



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. E042 OF 2020

EUNICE GRACE NJAMBI KAMU.....1ST PLAINTIFF

DAVID HENRY KARANJA MBOGUA2ND PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

CHINA ROAD & BRIDGE COPORATION.....4TH DEFENDANT

RULING:

INTRODUCTION:

1. On the 25th February 2022, this Court rendered a Ruling in respect of two (2) Applications, namely, the Notice of Motion Application dated the 28th July 2020, as well as the Application dated the 10th September 2021, respectively, both of which were filed and/or lodged on behalf of the Plaintiffs herein.
2. In the course of delivery of the said Ruling, the Court made observations, which were captured vide Paragraphs 63 and 64 thereof and where the Court observed as hereunder;

“Para 63...

Before I reach conclusion in respect of the subject matter, there are two issues which I have not dealt with or addressed and same are as hereunder;

- a. Whether the subject suit is res-judicata on the basis of the proceedings and decision in ELC CIVIL SUIT NO 976 of 2012.*
- b. Whether the subject suit offends the provisions of Section 34 of Civil Procedure Act, Chapter 21 Laws of Kenya.*

Para 64.....

I must point out that though this two issues are pertinent and may impact on the validity on the subject suit, same were not addressed by the parties and in this regard, the court shall upon delivery of the ruling invite the parties and their advocates to address same vide further submissions.

3. Pursuant to the foregoing, the court indeed invited the Advocates of the Parties to file further submissions over and in respect of the twin issues, to enable the Court to be able to address and/or adjudicate upon same.
4. Other than the foregoing, there is also an Application that was filed by the 1st Defendant, namely, the Application dated the 26th July 2021, which seeks the following orders;
 - a. The Honourable Court be pleased to strike out the Complaint dated the 8th July 2020.*

b. *Costs of this application and of the suit be awarded to the 1st Defendant/Applicant.*

SUBMISSIONS:

5. The subject matter came up on the 25th February 2022, where upon the court delivered a ruling and thereafter issued further directions as to the disposal of the two issues, whose details were enumerated in terms of paragraphs of 63 and 64 of the ruling rendered on even date. Besides, directions were also issued as pertains to the disposal of the Application dated the 26th July 2021.

6. For the avoidance of doubt, the Parties herein agreed to have the itemized issues addressed and/or ventilated by way of written submissions, to be filed and exchanged within set time lines.

7. For coherence, the 1st Defendant, was directed to file and serve the written submissions in respect of the Application as well as the two identified issues within 14 days and thereafter the Plaintiffs and the rest of the Parties were to file and serve their written submissions within 14 days from the date of service of the 1st Defendant's written submissions.

8. Suffice it to note, that the 1st Defendant filed her written submissions on the 14th March 2022, whereas the Plaintiffs' filed their written submissions on the 4th April 2022.

9. On the other hand, the 3rd Defendants filed their written submissions to the Application dated the 26th July 2021 on the 10th December 2021, long before the directions of the court, which were issued on the 25th February 2022.

10. However, the 3rd Defendant did not file any written submissions as concerns the issues pertaining to the import and tenor of the Provision of Section 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya, being one of the issues, which was identified by the court, in terms of the ruling rendered on the 25th February 2022.

11. On the part of the 1st Defendant, it was submitted that the Plaintiffs' suit raises issues pertaining to execution, enforcement, implementation and/or satisfaction of the Decree issued vide ELC Petition No. 976 of 2012, which was between Grace Njambi Kamau & Another v The Attorney General & Others, who are substantially the same Parties who have been sued in the instant suit herein.

12. To buttress the submissions herein, the 1st Defendant, has invited the court to take cognizance of paragraphs 10, 16, 17, 18, 20 23, 24 as well as the prayers sought at the foot of the Complaint dated the 8th July 2020.

13. In a nutshell, it is the 1st Defendant's submissions that what the Plaintiffs herein are seeking is enforcement, execution and/or realization of the terms of the decree which was issued in the previous suit against the same Parties herein and/or substantially the same Parties, to the extent that the 1st Defendant herein was indeed sued in the previous suit as the 5th Respondent.

14. On the other hand, it has been submitted that the 2nd Defendant herein, was similarly, sued as the 2nd Respondent, albeit through her predecessor, namely, the Commissioner of Lands.

15. It has further been submitted that the 3rd Defendant herein, was also the 1st Respondent in the previous suit. In this regard, the 1st Defendant has contended that the subject suit is a replica of the previous suit.

16. In the premises, it is the 1st Defendant's contention that the issues being raised in the subject suit, ought to have been addressed vide the previous suit in line with the Provisions of Section 34 of the Civil Procedure Act, as read together Order 22 Rule 6 of the Civil Procedure Rules 2010.

17. Secondly, the 1st Defendant has also contended that the subject suit, is also barred by the Doctrine of Res-Judicata and is thus prohibited by dint of Section 7 of the civil procedure Act, Chapter 21 Laws of Kenya.

18. In this regard, it has been submitted that the issues that are being raised herein, including the issue of ownership, compensation, permanent injunction and compulsory acquisition or payment of value of the Land, were issues that were dealt with in the previous suit, namely ECL Petition No 976 of 2012 and thus same cannot be re-agitated herein.

19. Thirdly, the 1st Defendant has submitted that even though the suit herein was filed and/or lodged vide Complaint dated the 28th July 2020, the Plaintiffs herein, have neither extracted nor served Summons to enter appearance, either as required under the law or at all. For clarity, it has been pointed out that the Plaintiffs' were obliged to extract the summons to enter appearance within 30 days from the date of lodgment of the suit, which has not been done.

20. Based on the foregoing, the 1st Defendant has invoked and/or relied upon the provision of Order 5 rule 1 of the Civil Procedure Rules, 2010 and in this regard, same has contended that the Plaintiffs' suit has therefore abated and hence same has ceased to exist in the Eyes of the law.

21. On her part, the 3rd Defendant has supported the 1st Defendant's position and has reiterated the submissions that to the extent that no Summons to enter appearance were ever taken out and/or extracted within 30 days from the filing of the subject suit, the suit herein has therefore abated.

22. Secondly, the 3rd Defendant has further submitted that the issues that have been raised and ventilated in the subject suit were pre-eminent in ELC Petition No. 976 of 2012, which was heard and determined vide judgment delivered on the 10th July 2013 and hence the subject suit is Res-Judicata.

23. Premised on the foregoing, the 3rd Defendant has impleaded and relied on the provision of Section 7 Of the Civil Procedure Act, Chapter 21, Laws of Kenya and contended that the instant suit is Res-judicata.

24. On their part, the Plaintiffs' herein have conceded that same have previously filed and/or lodged ELC Petition No. 976 of 2012 between Eunice Grace Njambi Kamau and Another versus The Attorney General & 5 Others, which touched and/or concerned the issues of ownership of the suit property herein.

25. However, the Plaintiffs have contended that the dispute that was dealt with in the previous suit was separate and distinct from the issues in the subject matter and the Parties were also substantially different.

26. Based on the foregoing, it is the Plaintiffs' submissions that the issues that have been raised herein, including the Notice dated the 23rd June 2020, which was issued by the 1st Defendant and which precipitated the filing of the subject suit, could not have been dealt with and/or addressed in the previous suit, in the manner proposed by the 1st Defendant.

27. On the other hand, the Plaintiffs' have further submitted that the 2nd and 4th Defendants herein were also not Parties to the previous suit and therefore the Doctrine of Res-Judicata cannot be said to apply, yet the claims and/or issues affecting the said Defendants, could not have been determined in the previous suit.

28. Secondly, the Plaintiffs' have further submitted that the provisions of Section 34 of The Civil Procedure Act, Chapter 21, Laws of Kenya, deals with issues of execution, satisfaction and/or discharge of decrees, but same does not apply in respect of new matters and causes of action, which were neither dealt with, nor canvassed in the previous proceedings.

29. In any event, the Plaintiffs have further added that the Provisions of Section 34 of The Civil Procedure Act, would only apply to the Parties and/or litigants who are privy to the suit, but not new Parties, as in the case herein, where completely new Parties have been impleaded as Defendants. Consequently, it is the Plaintiffs' submissions that the provisions of Section 34 are irrelevant and inapplicable to the subject matter.

30. Finally, the Plaintiffs' herein do not dispute and/or contest the contention that no summons to enter appearance were ever extracted and/or sealed within the 30 days of the lodgment of the Plaint or at all. In any event, there is also no indication that any Application has ever been made to seek for extension of time to file and/or extract summons to enter appearance.

31. Be that as it may, it is the Plaintiffs' submissions that the failure to extract and serve summons to enter appearance is a procedural lapse and/or inadvertence, which should not be relied upon to invalidate a suit and in this regard, the Plaintiffs' have invited the Court to find and hold that such a failure does not by itself invalidate a suit.

32. In support of the foregoing submissions, the Plaintiffs' have invited the court to take cognizance of the decision in the case of the **Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 Others (2016) eKLR**, **Equatorial Commercial Bank Limited v Mohan Sons (K) Ltd (2012) eKLR** and **Najibhai Prabhudas & Company Limited v Standard Bank Limited (1968) E.A.**, respectively.

33. Based on the foregoing, the Plaintiffs' have implored the court, to find and hold that procedural technicalities should not be upheld, so as to deny and/or deprive a litigant of a right to a Fair Hearing pursuant to and in line with Article 50 (1) of the Constitution 2010.

ISSUES FOR DETERMINATION:

34. Having reviewed the submissions by the Advocates of the respective Parties and having taken cognizance of the Pleadings filed, particularly, the Plaint dated the 28th July 2020, the following issues do arise and are germane for determination;

a. Whether the Instant suit is Res-Judicata and thus barred by the Provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

b. Whether the subject suit offends and/or contravenes the provision of Section 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

c. Whether the entire suit has abated for contravening the provisions of Order 5 Rule 1 of the Civil Procedure Rules 2010.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the instant Suit is Res-Judicata and thus barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

35. It is common ground that the Plaintiffs' herein had previously filed and/or lodged ELC Petition No. 976 of 2012 whereby same sought various reliefs pertaining to and/or in respect of L.R No. Kiambaa/Ruaka/1580, which is the suit property herein.

36. Following the lodgment thereof, same was disposed of vide Judgment rendered on the 10th July 2013, whereby the Court granted orders as hereunder;

a. The Acquisition by the Petitioners of L.R No. Kiambaa/Ruaka/1580 was lawful and in accordance with the law and therefore deserving of protection under Article 40 of the Constitution, 2010.

b. The Forcible entry, seizure possession and impending demolition of the Petitioners premises, namely, L.R No. Kiambaa/Ruaka/1580 amounts to violation of their rights to protection of Property under Article 40 of the Constitution, 2010.

c. An order of Prohibition be and is hereby issued to prohibit the Respondents severally and/or jointly from entry into, seizure, confiscation, occupation, alienation and from taking possession of Land parcel number L.R No. Kiambaa/Ruaka/1580 unless and/or until there has been compliance with the Compulsory acquisition provisions of the Land Act no. 6 of 2012 and Articles 40 of the Constitution.

37. Nevertheless, despite having accrued the foregoing orders, the Plaintiffs herein have now filed the instant suit and same are now seeking the following reliefs;

a. Declaration be issued to declare that the action of the Defendants constitutes contempt of this Court's judgment in Nairobi ELC Petition No. 976 of 2012 between Eunice Grace Njambi kamau & Anather v Attorney General & 5 Others (2013) eKLR.

b. Declaration be issued to declare that the 1st Defendants notice dated the 23rd June 2020 claiming that the suit property, namely, L.R No. Kiambaa/Ruaka/1580 belongs to the Government of Kenya is illegal for being contrary to compulsory acquisition provisions of Land Act No. 6 of 2012 and Articles 40 of the Constitution and in contempt of the Judgment in Nairobi ELC Petition No. 976 of 2012 between Eunice Grace Njambi kamau & Anather v Attorney General & 5 Others (2013) eKLR.

c. An order that the Defendants compensate the Plaintiffs' a sum of Kshs. 76, 650, 000/= Only, before the seizure, entry and/or use of the suit property namely L.R No. Kiambaa/Ruaka/1580 for road construction.

d. Special damages for loss of income in the sum of Kshs.31, 680, 000/= Only.

e. An order of Permanent Injunction to restrain the Defendants either jointly and/or severally from entering, seizing and/or using the suit property for road construction unless and until the Plaintiffs have been compensated by the 2nd Defendant.

f. An order of Mandatory Injunction to compel the 3rd Defendant to compensate the Plaintiffs for acquisition of the suit property for road construction in accordance with the Judgment dated and delivered on the 10th July 2013 in Nairobi ELC Petition No. 976 of 2012 between Eunice Grace Njambi kamau & Anather v Attorney General & 5 Others (2013) eKLR.

g. General damages for loss and damage occasioned upon the Plaintiffs by the illegal and unlawful acts and/or omissions on the part of the Defendants.

h. Exemplary and punitive damages.

i. Costs of this suit.

j. Interest on c, d, e, f and g above at court rates since the filing of this suit.

38. From the reliefs that are sought at the foot of the instant suit, it becomes evident and/or apparent that what the Plaintiffs are now seeking before the court are issues that were deliberated upon and/or ventilated before the court in the previous suit and were substantially pronounced upon by the court.

39. For the avoidance of doubt, it is worthy to recall that the honourable court granted an order of prohibition, which is akin to permanent injunction and which effectively barred the Defendants herein from interfering with, alienating and/or otherwise disturbing the Plaintiffs proprietary rights over the suit property.

40. On the other hand, it is also important to not that the court also decreed that the order of prohibition shall subsists until and unless the Respondents in the previous suit and more particularly, the 2nd Respondent herein, namely the Commissioner of Land, now defunct, commenced the process of Compulsory acquisition.

41. To my mind, the Reliefs being sought in respect of the instant suit, including the compensation in the sum of Kshs.76, 650, 000/= only, as well as the Special Damages of Kshs.31, 680, 000/= Only, which are predicated upon paragraphs 20, 21 and 22 of the Plaint, are actually premised on a valuation under the pretext that the land is being compulsorily acquired and/or surrendered to the 2nd Defendant.

42. In my humble view, the provisions of Sections 108 to 111 of the Land Act, No. 6 of 2012, as well as Articles 40 of the Constitution 2010, which regulates the process of compulsory acquisition do not envisaged private valuation for purposes of compulsory acquisition.

43. Nevertheless, the issue of private valuation aside, the critical point to note is that the issue of compulsory acquisition, which is intertwined with ownership of the suit property, was the subject of the previous proceedings, vide ELC Petition No. 976 of 2012, which was heard and determined and hence the issues being raised herein are Res-judicata.

44. In my humble view, the contention by the Plaintiffs that the 2nd and 4th Defendants herein were not Parties to the previous suit namely, ELC Petition No. 976 of 2012, does not take this particular matter, outside the purview of the Doctrine of Res-judicata.

45. However, before delving much into whether or not the addition of another Party into a subsequent suit, would take out the subsequent suit outside the four corners of the Doctrine of Res-judicata, it is worthy to point out that the Plaintiffs herein had sued and/or impleaded the Commissioner of Lands, as the 2nd Respondent in the previous suit (Petition).

46. It is common knowledge that the Commissioner of Land, now defunct, was/is the predecessor of the National Land Commission, who has been sued as the 2nd Defendant herein.

47. Certainly, it cannot now be said that the 2nd Defendant herein was not a Party to the previous suit, given that her predecessor was indeed sued. Suffice it to say, that Res-judicata binds not only the Party, but also the Party's representatives, agents and/or servants.

48. Notwithstanding the foregoing, it is also sufficient to state that the addition of a Party to a matter that has hitherto been heard and determined, does not take out the matter from the four corners of the Doctrine of Res-judicata.

49. In this regard, I beg dis-abuse the Plaintiffs' submissions that the joinder of the 4th Defendant as a new Party, would provide an escape route to defeat and/or evade the Doctrine of Res-Judicata.

50. In support of the foregoing observation, I beg to adopt and endorse the holding of the Court in the case of **E.T. v Attorney General & another [2012] eKLR**, where the Court observed as hereunder;

In my view the addition of the Attorney General and the exclusion of the petitioner's mother, who was present in the first suit are merely cosmetic changes which do not affect my conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the Agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as party to evade the general principle.

There is no doubt that a compromise was reached and that its effect was to bring the claim resulting to an end such that the attack on the Agreement is a collateral challenge. It is not permitted and amounts to an abuse of the court process which this court retains jurisdiction to stop.

51. Other than the foregoing decision, the import and tenor of the Doctrine of Res-judicata was also revisited in the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR**, where the Court of Appeal observed as hereunder;

'Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by 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.'

52. In a nutshell, it is my finding and holding that the subject suit, is barred by the Doctrine of Res-judicata, insofar as the issues being raised herein, were indeed raised and ventilated before the court and for clarity, the court proceeded to and pronounced itself upon the said issues with clarity and finality.

53. Perhaps, it is also imperative to observe that the Doctrine of res-judicata also addresses such issues that ought to have been raised as part of the claims and/or defense in the previous suit, but which were never raised. In this regard, such issues are deemed to be constructively Res-judicata and same are captured vide Section 7 (4) of the Civil Procedure Act.

ISSUE NUMBER 2

Whether the subject suit offends and/or contravenes the provision of Section 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

54. Before venturing to address and/or deal with the second issue herein, it is appropriate and/or expedient to take cognizance of import and tenor of the provisions of Section 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya, which provides as hereunder;

34. Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court. Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

55. My reading and understanding of the foregoing provisions is that issues pertaining to execution, enforcement, implementation, satisfaction and/or discharge of the decree issued by a court shall be addressed and/or dealt with by the court which issued the said decree and in any event, in respect of the said suit and not otherwise.

56. Simply put, one is not required to file a new suit for purposes of execution and/or implementation of the Decree issued in another suit or at all, whether the Issue in contention be one of Contempt of Court or otherwise.

57. Nevertheless, despite the existence of the provisions of Section 34 of the Civil Procedure Act, as read together with the provisions of Order 22 Rule 6 of the Civil Procedure Rules 2010, the Plaintiffs herein have proceeded to file another suit whose import and tenor is essentially to enforce, implement, execute and/or realize the terms of the decree which was issued vide ELC Petition No. 976 of 2012 Eunice Grace Njambi Kamau & Another v Attorney General & 5 Others.

58. Perhaps, to be able to understand that the subject suit is meant to enforce, implement and/or execute the terms of the decree realized from the previous suit, it is necessary to reproduce some of the Reliefs that have been sought at the foot of the current Complaint, which is dated the 28th July 2020. For clarity, the said Reliefs are as hereunder;

a. Declaration be issued to declare that the action of the Defendants constitutes contempt of this court's judgment in Nairobi ELC Petition No. 976 of 2012 between Eunice Grace Njambi kamau & Another v Attorney General & 5 Others (2013) eKLR.

b. Declaration be issued to declare that the 1st Defendants notice dated the 23rd June 2020 claiming that the suit property, namely L.R No. Kiambaa/Ruaka/1580 belongs to the government of Kenya is illegal for being contrary to compulsory acquisition provisions of Land Act No. 6 of 2012 and Articles 40 of the Constitution and in contempt of the judgment in Nairobi ELC Petition No. 976 of 2012 between Eunice Grace Njambi kamau and Another v Attorney General & 5 Others (2013) eKLR.

c. An Order of Permanent injunction to restrain the Defendants either jointly and/or severally from entering, seizing and/or using the suit property for road construction unless and until the Plaintiff have been compensated by the 2nd Defendant.

d. An order of Mandatory injunction to compel the 3rd Defendant to compensate the Plaintiffs for acquisition of the suit property for road construction in accordance with the judgment dated and delivered on the 10th July 2013 in Nairobi ELC Petition No. 976 of 2012 between Eunice Grace Njambi kamau & Another v Attorney General & 5 Others (2013) eKLR.

59. It is apparent from the thematic prayers, which I have enumerated from the preceding paragraph, that what the Plaintiffs are seeking herein are effectively the enforcement of the decree which same already have and which were granted in their favor vide the previous decision.

60. In the premises, the question that I must ask myself is whether this court can become a court for purposes of execution, to execute decrees issued by a court of concurrent jurisdiction and if so, what then is the import of Section 34 (Supra).

61. Put another way, can this court constitute itself as a supervisor to supervise and/or superintend the decision of a court coordinate and/or concurrent jurisdiction and wouldn't such kind of an action culminate into a travesty of Justice.

62. In my humble view, the provisions of Section 34 of the Civil Procedure Act, forbids and/or prohibits the filing and/or lodgment of a fresh suit for enforcement and/or execution of the decree issued vide a separate suit. Consequently, I find and hold that the subject suit, *is ipso facto*, an abuse of the Due process of the court.

63. In support of the foregoing observation, I beg to adopt and endorse the holding of the Court in the case of **John Muthee Ngunjiri & 4 others v Attorney General & 3 others; Kenya Power & Lighting Co. Ltd & another (Interested parties) [2021] eKLR**, where the court observed as hereunder;

Under section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya all questions that arise in consequence of execution of the decree ought to be submitted to the court executing the decree for determination. In the present matter it is evident that there is a question whether or not the 1st interested party can proceed with execution of its decree against the plaintiff. Though that question would appear to have been answered by F Tuiyott, J, if the plaintiff was dissatisfied with the answer they ought to have appealed against the decision and/or applied for a review if there were any grounds to seek one.

Although the plaintiff has formulated a prayer that he calls a moratorium suspending settlement of the decree and the sale of the suit property pending the hearing and disposal of the suit herein, the prayer essentially is one, if granted that would have the effect of staying execution of the High Court decree by way of attachment of the suit property by the Decree holder. If there was anything that could justify such a suspension, in my view, the proper court would still be the High Court which was seized with the application for execution.

Section 34 Civil Procedure Act provides as follows:-

34. Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

In my view issues and questions of the settlement of the decree in Nairobi HCC No.14 of 2004 (Commercial and Admiralty Division) are not issues that this court has jurisdiction to deal with. This court cannot purport to play an oversight role over the High Court. The court has concurrent jurisdiction with the High Court and in matters reserved for the High Court, it lacks jurisdiction to deal with the same and viceversa.

64. Similarly, I come to the conclusion that the subject suit runs afoul the provisions of Section 34 of the Civil Procedure Act and hence the Plaintiffs herein are non-suited.

ISSUE NUMBER 3

Whether the entire suit has abated for contravening the provisions of Order 5 Rule 1 of the Civil Procedure Rules 2010.

65. The 1st Defendant herein raised the issue that though the Plaintiff was filed on the 28th July 2020, the Plaintiffs' advocates neither generated nor extracted summons to enter appearance and in this regard, none was ever signed nor sealed whatsoever.

66. On the other hand, it was further submitted that despite the laps of 30 days within which the Plaintiffs were expected and/or required to extract summons to enter appearance, none was ever been extracted or sealed.

67. Consequently, the 1st Defendant contended that to the extent that no summons to enter appearance was ever extracted and/or sealed, the subject suit has since abated and hence ceased to exist in the eyes of the Law.

68. Confronted with the submissions by the 1st Defendant, the Plaintiffs herein did not contest the fact that no summons to enter appearance have been extracted. However, the Plaintiffs' herein contended that the failure to extract such summons is a procedural lapse, which by itself should not invalidate the suit and in this regard, the Plaintiffs have invited the court to ignore and/or disregard the said Lapse and proceed to uphold the suit.

69. Before resolving the dispute beforehand, it is imperative to take cognizance of the import and tenor of the provisions of Order 5 Rule 1 of the Civil Procedure Rules, 2010 and in this regard same are reproduced as hereunder;

1. Issue of summons [Order 5, rule 1.]

(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.

(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.

70. From the foregoing provisions, it is apparent that the Summons to enter appearance ought to be extracted, lodged with the court and same shall be sealed within 30 days from the date of filing of suit.

71. On the other hand, it is also imperative to note that where the summons are not collected for service within 30 days from the date of issue or notification whichever is later, the suit shall abate.

72. My understanding of the foregoing provisions is that it is mandatory upon the Plaintiffs or such other Party filing a suit to generate and lodge the summons to enter appearance alongside the Plaintiff and/or such other originating pleadings and upon such lodgment to endeavor to collect the summons within 30 days from the date of issue for purposes of service.

73. It is also apparent, that in the event of failure to comply, the net effect of such failure is that the suit shall abate.

74. I must state that where a suit abates, the same ceases to exist in the eyes of the law and same can therefore not be taken cognizance of. For clarity, it becomes non-existent and no further proceedings can be taken in respect thereof, unless and until same is revived, in accordance with the law.

75. To understand the import and meaning of abatement, I beg to borrow and adopt the holding and explanation of the Court of Appeal in the decision in the case of **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR**, where the court observed and explained as hereunder;

“The effect of an abated suit is that it ceases to exist in the eye of the law.”

76. Other than the foregoing decision, the legal implication of an abated suit was also discussed and/or deliberated upon in the decision in the case of **KENYA FARMERS CO-OPERATIVE UNION LIMITED V CHARLES MURGOR (DECEASED) t/a KAPTABEI COFFEE ESTATE [2005] eKLR**, where the court stated as hereunder;

Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.

77. In my humble view, given that no summons to enter appearance were extracted within the statutory timelines and coupled with the fact that no application for revival of the subject suit has ever been mounted by and/or at the instance of the Plaintiffs herein, I come to the conclusion that the suit herein has similarly abated and hence ceased to exist in the eyes of the law.

78. Perhaps, before I depart from the subject issue, it is imperative to take note of the decision of the court in the case of **Mobil Kitale Service Station v Mobil Oil Kenya Limited & Another (2004) eKLR**, where the court held as hereunder;

If there is no summons which was issued in the first instance then there is nothing capable of being extended. I agree with Mr Ohaga that the failure of the plaintiff to issue and give summons is in clear contravention of the order of injunction granted to the plaintiff. And it would be impossible for the defendant to respond to the suit. We ought to respect the rules of engagement for they are promulgated to achieve justice to the rival parties: Summons is a judicial document calling a party to submit to the jurisdiction of the Court and if the party is not given that opportunity how else would he submit to the jurisdiction of the Court. In my understanding, order 4 and 5 of the Civil Procedure Rules are designed to enable the parties to follow certain procedures. The word used is “shall” which makes it mandatory to comply with the direction. And if there is no explanation as to why the summons were not taken out then the Court has no discretion but a judicial duty to ensure the Rules of Procedure are followed and failure to observe would be fatal.

79. The conventional wisdom conveyed vide the decision alluded to in the preceding paragraph found favor and was endorsed by the Court in the decision in the case of **Lee Mwathi Kimani v National Social Security Fund & another [2014] eKLR**, where the court held as hereunder;

Under order 5(1) sub rules 3, 5 and 6 reproduced above it is evident that the plaintiff has an obligation to ensure the summons are prepared and signed by the court to facilitate service on the defendant. In the present case it is apparent the plaintiff did not follow up and/or collect the summons as envisaged under sub rule 6 of Rule 1 of Order 5. There is no indication that the plaintiff has applied for a re issue and/or extension of the original summons.

It is my view that where no summons have been issued in accordance with order 5 of the Civil Procedure rules there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are elaborate and comprehensive and we couched in mandatory terms and where for some reason a plaintiff has experienced difficulties in service of the summons Order 5 Rule 2 provides a reprieve in that a plaintiff can apply for the validity of the summons to be extended. Service of summons in my view is a vital step in initiating the litigation and thus until a summons is properly served the Defendant has no valid invitation to defend the suit.

80. Simply put, the path is well beaten. Where summons to enter appearance have neither been extracted nor served, the suit abates and the import of abatement cannot be gainsaid.

FINAL DISPOSITION:

81. Having reviewed the issues for determination that were outlined herein before, I come to the conclusion that the suit filed vide the Plaintiff dated the 28th July 2020, is not only barred by the Doctrine of Res-judicata, but same is also contrary to and in contravention of the provisions of Section 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

82. On the other hand, it is also imperative to implore Parties and/or litigants to endeavor to comply with the provisions of the law and to eschew blatant and/or flagrant disregard of the Rules of procedure and essentially those that are intertwined with the substance of a case, like

in the instance case, where summons to enter appearance were neither extracted nor served either as required or at all.

83. Nevertheless, I come to the conclusion that the Notice of Motion Application dated the 26th July 2021, by and/or at the instance of the 1st Defendant, is Meritorious. Consequently, same be and is hereby allowed.

84. In the premises, the Plaintiffs' suit be and is hereby struck out with costs to the 1st, 2nd and 3rd Defendants only.

85. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT

MR. MWATHE H/B FOR MR. KIBE MUNGAI FOR THE PLAINTIFFS.

MR. BRIAN OCHIENG FOR THE 1ST DEFENDANT.

N/A FOR THE 2ND ,3RD AND 4TH DEFENDANTS.