REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. E001 OF 2020.

FREDRICK WEKESA MACHASIO.....1ST PLAINTIFF

PATRICK WANJALA MACHASIO.....2ND PLAINTIFF

VERSUS

WILSON WEBI.....1ST DEFENDANT

ALEXANDER MUKHWANA MACHASIO.....2ND DEFENDANT

MARGARET TINDI MACHASIO.....3RD DEFENDANT

PETER MUMELA MACHASIO.....4TH DEFENDANT

JOSPEH WAMALWA MACHASIO..... 5TH DEFENDANT

MAURICE MACHASIO.....6TH DEFENDANT

PETER WANDERA.....7TH DEFENDANT

THOMAS MACHASIO.....8TH DEFENDANT

R U L I N G

It is not in doubt that the primary role of the Courts is to hear and determine disputes. That includes settling siblings' rivalries such as this one.

However, that role is not the preserve of the Courts. There are other fora best suited in resolving family disputes. They include the church **[MATHEWS 18:15 – 17 ESV]**. That is why **Article 159 (2) (c) of the Constitution** states that: -

> ***"alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)."***

When, as in this case, siblings resort to the Court process to solve squabbles over their father's property during his life time, it erodes the Honour that he deserves. In my view, the parties herein ought to consider other dispute resolution mechanisms as a way of showing Honour to their father. The Bible tells us in **EXODUS 20:12** that: -

> ***"Honour your father and your mother that your days may be long in the land that the LORD your God is giving you."***

The converse is also true because in **EPHESIANS 6:4** it is written that: -

> ***"Fathers, do not provoke your children to anger but bring them up in the discipline and instruction of the LORD"***

Both parents and their children therefore have a role to play in maintaining this equilibrium so that litigation over family disputes becomes

the last resort. This is especially so where the combatants, as in this case, are children litigating over property belonging to their father and grandfather when he is still alive. This litigation, however, does not portend well and if not handled properly by the family, it is a clear precursor of serious turbulence ahead with regard to the ownership of the land parcel **NO NDIVISI/MUCHI/2111** (the suit land) as will become clearer soon.

Other than for **WILSON WEBI** the 1st defendant who is sued as the **NATIONAL CHAIRMAN OF THE BABICHACHI CLAN** to which the parties herein belong, all the other parties herein are either children or grandchildren of **GABRIEL MUMELA MACHASIO** who is still alive and is the registered proprietor of the suit land. That registration was done pursuant to the Judgment of the Court of Appeal in Civil Appeal No 41 of 2017 **KISUMU – GABRIEL MUMELA MACHASIO .V. GEORGE WANYAMA MACHASIO**. In that appeal where **GABRIEL MUMELA MACHASIO** was the Appellant, the Court in it's Judgment delivered on 7th December 2018 made the following finding in paragraph 16 (iv): -

> ***"The trust is determined and the suit land to be registered in the name of the Appellant as proprietor."***

That ought to have brought to an end any simmering disputes among these siblings over the suit land.

That did not happen because two years later, by a plaint dated 27th October 2020 and filed herein on 2nd November 2020, the plaintiffs who are the children of **GABRIEL MUMELA MACHASIO** sought against their siblings (2nd, 3rd, 4th and 5th defendants) and their children (6th, 7th and 8th defendants) some four (4) reliefs one of which is that the suit land be registered in their names the same having been bequeathed to them pursuant to a distribution scheme arrived at in 1974 by their father but which the plaintiffs' allege has now been fraudulently trashed following another clan meeting in June 2020.

The defendants filed a joint defence denying all the allegations levelled against them. They denied that the meeting in June 2020 was called to perpetuate a fraud adding that it was infact called by **GABRIEL MUMELA MACHASIO** the registered proprietor of the suit land and who is not a party to this suit.

Simultaneously with the plaint, the plaintiffs filed a Notice of Motion premised on the provisions of **Sections 3 and 3A** of the **Civil Procedure Rules** and **Order 40 Rule 1** of the **Civil Procedure Rules**. In that application which is the subject of this ruling, the plaintiffs seek the following orders: -

1. **Spent**

2. **That a temporary injunction do issue restraining the defendants through their servants and agents from registering or causing effecting of registration of any interest or causing sub -division and or disposal of any interest in title NO NDIVISI/MUCHI/2111 pending hearing and final determination of this suit.**

3. **That status quo in respect of title NO NDIVISI/MUCHI/2111 be preserved and that there be no dealing or effecting of registration of any disportions (sic) over the said title pending hearing and final determination of this suit.**

4. **Costs be provided for.**

The application is based on the grounds set out therein and is also supported by the affidavit of **FREDRICK WEKESA MACHASIO** the 1st plaintiff herein.

The gravamen of the application is that the plaintiff's father **GABRIEL MUMELA MACHASIO** was the proprietor of the original land parcel **NO NDIVISI/MUCHI/1202** measuring 42 acres. However, the said land had been registered in the names of his eldest son **GEORGE WANYAMA MACHASIO** (deceased) to hold in trust for the family. Following his retirement from the **EAST AFRICA RAILWAYS AND HARBVOURS**, their father called a clan meeting on 22nd December 1974 and distributed the said land among his children. The distribution scheme was reduced in writing. However, around 1984, the deceased fraudulently divided the said land into parcels **NO NDIVISI/MUCHI/2109**, **2110**, **2111** and **2217**. However, whereas parcels **NO NDIVISI/MUCHI/2109**, **2110** and **2117** were distributed as per the distribution scheme and agreement made on 22nd December 1974, the deceased registered the suit land in his names thereby gaining beyond his allocated share. This prompted their father **GABRIEL MUMELA MACHASIO** to file **BUNGOMA HIGH COURT CIVIL CASE No 83 of 2010** against the deceased which culminated in **COURT OF APPEAL CIVIL APPEAL No 41 of 2017 KISUMU** which directed that the suit land reverts to **GABRIEL MUMELA MACHASIO**. The defendants have however sub – divided the suit land as per the attached mutations which they now want to transfer to themselves and this will defeat the distribution scheme of 22nd December 1974 and short – change the plaintiffs' hence the application. Annexed to the application are the proceedings of 22nd December 1974, the Judgment in **COURT OF APPEAL CIVIL APPEAL No 41 of 2017 (KISUMU)** and the subsequent decree.

The application is opposed and **ALEXANDER MUKHWANA MACHASIO**, the 2nd defendant herein has, with the authority of the other defendants, deponed by his replying affidavit dated 28th November 2020 that this application is not only an abuse of the Court process but further, that this suit is res – judicata as the subject matter was determined in **COURT OF APPEAL CIVIL APPEAL No 41 of 2017 (KISUMU)**. That the proprietor of the suit land is **GABRIEL MUMELA MACHASIO** who is alive and he is the one who wishes to sub – divide it and not the defendants. That since the defendants are not the registered proprietors of the suit land, the plaintiffs have no cause of action against them and the application should therefore be dismissed with costs. Annexed to the replying affidavit are a copy of the title to the suit land showing that it was registered in the names of **GABRIEL MUMELA MACHASIO** on 12th March 2019, mutation forms and diagrams of the proposed sub – divisions to give rise to parcels **NO NDIVISI/MUCHI/10442**, **10443** and **10444**.

When the application was placed before me on 2nd November 2020, I directed that it be canvassed by way of written submissions.

Those submissions were subsequently filed both by **MR WASILWA** instructed by the firm of **BMS ADVOCATES** for the plaintiff and by **MR WAMALWA** instructed by the firm of **WAMALWA SIMIYU & COMPANY ADVOCATES** for the defendants.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by Counsel.

In paragraph 7 of his replying affidavit, the 2nd defendant has averred that this suit is infact res – judicata the dispute involving the suit land having been determined in **COURT OF APPEAL CIVIL APPEAL No 41 of 2017**. This should be the starting point in the determination of this application and indeed the whole suit because res – judicata is a complete bar to any subsequent suit involving the same parties and subject matter.

The doctrine of res – judicata is provided for in **Section 7 of the Civil Procedure Act** as follows: -

> ***7: "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."***

It is clear from the above that before a plea of res – judicata can properly be invoked to terminate any suit, the following must be proved: -

> **1: The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.**
>
> **2: The former suit must have been between the same parties or parties under whom they or any of them claim.**
>
> **3: The parties must have litigated under the same title.**
>
> **4: The Court which decided the former suit must have been a competent Court.**
>
> **5: The former suit must have been heard and finally decided by that Court.**

None of the parties have addressed me on the issue of res – judicata in their submissions. Counsel have dwelt mainly on whether or not the principles set out in **GIELLA .V. CASSMAN BROWN & COMPANY LTD 1973 E.A 358** have been met to warrant the grant of orders of temporary injunction pending trial.

It is however not in dispute that the suit land was the subject matter in **COURT OF APPEAL CIVIL APPEAL No 41 of 2017** involving **GABRIEL MUMELA MACHASIO** and one of his sons **GEORGE WANYAMA MACHASIO**. That dispute was determined in favour of **GABRIEL MUMELA MACHASIO** when the Court of Appeal in its Judgment dated 7th December 2018 ordered that the suit land be registered in his names. One of the issues raised in that appeal was the clan meeting of 22nd December 1974 which is also being raised by the plaintiffs in this case. The plaintiffs are also challenging the meeting of June 2020 by which **GABRIEL MUMELA MACHASIO** purported to sub – divide the suit land among all his children. They seek orders that the proceedings of that meeting be declared null and void.

The ownership of the suit land was determined by the Court of Appeal two (2) years ago in a suit involving the plaintiff's father and one of their siblings. The plaintiffs were not parties in **COURT OF APPEAL CIVIL APPEAL No 41 of 2017 KISUMU**. However, they are pursuing the same common issue that was considered and determined by that Court with respect to the suit land. To purport to re – consider the dispute over the ownership of the suit land will amount to this Court sitting on appeal over a decision of a superior Court. That is not permissible. The plaintiffs cannot be allowed to re – agitate the same issues that their late brother **GEORGE WANYAMA MACHASIO** and their father **GABRIEL MUMELA MACHASIO** brought up for determination in the previous litigation. The Court of Appeal of Tanzania in the case of **LOTTA .V. TANAKA & OTHERS 20903 2 E.A 556 (CAT)** said as follows with regard to the doctrine of res – judicata: -

> ***"Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final Judgment between <u>the same parties or their privies</u> on the same issue by a Court of competent jurisdiction in the subject matter of the suit. Further, that a person does not have to be formally enjoined in a suit but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit."*** Emphasis added.

This decision has been followed in this country. See for example **JOHN NJUE NYAGA .V. THE ATTORNEY GENERAL & OTHERS C.A CIVIL APPEAL No 46 of 2015 NYERI (2016 eKLR)**.

It is clear to me that this suit is res – judicata and neither it nor this application upon which it is founded can be sustained.

Should I be wrong on the issue of res – judicata and have to determine this application on it's merits, I would not arrive at a different conclusion.

This is because, the principles for the grant of a temporary injunction pending trial were set out in the case of **GIELLA .V. CASSMAN BROWN** (supra) as follows: -

1. **The Applicant must establish a prima facie case with a probability of success.**

2. **A temporary injunction will not normally be granted unless the Applicant shows that he will suffer irreparable injury that cannot otherwise be compensated by an award of damages.**

3. **If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case was defined in **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No 39 of 2002 [2003 eKLR]** as: -

> ***"…… a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*** Emphasis added.

It is common knowledge that the suit land is neither the property of the plaintiffs nor the defendants. It is the property of **GEORGE MUMELA MACHASIO** who is not a party in this case. To issue an order of temporary injunction or indeed any orders with respect to the suit land without the participation of the owner of that property would be an affront to Article 40 of the Constitution which protects the right to own property. In **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No 77 of 2012**, the Court of Appeal observed as follows with regard to a prima facie case: -

> ***"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation."*** Emphasis added.

In urging this Court to grant the orders sought, Counsel for the plaintiffs has submitted as follows: -

> ***"Your Lordship, it is evidently clear that there are fundamental issues about who amongst the Applicants and Respondents is entitled to a share in title NO NDIVISI/MUCHI/2111 and these legitimate interest and expectations of the belligerents can only be ventilated upon a full trial herein. Issuance of conservatory orders to preserve the subject property in these circumstances to enable the Court to arbitrate and decide on the bona fide beneficiaries of the land is therefore undoubtedly merited."***

Counsel has also cited my Judgment in **BUNGOMA ENVIRONMENT AND LAND COURT JUDICIAL REVIEW CASE No 1 of 2020 [2020 eKLR]** also involving the parties herein where in dismissing the plaintiffs' application for an order of certiorari with respect to the suit land, I stated that: -

> ***"The simmering dispute involving the Applicants and the Interested Parties over the sharing of the land parcel NO NDIVISI/MUCHI/2111 will not properly be determined by the Judicial review remedy of certiorari. That dispute will best be determined through a civil suit."*** Emphasis added.

Such civil suit must surely involve the registered proprietor of the suit land **GABRIEL MUMELA MACHASIO** who, unfortunately, has not been impleaded in these proceedings. The plaintiffs' Counsel is of course correct when he submits that with regard to the ownership of the suit land, the ***"expectations of the belligerents can only be ventilated upon a full trial herein."*** However, no meaningful trial can be held in this matter unless the owner of the property in dispute is a party. If any rights of the plaintiffs have been or are threatened with violation with respect to the suit land, it is doubtful if such violation can properly be remedied without the involvement of **GABRIEL MUMELA MACHASIO** in these proceedings. I do not see what prima facie case the plaintiffs have established to warrant the grant of the orders sought. And if they had any such case, it certainly cannot be against the defendants herein.

The plaintiffs having failed to surmount the first hurdle of establishing a prima facie case, there is no requirement to consider the other two principles set out in **GIELLA .V. CASSMAN BROWN & CO LTD** (supra). This is because, as was held in **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS** (supra): -

> ***"If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."***

Clearly therefore, even on the merits, the plaintiffs' Notice of Motion dated 27th November 2020 is premised on hollow ground.

Ultimately however, this suit is res – judicata. It is struck out together with the Notice of Motion dated 27th November 2020 upon which it is founded. As the parties are family, there shall be no orders as to costs but I implore them to pursue an out of Court settlement to the dispute.

Boaz N. Olao.

J U D G E

28th January 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 28th day of January 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

28th January 2021.