



**Ethics and Anti-Corruption Commission v Wazazi Farmers Company Limited & 6 others;
Kenya Agricultural and Livestock Research Organization (Interested Party) (Land Case
E052 of 2024) [2025] KEELC 4189 (KLR) (Environment and Land) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4189 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
LAND CASE E052 OF 2024
MC OUNDO, J
MAY 29, 2025**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

WAZAZI FARMERS COMPANY LIMITED 1ST DEFENDANT

SAVANNAH BREWERIES LIMITED 2ND DEFENDANT

DAVE MWANGI 3RD DEFENDANT

WANGETHI MWANGI 4TH DEFENDANT

PATRICK M MUNGAI 5TH DEFENDANT

JOHN MBURU KIMEMIA 6TH DEFENDANT

WILSON GACHANJA 7TH DEFENDANT

AND

**KENYA AGRICULTURAL AND LIVESTOCK RESEARCH
ORGANIZATION INTERESTED PARTY**

RULING

1. Vide a Notice of Motion Application dated 13th December, 2024 and brought under the provisions of Section 1A and 1B of the *Civil Procedure Act*, Order 40 Rule 1(a) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of law, the Plaintiff seeks for an order of temporary injunction restraining the 1st to 6th Defendants, their servants, employees and/or



agents or any other person from alienating, selling, advertising for sale, transferring, charging, further charging, developing, leasing, sub-dividing, wasting, entering and remaining upon or in any way dealing with the parcels of land described as Naivasha L.R Nos. 5211/9, 5211/10, 5211/11, 5211/12, and 5211/13 (suit properties) which were hived from Naivasha L.R 5211/12, pending the hearing and final determination of the present suit.

2. The said Application is premised on the grounds therein as well as the Supporting Affidavit of even date sworn by Agosta Mecca a forensic Investigator of the Plaintiff who deponed that the Plaintiff had received an allegation that land parcels Naivasha L.R Nos. 5210, 5211 and 5212 which had been set aside for government's use as a Livestock Experimental Farm in the year 1904 by the Commissioner of Lands vide a letter Reference No. 6542/11 dated 6th November, 1952 had fraudulently been allocated to individuals.
3. That Naivasha L.R Nos. 5211/9, 5211/10, 5211/11, 5211/12, and 5211/13 had been planned, reserved and used specifically as a government farm for agricultural and livestock research by the interested party herein. That since Naivasha L.R No. 5211/2 was a public land reserved for the said purpose, it had therefore been unavailable for allocation wherein the 8th Defendant had un-procedurally and illegally registered the same to the 1st to 6th Defendants between March 2000 and October 2002
4. That the suit herein was of great public interest as the same had affected public property of great value, which if not secured through a prohibition, the Government would suffer irreparable loss which could not be compensated by damages.
5. That the Plaintiff was reasonably apprehensive that the 1st to 6th Defendants were likely to dispose of, transfer, waste, charge and/or damage the suit property to defeat the efforts of recovering the same and reverting it back to the Government. That subsequently, the Plaintiff had a prima facie case with very high chances of success. That the balance of convenience thus tilted in its favour wherein it was fair, just and in the interest of justice that the orders sought be granted in order to avert the loss of public property.
6. In response and opposition to the Plaintiff's Notice of Motion Application, the 1st Defendant vide its Replying Affidavit sworn on 21st January, 2025 by Linda Mugure Kimemia, a Director of the 1st Defendant deponed that the Plaintiff's Application was devoid of merit, vexatious, misinterpretation of material facts, misconceived and otherwise an abuse of the court and legal process.
7. That the Application and the suit herein was res judicata Nakuru, ELC Petition No. 17/2019 wherein the dispute over Naivasha L.R Nos. 5211/9-13 and or the mother title whereof between the same parties herein, had been heard and determined by the court of concurrent jurisdiction wherein a judgement that had been delivered on 29th June, 2023 where the reliefs sought therein had been granted. That the said judgement had not been set aside or varied by the Superior Court or any court of concurrent jurisdiction, hence it was binding on this court and any court of concurrent jurisdiction.
8. That the Applicant had been joined as an Interested Party in the said Petition wherein it had filed a Replying Affidavit and submissions raising similar issues raised herein. That subsequently, the instant suit was an afterthought and a vexatious attempt to have a second bite at the cherry over the same issues in a different court through forum shopping which was an abuse of court and legal process. That the Application was an appeal of the judgement of a court of concurrent jurisdiction and double jeopardy on the Respondents over the same issues.
9. That further, there was also a pending suit before the ELC Court at Nakuru being ELCLC/E062/2021 (Consolidated with ELCLC/82/2019) between the parties herein over the same subject



matter in dispute herein which had substantially been heard and was pending defence case hearing and where the Plaintiff/Applicant herein was an Interested Party.

10. That the said judgement in Nakuru ELC Petition No. 17/2019 and the pending Nakuru ELCLC/E062/2021 (Consolidated with ELCLC/82/2019) had rendered the instant suit res judicata and sub-judice respectively. That subsequently, the court lacked jurisdiction or was barred from entertaining, adjudicating or proceeding with the suit and application herein pursuant to the provisions of sections 5, 6 and 7 of the Civil Procedure Act.
11. That the Applicant had come to court with unclean hands, misrepresentation or non-disclosure of material facts and in abuse of the overriding objective of the court in forum shopping spree over res judicata and sub-judice matters thus undeserving of the reliefs sought. That accordingly, the only remedy that was available to the Applicant in the interest of justice was striking out of the instant suit and application and or at the minimum, stay the same pending the outcome of Nakuru ELCLC/E062/2021 (Consolidated with ELCLC/82/2019) which had been filed first in time and was pending before a court of concurrent jurisdiction. That further, the instant Application had been caught up with laches as the same was based upon an alleged letter dated 6th November 1952 and/or a valuation report of the year 2019 which were over 72 years and 4 years respectively since the alleged cause of action had arisen, without any explanation for the inordinate and unreasonable delay yet equity did not assist the indolent.
12. That the Application and suit herein did not disclose any prima facie case with good chances of success. That in any case, the 1st Defendant was an innocent purchaser for value without defects, if any, of the mother title known as LR No. 5211/2 measuring 140.2 hectares from the then registered owner the Settlement Fund Trustees (SFT) at a consideration of Kshs. 866,100/= on or about the 3rd March, 2000 who had upon receipt of the said consideration transferred the said mother title to the 1st Defendant.
13. That the 1st Defendant's interest in the said land had been registered on 3rd March, 2000 wherein a Certificate of Title in its name had been issued on even date since the said land had been free from of any encumbrances. That the 1st Defendant had taken immediate possession of the land comprised in the said mother title on the said date of acquisition after which it had sub-divided the said mother title into the suit properties among others namely Naivasha L.R Nos. 5211/9-13, sold some of them and transferred for value to the 2nd to 6th Defendants.
14. That subsequently, the allegations that the mother title and or suit property had been public land was baseless, misconceived and frivolous. That in any event, the said allegation was res judicata the judgement of a court of concurrent competent jurisdiction in Nakuru ELC Petition No. 17/2019 hence vexatious. She refuted the allegations that there had been illegal or fraudulent dealings by the 1st Defendant in the suit properties or the mother title at any time alleged in the suit herein or at all.
15. She deponed that the Plaintiff had not demonstrated that the suit properties or the mother title had been public land or government property at all. That in any event, the alleged letter dated 6th November 1952 by Special Commissioner and Ag Commissioner of Lands was neither a legal document or title to land in both the repealed and present laws nor had they been issued by a competent person in law. That indeed, the alleged officer had no legal authority or capacity to declare, reserve, alienate or allocate land at all. That the instant Application having failed to demonstrate irreparable loss, the balance of convenience tilted towards dismissing the same to prevent abuse of court and legal process as well as the overriding objective of the court.
16. That further, the allegations that the Applicant's incompetent suit herein would be rendered nugatory or loss of public funds were baseless and frivolous since there would be great prejudice and miscarriage



of justice if the court were to entertain the present application as the same had flown in the face of fair trial, overriding objectives of this court and the principle of finality of disputes. That the instant Application was greatly prejudicial to the 1st Defendant, contra statute, Constitution of Kenya and equity as far as it sought to curtail and interfere with the 1st to 6th Defendant's right to ownership, use and enjoyment of property. She thus prayed that the instant Application be either dismissed or struck out with costs.

17. The 2nd to 4th Defendants on the other hand via their Replying Affidavit sworn on 28th January, 2025 sworn by Moses Ngechu Kimemia, a Director of the 2nd Defendant herein also deponed that the Plaintiff's Application was misconceived, frivolous, bad in law and an abuse of the court process.
18. That the 2nd Defendant was the registered owner of all that parcel of land known as L.R No. 5211/12 while the 3rd and 4th Defendants were the registered owners of L.R Nos. 5211/9 and 5211/10 respectively. That L.R No. 5211/2 which had belonged to the 1st Defendant had been subdivided into L.R No. 5211/9-13 wherein the various sub-divisions had been sold to various people.
19. That the 1st Defendant had filed Nakuru ELC No. E062 of 2021; Wazazi Farmers Co. Limited v The Kenya Agricultural and Livestock Research Organization and Ethics and Anti-Corruption Commission and 4 others. That on other hand, the Plaintiff, the 1st, 3rd and 4th Defendants herein had filed various applications in Nakuru ELC No. E062 of 2021 to be joined as parties in the said matter. That subsequently, on 8th December, 2021, the trial court had made an order for status quo to be maintained until the hearing of the suit which orders were still in force.
20. He deponed that prior to the filing of Nakuru ELC No. E062 of 2021, the Interested Party herein had filed Nakuru ELC No. 82 of 2019 against the 2nd Defendant herein touching on the parcel of land L.R No. 5211/12 which was in the dispute herein. That indeed, the 2nd Defendant herein had filed a defence and counter-claim and in the said counter-claim, it had laid a claim against the Interested Party herein, the National Land Commission and the Chief Land Registrar.
21. That further, the 2nd Defendant herein had filed Nakuru ELC Petition No. 17 of 2019; Savanna Breweries Limited v National Land Commission & 3 others and Karati Farm & 2 others challenging the decision by the National Land Commission to cancel the title deeds to the subject matter of the suit herein without giving the owners a chance to be heard wherein the court had determined the said Petition and rendered a judgement on 29th June, 2023. That during the pendency of the said three suits, the 2nd Defendant herein had filed an application in Nakuru ELC No. E062 of 2021 for the consolidation of the said suits wherein the court had determined that the Petition be heard separately while the other suit be consolidated with Nakuru ELC No. E062 of 2021 being the lead file.
22. He deponed that the pending suit had proceeded extensively wherein the Plaintiff herein who had been meant to testify on 16th December 2024 had sought adjournment on the basis that they had filed the instant suit wherein a hearing had been scheduled for 8th May, 2025. That the law prohibits a court from hearing and determining a suit which was still proceeding between the same parties and/or parties under whom they claimed over the same subject matter that was pending or proceeding in another court having competent jurisdiction to deal with the matter as was the case in the instant matter. That further, the Plaintiff herein had also been aware that there had been orders of preservation of the suit properties, thus the instant application was a waste of judicial time.
23. That they had held the title deeds to the suit properties for more than 20 years and had been in possession of the same until when the Interested Party herein forcefully attempted to evict them while the Plaintiff herein had sought to unlawfully have their title deeds cancelled which actions had been



- opposed by the court in its judgement in ELC Petition No. 17 of 2019. He thus prayed that the Plaintiff's Application be dismissed.
24. The 2nd to 4th Defendants had also filed a Notice of Motion Application dated 28th January, 2025 brought under the provisions of Section 3A, 6 of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules and any other enabling law seeking that the court find that the Plaintiff's suit was res sub judice, scandalous, frivolous, vexatious and an abuse of the court process and the same be dismissed with costs.
 25. The said application was premised on the grounds therein as well as the Supporting Affidavit of an equal date sworn by Moses Ngechu Kimemia, a Director of the 2nd Defendant herein who reiterated the contents of his Replying Affidavit in opposition to the Plaintiff's Notice of Motion Application herein to depone that the Plaintiff/Applicant had filed the instant suit in an attempt to forum shop and to vex them into numerous litigations when the issues that had been raised herein could be heard in the pending suit.
 26. That the Plaintiff/Applicant herein ought to have moved the court in Nakuru ELC No. E062 of 2021 if it had needed to re-open the case and not filing a fresh suit. That in any case, the interest that were being protected were in favour of the Interested Party who was a party in the pending suit hence if the evidence was to be adduced, then the said Interested Party ought to have called the Plaintiff as a witness in the pending suits. That indeed, the Plaintiff had been mischievous in failing to inform the court of the existing suits, therefore, it was clear that it had moved the court with unclean hands thus the entire suit was an abuse of the court process, was res sub-judice and should be struck out with costs,
 27. A Replying Affidavit dated 20th February, 2025 and sworn by Evans D. Ilatsia, the Interested Party's Deputy Director General was in support of the Plaintiff's Application herein. The deponent deponed that land parcel L.R Nos. 5211/9, 5211/10, 5211/11, 5211/12 and 5211/13 (suit properties) which were the subject matter of the proceedings herein had at all times been under the quiet use and possession of the Interested Party as a public research land since the pre-colonial era and that at no time had its possession and/or ownership been changed in favour of the Plaintiff. That the Plaintiff was thus well within its constitutional and statutory mandate to seek the reliefs herein in the interest of preserving the suit properties pending the hearing and determination of the suit.
 28. He deponed that the 1st to 7th Defendants had not successfully challenged the Interested Party's occupation and use of the suit properties which had been purportedly transferred in favour of the 1st to 6th Defendants between March 200 and October 2002 in total disregard of the status thereof. He thus deponed that the Plaintiff and the Notice of Motion as had been drawn and filed had merited the granting of the reliefs that had been sought since they sought vindication of justifiable right against the Defendants because the Defendants had no right in law over the public property. That the court could not legally force a public institution to part with its property, the Plaintiff had demonstrated that the reliefs sought were in the interest of justice and that the threshold for granting the said reliefs under the provisions of Order 40 of the Civil Procedure Rules had been satisfied.
 29. He thus prayed that the Plaintiff's Notice of Motion Application dated 13th December, 2024 be allowed in the interest of justice.
- Parties took the court's directions to have the application disposed of by the way of written submissions, which I shall herein summarize as follows;
30. The Plaintiff's submissions in opposition to the 1st Defendant's preliminary objection dated 18th March 2025 (sic) and the 2nd -5th (sic) Defendants' Notice of Motion dated 21st February 2025 (sic) was that these applications ought to be dismissed as they had misconstrued both the facts and applicable law.



- That the current suit sought declaratory reliefs and orders to recover LR No. 5211/2 which was a public asset and which had unlawfully been alienated through fraudulent conduct.
31. While relying on the decision in *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited* (1969) EA. 696 the Plaintiff submitted that the Objection raised by the Respondents ought to be dismissed as it was not purely on a point of law because it required evaluation of evidence regarding the parties, causes of action and factual Nexus between this suit and the previous matters where in the court was called upon to interrogate facts beyond the pleadings which then vitiated the foundational requirement of a preliminary objection. Reliance was placed on the High Court decision in the case of *Oraro vs Mbaja* [2005] eKLR.
 32. On the issue of the matter being *Res judicata*, the Plaintiff's submissions, while relying on the provisions of Section 7 of the *Civil Procedure Act*, was that it was neither a Plaintiff nor a Defendant in Nakuru ELC Petition No. 17 of 2019 but participated as an Interested Party in Nakuru ELC E062 of 2012 So which it was not a substantive litigant and could not raise or be bound by the core issues. Reliance was placed on the cases in *Mumo Matemu Trusted Society of Human Rights vs Mumo Matemu* [2014] eKLR and *Francis Karioko Muruatetu & Another vs Republic & 5 Others* [2016] eKLR. That no relief had been sought by Wazazi farmers against the Plaintiff in the Nakuru matters.
 33. The gravamen of the current suit is whether LR No. 5211/2 was fraudulently and unlawfully alienated from public land ownership. It is well settled that constitutional Petitions are not designed to adjudicate complex technical disputes, such as those involving land title determination wherein Land ownership issues required a comprehensive evidentiary process. That not all issues in the instant suit had been determined. That the adjudication of land title, with its attendant technical issues, ought to proceed through ordinary civil litigation.
 34. That in *Gurbachand Singh Kalsi v Yowani Ekors* [1958] EA 450, the former East African Court of Appeal had held that where a pleading in the subsequent suit are distinct and inconsistent it cannot be said that they ought to have been raised in the former suit.
 35. That ELC E062 of 2021 was still active and was fixed for defence hearing on 8th May 2024 and therefore it could not support a plea of *res judicata* until judgment is rendered. That the Constitutional Petition in ELC Petition 17 of 2019 did not determine ownership, a case which the Defendants are basing their *res judicata* allegation.
 36. On whether or not this present matter was sub judice, the Plaintiff relied on the provisions of Section 6 (sic) to submit that the pending matter in Nakuru ELC E062 of 2021 did not qualify as "between the same parties" since the Plaintiff herein was only an Interested Party therein and could not lawfully initiate or frame issues in ELC E062 of 2021. That the underlying subject matter in Nakuru ELC No. E062 of 2021 was primarily concerned with procedural questions and did not adjudicate on the evidentiary record relating to fraud in the conveyance of public land. That the case of *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] eKLR, established that sub judice could only operate where there was complete identity regarding the issues, relief sought, and parties; a condition which was not met in the present case. That further, the provisions of Section 6 of the *Civil Procedure Act* did not empower a Judge to strike out proceedings but to stay the same.
 37. That the current suit was not frivolous vexations and an abuse of the court process, but rather that the Plaintiff sought that the court declares the process of acquisition of the public land by the Defendants was flawed, and thus, the titles held by them were null and void. That the suit had been brought in the interest of justice and the public good to protect land meant for furtherance of agricultural and livestock research in the country.



38. That the Plaintiff was not forum shopping and vive its pleadings and accompanying affidavits, had fully disclosed and explained its position in ELC E062 of 2021 and ELC Petition No. 17 of 2019 in the spirit of Order 4 Rule 1(1)(f) (sic).
39. The suit was not statute barred by virtue of the provisions of Section 42 of the Limitations of Actions Act which allows the Commission to recover public assets at any time and as had been held in the case of Riverbank Plaza Limited v Nairobi City County [2021] eKLR.
40. The 1st Defendant's written submissions in support of the 2nd to 5th (sic) Defendants Notice of Motion dated 28th January 2025, and objection to the Plaintiff's application and suit proceeding against was based on two issues for determination;
 - i. Whether the suit and the application dated 13th December 2024 are sub judice and res judicata?
 - ii. Whether the plaintiff should be granted orders of injunction sought?
41. On the first issue for determination, the 1st Defendant relied on the holding in the case of Mukisa Biscuits (supra) to submit that The doctrine was founded on public policy and was aimed at achieving two objectives namely a finality to litigation and that an individual should not be harassed twice on the same account of litigation. It placed reliance on a Court of Appeal decision in the case of Nicolas Njeru vas Attorney General & 8 Others [2013] eKLR.
42. That the application and the suit were both sub judice and res judicata as demonstrated by the second to fourth defendant supporting affidavit dated 28th January 2025 which had annexed pleadings and the existence of Nakuru ELCLC E062/2021. That the court should interrogate the provisions of Section 6 of the *Civil Procedure Act*.
43. The 1st Defendant also relied on the provisions of Section 7 of the *Civil Procedure Act* to submit that Nakuru Petition No. 17 of 2019 had been a matter between the same parties and same subject matter wherein the issues in dispute which were directly and substantially in issue between the parties Had been hard and determined via a judgment of the court delivered on 29th June 2023.
44. That the filing of the instant suit and application were only meant to re-litigate or re-agitate the issues already determined. Reliance was placed on the case of James Njuguna Chui vs John Njugu Kimani [2017] eKLR to submit that the Plaintiff/Applicant had come to court with unclean hands, misrepresentation, non-disclosure of material facts and an abuse of the overriding objective of the court in a forum shopping spree over res judicata and sub judice matters, and therefore was undeserving of the relief sought.
45. On the second issue as to whether the Plaintiff should be granted the orders of injunction sought in its application of 13th December 2024, the 1st Defendant's submission in opposition and while relying on its replying affidavit of 21st January 2025 was to the effect that, the same was devoid of merit, was frivolous, vexatious and an abuse of the court process. That there was misrepresentation, distortion or disclosure of material facts hence was undeserving of the reliefs sought.
46. That the suit had been caught up with laches as the same was based on an alleged letter dated 6th November 1952 and a valuation report of 2019 which were over 72 and 4 years respectively. The inordinate delay was unexplained. We could not assist the indolent. Reliance was placed on the decision in the case of Stanley Anyamba Ageyo & Another vs Musa Matu Ruinga & 5 Others [2022] eKLR, to submit that the Plaintiff had not established a prima facie case to warrant the grant of orders of injunction.



47. That secondly, KARLO, whom the Plaintiff purports to claim the land for, was not the registered proprietor of the said suit parcel of land and therefore there had been no prima facie case established as was held in the case of Kenya Commercial Finance Company Limited vs Afraha Education Society [2001]1 EA 86 which was adopted and cited with approval by the Superior Court in the case of Board of Governors Afraha High School & Another vs Kenya Commercial Bank [2004] eKLR, that on the other hand, the 1st Defendant was the proprietor of the suit parcel of land having been registered as such on the 3rd March 2000.
48. That the Plaintiff had also failed to demonstrate any irreparable loss that it would suffer were the orders of injunction not granted. That it had not attached a valuation on the subject land, which in itself is an admission that the subject matter was quantifiable. That it was trite that the value of the suit property is known and is ascertainable for compensation of any loss by damages. Reliance was placed on the decision in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR.
49. That there was no demonstration that the suit properties or mother title was public land or Government property and in any event, the alleged letter dated 6th November 1952 by Special Commissioner and Ag Commissioner of Lands was neither a legal document nor title to land and the alleged officer had no legal authority or capacity to declare, reserve, alienate or allocate land at all.
50. On the issue of where the balance of convenience tilted, the 1st Defendant's submission was that the Plaintiff/Applicant had failed to establish all the three pillars on which rests the foundation of any order of injunction conditions, as was held in the Nguruman Limited case (supra) that were the court in doubt, then the balance of convenience would tilt in favour of maintaining the status quo which would be that the 1st Defendant was granted and took immediate possession of the said land comprised in the mother title on the above date of acquisition and thereafter subdivided it into resultants parcels being LR. No. 5211/9-13, sold some of them and transferred for value to the 2nd -6th Defendants. Reliance was placed on the decision in the case of Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 Others [2016] eKLR.
51. Its submission was that since the Application was prejudicial to the 1st Defendants, contra statute, *the Constitution* and equity in so far as it sought to curtail and interfere with the 1st -6th Defendants' right to ownership, use and enjoyment of property, that the same should be struck out with costs.
52. The 2nd to 4th Respondents' submissions dated 5th March 2025 in support of their Application dated 28th January, 2025 had been based on one issue for determination to wit; whether the suit herein was res sub-judice.
53. Reliance was then placed on the provisions of Section 6 of the *Civil Procedure Act* and the decided case of Daniel Kipkemoi Bett & another v Joseph Rono [2022] eKLR to submit that from the look of the grounds on the motion as well as the affidavits in support of the motions, there existed Nakuru ELC No. E062 of 2021; Wazazi Farmers Co. Limited v The Kenya Agricultural & Livestock Research Organization and Ethics and Anti-Corruption Commission & 4 others consolidated with Nakuru ELC No. 82 of 2019; Kenya Agricultural and Livestock Research Organization (KALRO) v Savannah Breweries Limited which touched on the same parcels of land herein dispute and between the same parties. The copies of the pleadings in the said cases had been attached.
54. That further, the existence of the said suit had been confirmed by the 1st Defendant at paragraph 9 of their Replying Affidavit in response to the main motion by the Plaintiff and further at paragraph 3 of the 1st Defendant's Statement of Defence. That the Plaintiff herein had also conceded to the same at paragraph 20 of the Plaint. That the said suit had proceeded substantially wherein the same had been scheduled for hearing on 8th May 2025 when the Plaintiff herein was scheduled to adduce evidence.



55. That indeed, there had been no justification to why the Plaintiff herein would move to another court, of competent jurisdiction but in a different geographical location, to hear and determine a suit where parties were the same and the subject matter was substantially in issue before another court of concurrent jurisdiction as done in the instant case. That the 7th Defendant herein who had been described as the Commissioner for Lands was also a party in the pending suit, through his office, the National Land Commission which had taken over. That the mere fact that the Plaintiff herein was an Interested Party in the other suit did not prevent the instant suit from being res sub-judice. That the Plaintiff herein was advancing the interest of the Interested Party herein which interested party was the Plaintiff in Nakuru ELC No. 82 of 2019 and the Defendant in the lead file Nakuru ELC No. E062 of 2021. That in any case, the claim and interests of the Plaintiff in the instant suit had well been represented in the said pending suit where they were also parties.
56. That further, there were status quo orders that had been issued in Nakuru ELC No. E062 of 2021 over the suit properties, pending the hearing and determination of the suit hence the Plaintiff herein was forum shopping by filing an application for injunction to mislead the court. That the outcome of the pending suit would greatly affect the instant suit, as was held in the decided case of Kinatwa Co-operative Savings & Credit Society Limited v Kinatwa Prestige Ltd [2021] eKLR where the court had cited the case of Kenya Bankers Association v Kenya Revenue Authority [2019] eKLR.
57. That the rationale behind the sub-judice rule was to prevent a situation of having conflicting orders emanating from two or more different courts over the same subject matter. That in the present case, were the matter to proceed, there would be two judgements from two competent courts over the same parcels of land. They thus urged the court to find that the instant suit was res sub-judice and dismiss or strike out the same with costs.

Determination

58. I have considered the applications herein, the affidavits in opposition, the applicable law and the authorities cited by the parties herein. Pursuant to the filing of the Suit and an Application herein wherein the Plaintiff sought for a temporary injunction restraining the 1st to 6th Defendants, their servants, employees and/or agents or any other person from alienating, selling, advertising for sale, transferring, charging, further charging, developing, leasing, sub-dividing, wasting, entering and remaining upon or in any way dealing with the parcels of land described as Naivasha L.R Nos. 5211/9, 5211/10, 5211/11, 5211/12, and 5211/13 (suit properties) which were hived from Naivasha L.R 5211/12, the 1st to 4th Defendants via their Replying affidavits sworn on the 21st January, 2025 and on the 28th January, 2025 respectively, as well as a Notice of Motion by the 2nd to 4th Respondents dated the 28th January 2025, sought to have both the Plaintiffs suit and Application struck out and/or dismissed for being Res judicata Nakuru, ELC Petition No. 17/2019 as well as for being sub-judice Nakuru ELCLC/E062/2021 (Consolidated with ELCLC/82/2019).
59. The 1st to 4th Respondents' argument was that Nakuru, ELC Petition No. 17/2019 had been a dispute over Naivasha LR Nos. 5211/9-13 and/or the mother title and between the same parties herein, which matter had been heard and determined by the court of concurrent jurisdiction wherein a judgement had been delivered on 29th June, 2023 granting the reliefs therein sought. That the said judgement had not been set aside or varied by the Superior Court or any court of concurrent jurisdiction, hence it was binding on this court and any court of concurrent jurisdiction.
60. That there was also a pending suit before the ELC Court at Nakuru being ELCLC/E062/2021 (Consolidated with ELCLC/82/2019) between the same parties herein over the same subject matter in dispute herein which matter had substantially been heard. That the Plaintiff herein was advancing



the interest of the Interested Party therein which interested party was the Plaintiff in Nakuru ELC No. 82 of 2019 and the Defendant in the lead file Nakuru ELC No. E062 of 2021. That indeed, there were interim orders of status quo in place, pending the hearing of the suit, which orders were still in force. Their argument was that the Plaintiff's suit was scandalous, frivolous, vexatious and an abuse of the court process.

61. It is to be noted that whilst the 5th, 6th and 7th Defendants did not participate in the Plaintiff's Notice of Motion Application dated 13th December, 2024, there had also been no response by either parties to the 2nd to 4th Defendant's Notice of Motion Application dated 28th January 2025.
62. I thus find the matters arising for my determination being as follows;
 - i. Whether the Plaintiff's suit is Res judicata.
 - ii. Whether the Plaintiff's suit is Sub judice
 - iii. Whether the said Preliminary Objection raised herein has merit and if not;
 - iv. Whether Plaintiff's application for interim orders of injunction are sustainable.
63. The all-important case decided by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited (1969) EA. 696 was clear as to the effect of raising an improper Preliminary Objection in that the court had held thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
64. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. The Supreme Court in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph 59 held as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

 - a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action.”
65. Thus in order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
 - i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.



- iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
66. In order to so determine, the 2nd -4th Respondents in their Notice of Motion dated the 28th January 2025 annexed the pleadings and judgements in respect of the previous suits so as to show clearly that the suit fell on all fours on the doctrine of res judicata and was also sub judice.
67. I have considered the decision in the matter referred to as Nakuru, ELC Petition No. 17/2019 herein reported as Savannah Breweries Limited v National Land Commission & 3 others; Karati Farm & 2 others (Interested Parties) [2023] KEELC 18634 (KLR).
68. I note that the parties therein were Savannah Breweries Limited as the Petitioner vs the National Land Commission, the Hon Attorney General, the Chief Land Registrar and the Kenya Agricultural and Livestock Research Organization as the Respondents wherein Karati Farm, Top Farm and Ethics and Anti-Corruption Commission were the Interested Parties. I also note that the subject suit property therein was LR No. 5211 which was the mother title to the Petitioner's Property known as LR No 5211/12.
69. In the said Petition, it had been the Petitioner's case that whilst it was the registered owner of LR 5211/12, title number 90279 which had been carved out from LR No 5211/2/5 Grant No. IR No 82600, by virtue of a decision by the 1st Respondent, and without Notice, title to LR 5211 had been revoked and the land registered to the 4th Respondent, thus infringing on it's (Petitioner's) rights under Article 47 and 48 of *the Constitution*. In its judgement of 29th June 2023, the court granted the orders sought in the Petition for the reasons that the Petitioner had not been given an opportunity to be heard before the 1st Respondent purported to revoke LR 5211. That further, the Gazette Notice No 1716 did not contain the particulars of the Petitioner and had only been addressed to the 4th Respondent, the 1st and 2nd interested parties, and yet the Petitioner had an interest in the suit property.
70. It is therefore clear that whereas the court's determination of the Nakuru Petition No. 17/2019 had been based on issues of violation of the Petitioner's constitutional rights, on the other hand, the Plaintiff in the current suit seeks a determination of ownership rights and/or any other proprietary rights in parcel of land described as Naivasha LR. Nos. 5211/9, 5211/10, 5211/11, 5211/12, 5211/13 and 5211/14 which land they purport to be public land.
71. I thus find that the cause of action and its remedy in the current suit being different from the cause of action and its remedy in the former Petition, the issue of Res judicata was thus not properly raised in the circumstance for which the objection therein raised on a point of Res judicata lacks merit and is herein dismissed.
72. On the second issue as to whether the current suit was sub judice a pending matter in Nakuru ELC E062 of 2021 (Consolidated with ELCLC/82/2019), the law under the provisions of Section 6 of the *Civil Procedure Act* provides as follows:
- 'No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.'
73. I have gained sight of the pleadings in Nakuru ELC E062 of 2021 (Consolidated with Nakuru ELCLC No. 82 of 2019) herein annexed, the parties and the cause of action. Indeed, the parties in Nakuru



ELC E062 of 2021 were Wazazi Farmers Company Limited as the Plaintiffs vs Kenya Agricultural and Livestock Research Organization as the Defendant and Ethics and Anti-Corruption Commission, Savannah Breweries Limited, Dave Mwangi and Wagethi Mwangi as the interested party. This matter was consolidated with ELCLC No. 82 of 2019 wherein the parties were Kenya Agricultural and Livestock Research Organization as the Plaintiff vs Savannah Breweries Limited as the Defendant. In a counter claim therein, Savannah Breweries Limited was the Plaintiff vs Kenya Agricultural and Livestock Research Organization, National Land Commission and the Chief Land Registrar as the Defendants. To this end, I find that parties therein were similar and/ or were litigating under the same title to the parties in the current suit.

74. As to the cause of action, in Nakuru ELC E062 of 2021, the Plaintiff therein had sought for a permanent injunction restraining the Defendants from interfering in any manner with land parcel number IR 32600 LR No. 5211/2 situate in Naivasha Municipality in Nakuru County whereas in Nakuru ELCLC No. 82 of 2019, the Plaintiff had sought for orders of Permanent injunction restraining the Defendants from interfering with its quiet possession and use of LR No. 5210 and 5211 comprising approximately 2578 acres or any portion thereof within Naivasha Township, land it currently occupied. In its counterclaim, the Defendants now, Plaintiff therein sought that it be declared the rightful and legal owner of all that parcel of land known as LR No. 5211/12 and there be a permanent injunction against the Defendants from interfering in the said parcel of land.
75. In the present case, the Plaintiff herein has sought for a determination of ownership rights and/or any other proprietary rights in respect of the parcels of land described as Naivasha LR. Nos. 5211/9, 5211/10, 5211/11, 5211/12, 5211/13 and 5211/14 which parcels of land it is not disputed were a sub-division of the mother title No. LR No. 5211/2. On this ground I find yet again, that the cause of action Nakuru ELC E062 of 2021(Consolidated with Nakuru ELCLC No. 82 of 2019) for which it is not disputed that there are interim orders of status quo for preservation of the suit properties in force, is similar as in the current suit.
76. The Supreme Court of Kenya in Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR had observed as follows:

“The term sub judice is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

77. Accordingly, I find that the matter in issue in the present suit is directly and substantially in issue with the previously instituted suit pending before Nakuru Court in Nakuru ELC E062 of 2021(Consolidated with Nakuru ELCLC No. 82 of 2019) and between the same parties and therefore is sub judice. I find that where the test of res sub judice is established or met, the marginal notes in Section 6 of the *Civil Procedure Act* stipulates that the latter suit would be stayed until the earlier suit



is heard or determined. There can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the *Civil Procedure Act* which require under Section 1B that there be an “efficient use of the available judicial and administrative resources”.

78. Having considered all the above, the current suit, I find is an abuse of the court process and need not be stayed as the claim herein can perfectly be litigated in Nakuru ELC E062 of 2021(Consolidated with Nakuru ELCLC No. 82 of 2019). In the circumstance therefore the 2nd to 4th Defendants’ Notice of Motion Application dated 28th January, 2025 succeeds with the result that the Plaintiff’s latter suit and its Application dated the dated 13th December, 2024 are hereby struck out with costs to the Defendants.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 29TH DAY OF MAY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

