she was listed as Plaintiff/Applicant **No. 42** and she purportedly signed the instruction letter of authority to 1<sup>st</sup> Plaintiff and affidavit. He annexed a copy of her Certificate of Death and marked it as **GMM-3**.

20. He then deponed that the instant suit had been filed without leave of court hence contravened the orders which Hon. Justice Chemitei issued on **11/06/2019**. He annexed the copy of the order issued in **Kitale High Court Case No. 22 of 2018**. He annexed a copy of the said order and marked it as **GMM-4**. He termed the suit as incompetent and fatally and defective. He sought its dismissal. He also contended that the threshold for the grant of an injunction as set out in **Giella v cassman Brown (1932) EALR** had not been met.

c) **Replying Affidavit by the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents**

21. The 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> opposed the Application by way of a Replying Affidavit sworn by one **Mathew Juma Khisa**. It was sworn on **14/12/2021** and filed on **16/12/2021**. He deponed that he too was one of the directors of the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Respondent's Board of Directors authorized him to swear the Affidavit also on behalf of the 1<sup>st</sup> Respondent through a resolution made on **24/11/2021**. He annexed a copy of the authority and marked it as **MJK 1**. He pointed out that he was the 6<sup>th</sup> Respondent and had authority to depone the Affidavit on behalf of the other respondents.

22. To him, he deponed that, the prayers (c), (d) and (e) of the Application dated **17/11/2021** had merit. His deposition was that the Applicants were members of the 1<sup>st</sup> Respondent by virtue of being allotted shares by the directors of the Company. He then deponed that the orders sought against the 13<sup>th</sup> Defendant ought to be considered because they were issued (by the Court in the Eldoret case) against the 1<sup>st</sup> Respondent and directed to it as a legal entity without considering its members, shareholders and or purchasers who were the Plaintiffs.

23. He contended that the case, **Eldoret ELC 87 of 2015**, was between the 1<sup>st</sup> Defendant/Respondent (Tawai Limited) and the 13<sup>th</sup> Defendant (Eldoret Express Co. Ltd). He deponed that the Applicants were neither sued nor joined as parties to defend their proprietary interests. He then stated that the subject matter in the aforesaid suit was land parcel **L.R. 5707 IR 18551** measuring **764** acres wherein some of the directors and the Plaintiff occupied a portion measuring over **200** acres.

24. They too supported the idea that there was a likelihood of chaos erupting and there being bloodshed if the intended eviction was to be carried out. They then stated that this Court should determine or ascertain the contested title parcels **L.R. 5707 (R)** and **L.R. 5707(6)** and the latter did not exist and it did, it was obtained fraudulently. He produced and marked as **MJK 2** a copy of the title.

25. He then alluded to mismanagement of the 1<sup>st</sup> Defendants and internal wrangles therein, alleging that there are more than **eleven** directors whose association affected the operations of the Company which was detrimental to the Applicants. He stated that there were two factions within the 1<sup>st</sup> Respondent. One of them had gone ahead to subdivide the suit land giving rise to land parcel numbers **Kiminini/Kiminini Block 9(0-297)** without the involvement of the directors. He annexed and marked **MJK 3** copies of correspondences between the directors and the surveyor. He then stated that the eviction order was in respect of **L.R. No. 5707/6** whereas the surveyor's plan indicated **L.R. No. 5707(R)**. He then prayed for partial grant of the reliefs sought.

d) **Supplementary Affidavit**

26. Upon being served with the responses by the Respondents, the Applicants filed a supplementary Affidavit through one **Evans Simiyu Sundwa**. He did so on **16/12/2021**. In the Affidavit he deponed that it was evident that there were wrangles in the 1<sup>st</sup> Respondent's management and that the Applicants were not involved in the **Eldoret High Court Case No. 87 of 2015**. He reiterated that the Applicants were bona fide purchasers. He then sought to explain that the allegation of some members being deceased and signatures being forged were weird allegations by the 8<sup>th</sup> Respondent working in cahoots with the splinter group. He then deponed that the claim that said Rosemary Nakhumicha Simiyu died bordered on perjury. He annexed and marked as **ESS 1** a copy of an Identity Card of the said person. He then swore that the other Respondents seemed to agree to the predicament the Applicants were in and did not oppose the Application hence it be granted.

## SUBMISSIONS

27. The Application was disposed of by way of written submissions. The Applicants filed theirs on 16/12/2021 while the 1<sup>st</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> Respondents filed theirs on 09/12/2021. The 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants filed theirs on 16/12/2021.

28. In the Plaintiff's submissions they raised a number of issues, namely, whether they were bona fide members and innocent purchasers for value, of which they submitted they were; whether the Plaintiffs were aware of the eviction orders issued in **Eldoret ELC No. 87 of 2021** (sic) (formerly **Kitale HCC No. 18 of 2008**), of which they stated that they were not up to when they learnt of them in **October, 2021** through service of the same by the bailiffs; whether they were condemned unheard, of which they relied on the principle of "*audi alteram partem*" (hear the other side) as a matter of natural justice, and they relied on **Article 47(1) and (2) of the Constitution of Kenya, 2010** and two cases, namely ***Egal Mohammed Osman v. Inspector General of Police & 3 others [2015] eKLR*** and ***Judicial Service Commission v. Gladys Boss Shollei and another [2014] eKLR***; whether the Respondents controverted the orders sought by the Applicants, of which they stated that some of the Respondents did while others (of a different faction) did not; and whether they had brought themselves within the requirements of the ***Giella v Cassman Brown*** case, of which they stated they did by summing it up that they satisfied the three requirements.

29. The 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants submitted that they did not oppose the orders sought. They submitted further that it was not disputed that the Applicants were members of the 1<sup>st</sup> Defendant and that they ought to be given an opportunity to be heard. They too insisted that in the event of eviction there was a likelihood of eruption of chaos.

30. The 1<sup>st</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> Respondents appear to have been left (others) all alone to oppose the Application. Their submissions were that to seek to stop the decree of a superior competent Court by another superior one was an absolute and that such a suit was duplicitous. The also submitted that on 11/06/2019, the High Court barred the parties herein from filing any suits involving Tawai Co. Limited without leave of the Court. They then stated that the present suit having been brought without such leave was incompetent and fatally defective. They refuted the point that the Application had met the requirements of the ***Giella v. Cassman Brown*** case. They emphasized that the Applicants had even forged some signatures of deceased persons and they (Applicants) were not genuine in their Application. They prayed that the Application be dismissed with costs.

## ISSUES, ANALYSIS AND DETERMINATION

31. I anxiously and carefully considered the instant application, the grounds it was brought under and both affidavits in support. I also duly took into account that there were replying affidavits and submissions on the positions taken by the respective respondents both groups which took opposing sides as well. I gave due regard to the law cited and authorities relied on as well. I found that the instant matter raised at the interlocutory stage weighty issues which go to the root of the suit, particularly those by the 1<sup>st</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> Respondents. As I determined the merits of the Application I had to consider the said issues because granted that the said issues were successful to cause the prayers sought being denied, if the Court would not give their import in relation to the status of the Suit, they would have to be determined soon after, by way of preliminary objections and still the Court would have to come to similar conclusions. Prudence requires that they be considered at once. Therefore, I find the following as issues for consideration:

- a) *Whether the suit is defective for duplicity;*
- b) *Whether the suit contravenes the orders made on 16/06/2019;*
- c) *Whether the application is merited;*
- d) *What orders to issue and who to bear costs?*

32. Since this suit raises a number of issues some of which go to its root, it is proper to deal with them in an organized sequence beginning with those that, if merited, may determine both the entire suit. This is because once one succeeds, there would be no need to analyze the other issues. Thus, I start with the first one, namely, whether the suit is defective for duplicity.

33. The Applicants contended that the orders they sought to stop or have declared as having condemned them were issued by my brother or sister judges sitting in the Eldoret station of this Court. They gave the case in question as **Eldoret ELC No. 87 of 2015** (Formerly **Kitale HCC. No. 18 of 2008**). It is clear that this Court is being called upon to act on orders issued by its sister Court. The prayers are not for review of the orders of my brother or sister judge but in a completely new or fresh matter. The Eldoret Court is not a subordinate Court to this one lest one would think that the Applicants ought to have moved this Court by way of judicial review.

34. Furthermore, the Applicants made a claim that they are innocent purchasers and or occupiers. This Court will not dwell so much on the import of the two terms or positions of some of the Applicants if it would be believed as such. But suffice it to say that if they are purchasers (of land in the area) then they are not members of the 1<sup>st</sup> Respondent because purchase of land from a shareholder or member does not qualify one to automatically be a member. What entitles one to be a member of a company is the purchase of a share or shares of the company. This they ought to have demonstrated clearly.

35. Secondly, if they are occupiers of part of the land, that makes them squatters or licencees by whatever way they may have come onto the land. In such circumstances they have no business interfering with the affairs of the company. A company's business is run by its members in two levels: the shareholders through General and Special meetings, and the Board of Directors' meetings. If the applicants are occupiers they cannot participate in any of the two levels. In essence the Applicants ought to have elected on who they are in relation to the Company (Tawai Limited). Mere presence on the company's or the shareholders' land does not entitle one to meddle with the affairs of the company.

36. One of the puzzling things that this Court was called upon to ponder about is the view, opinion and language of the Applicants about

why the eviction orders of the Court given on **23/06/2021** should not be effected. The alluded to there being chaos, violence and bloodshed if that happened. With due respect, the Court cannot be hoodwinked into not issuing orders towards the ends of justice simply because some people or parties have purposed in their hearts or minds that they will disobey or disregard the of court orders though causing mayhem, breach of peace and violence. It is worth putting it to everyone, including the parties herein, that they ought to obey the law. This, in my view is blackmail to the Court. It does not matter whether the orders are for eviction or otherwise: obedience to the law is key. If it is legally determined, as it has in **Eldoret ELC No. 87 of 2015**, that the Applicants have a duty to move out of the land peacefully since it would be settled that it is not theirs. They do not have to purpose to die or harm themselves on it through meaningless and unlawful resistance. Ours are a country is not a man eat man society. We are a civilized nation whose citizens love and respect the rule of law. So much so that if one is ordered to move out of some else's land he should do so peacefully. He should not '*see bloodshed*'. Having said that I now turn to the issues raised.

37. In urging the prayer for injunction as made in prayers (b) and (c) of the Application the Applicants brought out another prayer (d) that the Court declares that they were condemned unheard in **Eldoret ELC Case No. 87/2015 (Formerly Kitale HCC No.18 of 2008)** and therefore adverse orders were issued in the case to their detriment. I will not get into enumerating and explaining the rules of natural justice. But one of them – the right to be heard – has been brought into focus. There is no dispute that the Eldoret case exists referred to exists. All parties herein agree that there are valid orders in place in the matter. To make it clear, there is no doubt that the Court issued an order for eviction in the said matter: that was on **23/06/2021**. A copy of it was Annexure ESS 5 of the Applicant's Supporting Affidavit sworn by Evans Simiyu Sundwa. The parties in the **Eldoret ELC No. 87 of 2015** were **Eldoret Express Company Limited vs. Tawai Limited and the National Land Commission**. The Plaintiff in that case is the **13<sup>th</sup>** Defendant/Respondent herein while the **1<sup>st</sup>** Defendant in the case is now the **1<sup>st</sup>** Defendant in this case. Only the **2<sup>nd</sup>** Defendant in the case has been left out of the suit herein.

38. This Court decided to use the simplest of the explanations and illustrations possible in this ruling so that the parties herein will quickly and easily understand the issues at hand. Thus, I start by looking at the facts not in dispute as between the parties herein. It is common ground that the orders of **23/06/2021** arose from others issued earlier, on **19/11/2020** in the same case. There is consensus between the parties that the land parcels of land in that case were the same as the instant case. The only issue is that the parties keep referring to one of them as **L.R. No 5707/R** or **L.R. No. 5707 (R)**. Otherwise the Applicants would not be complaining that they were "condemned unheard." Therefore, what is not in contention is that, if the arguments by the Plaintiffs is anything to go by, they - the Applicants - should have been given a hearing in the **Eldoret ELC No. 87 of 2015** but they were not.

39. Again, the Applicants argued that they were left out of the proceedings in the Eldoret Case by not being made parties as Defendants or Interested Parties. They contended that that would have been so because they were members or innocent purchasers of some of the parcels of land in issue hence they were condemned unheard when the **Eldoret High Court No. 87 of 2015** proceeded to hearing in their absence. Further, they argued that the **1<sup>st</sup>** Defendants/Respondents participated in the proceedings of the case in point but to their exclusion hence they were prejudiced. It is also clear from the facts before me that the proceedings in **Eldoret ELC No. 87 of 2015** are concluded so far. That means that whatever the parties complain of which they should have been heard on is settled in that case. That is why they argue that they were condemned unheard. And if the issues therein are not concluded, then the parties have not been condemned unheard: they can join the proceedings therein and be given a hearing. But to the extent that the Applicants argue that they were condemned unheard, it means that the subject in that suit is settled. If it is settled, then to raise it in a separate subsequent suit is to go against the doctrine of *res judicata*.

40. The concept of *res judicata* is not a complex doctrine to understand. It simply means that a court of competent jurisdiction has made findings in merit on issues between same parties litigating under same title. The fact that a party excludes or includes one or more parties in a subsequent suit does not change the character and application of the doctrine. In **Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR** the Court of Appeal stated as follows:

***"To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."***

41. Section 7 of the **Civil Procedure Act** provides for the application of the doctrine in Kenya. 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."***

42. In situations where a party raises the point that he was not heard, he is in essence saying that there was a competent forum which considered the same issues as the ones he is raising or they were directly or indirectly substantially in issue in that former matter but he was not given opportunity to be heard. Such opportunity could have been denied by virtue of his not being accorded a chance to speak if he was in the proceedings or he was left out of the proceedings. If the latter is, that is to say, that he was left out of the proceedings, he can only go back to the same forum, inform it that he should have been in the proceedings but for reasons beyond his control (not adverted to) he did not find himself in the proceedings, and then request that he be heard. The Applicants have not done so in the instant case.

43. When a party raises the point that *res judicata* applies, it is a preliminary point of law which does not require evidence. The Court needs only to look at the law and the pleadings before it. A preliminary objection was defined in the *locus classicus* case of **Mukisa Biscuits Manufacturing Ltd. vs West End Distributors Ltd. [1969] E. A. 696**. If it succeeds, it disposes of a matter.

44. One thing that is clear, from the facts laid before this Court through the Replying Affidavits of is that the Applicants were subsumed in the title of the **1<sup>st</sup>** Defendant in the **Eldoret ELC No. 87 of 2015**. They still argue that they are members of the entity, Tawai Limited. They cannot run away from the fact that when Tawai Limited litigated the matter in **Eldoret ELC No. 87 of 2015** it did so in its capacity as a company which acted on behalf its members, of whom they are, if their argument would be taken to be true. Tawai Limited is a limited liability company whose members operates through the Board of Directors as the law provides, and they do so as a collective. There is no

severance of the members unless and until the company is would up or ceases to exist. It is immaterial whether it has factions or splinter groups. I do not want to deal with the doctrines of separate entity established in the case of **Salomon v. Salomon & Co Ltd [1897] AC 22** but it is important to remind the Applicants and some of the Respondents herein of the import of that case. In conclusion, this Court is of the view that this suit is *res judicata* and cannot therefore be properly entertained.

45. For the reasons above, I do not wish to spend time and other resources on the issue of this suit being one of a multiplicity of suits. However, it is without a doubt that once the Applicants knew that there were issues they should have been heard on in **Eldoret ELC 87 of 2015**, they ought to have moved the Court in the same matter so as to avoid another suit being filed and raising the same issues. It was not open for them to file another suit hence creating a multiplicity of suits.

46. In any event this is a court of competent jurisdiction and of the same level and is actually the same as the one sitting in Eldoret only that it has the Eldoret ELC Registry which functions the same way as the Kitale one. In filing the suit to stop the execution of the eviction orders issued in the Eldoret Court, the Applicants wish to indirectly treat and view the Eldoret Court as one whose orders are subject to Judicial Review. They may not have stated that they have filed an application for Judicial Review but by coming to this Court complaining of the fact that they were condemned unheard, they want this Court to declare the process followed by the Court in Eldoret a nullity. This is akin to moving the Court to make an order for judicial review over the decision of my brother/sister judge. It is not possible. On that account the Application and suit must fail.

47. Turning to the issue that whether the suit contravenes the orders made on **16/06/2019**, it requires this Court to examine the order and compare it with the circumstances herein. The order referred to and its import was introduced into these instant Application through the Affidavit of one **George M. Malanga**, the **8<sup>th</sup>** Respondent. It was sworn on **8/12/2021** and it annexed the said order in support of his deposition at paragraph **19** where he stated that the suit contravened the order. Therefore, at paragraph **20** he termed the suit as incompetent and fatally defective. The order was attached as annexure **GMM-4** of the Affidavit.

48. This Court had the occasion to examine the order. It was issued on the said date in **Kitale High Court Civil Case No. 22 of 2018**. The suit was instituted by the **1<sup>st</sup>** Respondent against six people of whom the **2<sup>nd</sup>**, **3<sup>rd</sup>**, **7<sup>th</sup>**, and **8<sup>th</sup>** Respondents were defendants. The relevant order which is said to have been contravened stated as follows:- “ No Director, past or present or member and or shareholder or purchaser of the said parcel of land should file any suit, application or claim relating to the Plaintiff Company without obtaining the leave of this Court pending further directions from Court.” I perused the order further and found that the parcel of land in question is **L.R. No. 5707/R**, which is the same parcel of land referred to in these proceedings.

49. When the issue was raised by the **1<sup>st</sup>**, **4<sup>th</sup>**, **8<sup>th</sup>**, **9<sup>th</sup>** and **12<sup>th</sup>** Respondents, the Applicants and the rival respondents did not raise any fact to counter the same. Moreover, the rival Respondents on whose behalf the **1<sup>st</sup>** Respondent played the ‘same side of league’ (I note here that the **1<sup>st</sup>** Respondent who was with the others I have singled out above was represented by a different law firm again but this time round with the **2<sup>nd</sup>**, **6<sup>th</sup>**, **10<sup>th</sup>** and **11<sup>th</sup>** Respondents did not oppose the Application again did not rebut the existence of the said order to date. It is absurd.

50. Absent of an order to the contrary of the annexure **GMM4**, I find that the suit was instated by purchasers and or members or shareholders of the **1<sup>st</sup>** Respondent but without any leave of the Court. It is therefore incompetent, fatally defective and should be struck out.

51. Striking out as I do is a painful step but if the Plaintiffs did not comply with the law (order), there is little this Court can do. And as I do so, the other disturbing issue that was raised was that the suit was brought by or on behalf of some people who are said to be dead.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 22ND DAY OF MARCH, 2022.**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**