



REPUBLIC OF KENYA



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Kaikai & another v Nkolia & 6 others (Environment & Land Petition E004 of 2024) [2024] KEELC 7176 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7176 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

ENVIRONMENT & LAND PETITION E004 OF 2024

EM WASHE, J

OCTOBER 15, 2024

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLE 10 (1)(2)
(B)(C), 25 (C), 40 (1) & (2) OF THE CONSTITUTION OF KENYA, 2010**

-AND-

IN THE MATTER OF: ARTICLES 21,22,23 & 27 OF THE CONSTITUTION OF KENYA, 2010

-AND-

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLE
47,60,64,73,232, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

-AND-

**IN THE MATTER OF: THE CONSTITUTION OF KENYA SUPERVISORY
JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS &
FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE RULES, 2006**

-AND-

**IN THE MATTER OF: THE CONSTITUTION OF KENYA PROTECTION OF
RIGHTS & FUNDAMENTAL FREEDOMS PRACTICE & PROCEDURE RULES 2013**

-AND-

**IN THE MATTER OF SECTIONS 9,17,18,19,20,21 AND 23 OF THE LAND (GROUP
RANCH) REPRESENTATIVE ACT, CAP 287 REVISED EDITION 2012 (1970)**

-AND-

IN THE MATTER OF: THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

-AND-

IN THE MATTER OF: THE LAND REGISTRATION ACT, NO. 3 OF 2012 LAWS OF KENYA

-AND-



IN THE MATTER OF: BREACH OF NATURAL JUSTICE

BETWEEN

JAMES KAYIONI KAIKAI 1ST PETITIONER
**BENJAMIN OLODURA KIRUTARI (SUING AS THE NEXT OF FRIEND OF &
ON BEHALFOF NDEGE KIPOS) 2ND PETITIONER**

AND

KORINKO NKOLIA 1ST RESPONDENT
BENARD KETERE 2ND RESPONDENT
JONATHAN KETERE 3RD RESPONDENT
LAND REGISTRAR, TRANSMARA SUB-COUNTIES 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT
DANIEL KALASINGA 6TH RESPONDENT
JAMES OLKIYAI OLE SERIANI 7TH RESPONDENT

RULING

1. The 1st to 3rd Respondents (hereinafter referred to as “the Applicants”) filed a Notice of Motion Application dated 03.07.2024 (hereinafter referred to as “the present Application”) against the 1st and 2nd Petitioners (hereinafter referred to as “the Respondents”) seeking the following Orders; -
 - a. The Honourable Court be pleased to strike out and/or Order Struck Out the Petitioners/ Respondents’ Petition lodged and/or filed in Court on the 17th of April 2024 vide the undated Petition on account of being Res-Judicata, Sub-Judice, scandalous, frivolous and abuse of the Court process.
 - b. Costs of this Application be borne by the Petitioners/Respondents
 - c. The Honourable Court be pleased to grant such further and/or other orders be made as the Court may deem fit, just and expedient.
2. The grounds upon which the above Orders have been sought is contained in the body of the present Application as well as the Supporting Affidavit sworn by the 1st Applicant and can be summarised as follows; -
 - i. The 1st Applicant introduced himself as the former Chairman of Olomismis Group Ranch which managed the defunct Olomismis Group Ranch while the 2nd and 3rd Applicants were the of ficials thereof .
 - ii. The 1st to 3rd Applicants stated that during the sub-division of LR.No.transmara/Olomismis/1 which belonged to Olomismis Group Ranch, a number of members were aggrieved by the manner and process which was undertaken and therefore filed a suit known as Kisii ELC Case No. 249 of 2013.



- iii. The 1st to 3rd Applicants further stated that after the filing of the proceedings known as KISII ELC Case No.249 of 2013, the Plaintiffs therein filed an Application for injunction against the Defendants including the 1st to 3rd Applicants but the said Application for Injunction was declined and/or dismissed.
- iv. Once again, the Plaintiffs in the proceedings known as Kisii ELC Case No. 249 of 2013 being aggrieved by the Ruling regarding their Application for Injunction proceeded to file an Appeal known as Kisumu Court of Appeal Civil Appeal No. 29 of 2014.
- v. Fortunately, the Appeal known as Kisumu Court of Appeal Civil Appeal No.29 of 2014 was amicably settled by a Status Quo Order pending the hearing and determination of the proceedings known as Kisii ELC Case No. 249 of 2013.
- vi. Indeed, the proceedings known as Kisii ELC Case No. 249 of 2013 were heard on merit and a judgement pronounced on the 05.10.2018 to the effect that the Plaint was dismissed with no orders as to costs.
- vii. The Plaintiffs in the said proceedings known as Kisii ELC Case No. 249 of 2013 being aggrieved with the Judgement pronounced on the 05.10.2018 filed an Appeal known as Kisumu Court of Appeal Civil Appeal NO. 27 of 2021 before the Court of Appeal in Kisumu.
- viii. The proceeding known as Kisumu Court of Appeal Civil Appeal NO. 27 of 2021 is still pending and has not been determined.
- ix. The 1st to 3rd Applicants aver that the alleged infringements by the Respondents herein are similar to the causes of action contained in the proceedings known as Kisii ELC Case No. 249 of 2013 as they relate to the process and manner in which the property known as LR.No.transmara/Olomismis/1 was sub-divided amongst the members and other persons thereof .
- x. Consequently, the facts and reliefs sought in the pending Petition are Res-Judicata to those pleaded in the proceedings known as Kisii ELC Case No. 249 of 2013.
- xi. The 1st to 3rd Applicants specifically stated that from the Judgement pronounced on the 05.10.2018 in the proceedings known as Kisii ELC Case No. 249 of 2013, it was clearly held that the 1st to 3rd Applicants had not done any wrongful acts during the said subdivision and should not be held responsible for any wrongful dealings.
- xii. Be as it may, the 1st to 3rd Applicants confirmed that the Appeal known as Kisumu Court of Appeal Civil Appeal NO. 27 of 2021 is still pending thereby rendering the issues contained in this pending Petition Sub-Judice.
- xiii. In addition to the foregoing, the 1st to 3rd Applicants pointed out that the Respondents infringement in this pending Petition is founded on an allegation of Fraud which allegation cannot be determined through a Constitution Petition but a normal suit hence the pending Petition is really an abuse of the Court process.
- xiv. The 1st to 3rd Applicants further pleaded that the Respondents are seeking a revocation of various titles known as LR.No.transmara/Olomismis/1-1680 yet the registered owners of the said properties whose legal and constitutional rights would be affected have not been joined in the pending Petition thereby infringing on their right to a fair hearing as entitled in the principle of natural justice.



- xv. The 1st to 3rd Applicants averred that the pending Petition is purely an exercise amounting to forum shopping keeping in mind that the Appeal known as Kisumu Court of Appeal Civil Appeal NO. 27 of 2021 is still awaiting determination purely with a view of causing confusion and/or possibly having conflicting decisions over the same properties known as LR.No.transmara/Olomismis/1-1640.
 - xvi. In conclusion, the 1st to 3rd Applicants sought this Court to strike out the pending Petition as well as subsequent application therein with costs.
3. The present Application was duly served on the Respondents who opposed the same by filing a Replying Affidavit sworn by the 1st Petitioner on the 07.08.2024.
 4. The Replying Affidavit dated 07.08.2024 advanced the following grounds in opposition of the present Application; -
 - i. First and foremost, the Respondents stated that the present Application was fatally defective, premature and of fended the mandatory provisions governing registered entities.
 - ii. The Respondents averred that the Applicants in the present Application did not have any legal authority and/or capacity to challenge the pending Petition herein and/or the applications pending therein.
 - iii. The Respondents pleaded that they had instituted the pending Petition with the authority and mandate of the registered members of Olomismis Group Ranch pursuant to AUTHORITY TO PRESENT US IN THIS SUIT dated 07.08.2024.
 - iv. The Respondents pleaded that the Mutation and/or Map used by the Applicants in the sub-division of the property known as LR.No.transmara/Olomismis/1 had been prepared by other persons not engaged by the lawful of fice holders of Olomismis Group Ranch which comprised of 380 members.
 - v. In essence, the said sub-division of the property known as LR.No.transmara/Olomismis/1 was undertaken contrary to the mandatory provisions of various Statutes and well as the provisions of the Constitution.
 - vi. The Respondents alleged that the Applicants herein were not the lawful of ficials of Olomismis Group Ranch which was the owner of LR.No.transmara/Olomismis/1 and therefore any Certificates of Titles issued on the actions of the Applicants were unlawful, fraudulent and illegal.
 - vii. The Respondent further averred that even after the filing of this Petition, the Applicants have continued to deal with, alienate and/or interfere with the assets of Olomismis Group Ranch including the property known as LR.No.transmara/Olomismis/169 (BUS PARK) and LR.No.transmara/Olomismis/220 (PLAYGROUND) contrary to law.
 - viii. In addition to the above properties, the Respondents stated that there is a portion of 8,000 acres which is yet to be sub-divided in the name of Olomismis Group Ranch which the Applicants have continued to deal with in the name of the group ranch yet they are not bona-fide and/or lawful of ficials thereof .
 - ix. The Respondents therefore averred that the pending Petition and/or the pending Application were neither Sub-Judice nor Res-Judicata as alleged in this present Application and there was not legal ground to strike out the same.



5. The Applicants on being served with the Replying Affidavit dated 07.08.2024 did not file any further Affidavit in opposition of the same.
6. The Court then proceeded to direct that the present Application to be canvassed through written submissions.
7. The Applicants duly filed their written submissions dated 16.09.2024 while the Respondents filed their submissions on the 16.09.2024.
8. The Court has carefully perused the present application, the Replying Affidavit filed therein and the submissions by the parties and identify the following issues for determination; -

Issue No. 1- Do the applicants herein have the locus standi and/or capacity to file the present application?

Issue No. 2- Is the present petition res-judicata the proceedings known as Kisii ELC Case No. 249 of 2013?

Issue No. 3- Is the present petition sub-judice the proceedings known as Kisumu Court of Appeal Civil Appeal NO. 27 of 2021?

Issue No. 4- Is the present petition an abuse of the court process?

Issue No.5- Is the present application merited?

Issue No.6- Who should pay the costs of the present application?

9. The Court having duly identified the issues for determination, the same will be discussed as hereinbelow.

Issue No. 1- Do the applicants herein have the locus standi and/or capacity to file the present application?

10. The first issue for determination is the locus standi and/or capacity of the Applicants to file and prosecute the present Application.
11. The Respondents pleaded in their Replying Affidavit as well as their submissions that the Applicants do not have the legal capacity and/or locus standi to file any pleadings in the pending Petition.
12. The Respondents averred that the Applicants were never and have never then of ficials of Olomismis Group Ranch which was the registered owner of the property known as LR.No.transmara/Olomismis/1.
13. Consequently, the Applicants actions of sub-dividing and/or transferring the sub-divisions known as LR.No.transmara/Olomismis/1-1640 was done illegally and in contravention of the Constitution of Kenya.
14. In addition to the above, the Respondents pleaded and submitted that the Applicants herein do not have any authority from the general membership of Olomismis Group Ranch to prepare, sign and/or file any legal documents before this Court including the present application for determination.
15. Based on the above pleadings and submissions, the Respondents sought for the present application to be dismissed forthwith.
16. The Applicants stated that previously before the dissolution of Olomismis Group Ranch, the 1st to 3rd Applicants were indeed of ficials of the said Group Ranch.



17. However, in the pending Petition before this Court, the Respondents had sued them in their own capacities and not as of fice holders of Olomismis Group Ranch.
18. Consequently, the Applicants are legitimate parties to the pending Petition and have the locus standi and capacity to defend themselves and/or file the present Application before Court.
19. To be able to resolve this issue, the court has gone through the pending Petition dated 15.04.2024 and in particular paragraphs 2,3 and 4.
20. The Respondents in their pending Petition describe the Applicants as male adults who purport to be the Chairman, Secretary and Treasurer of the dissolved Olomismis Group Ranch.
21. The Respondents throughout the entire pending Petition deny the Applicants to be valid of ficials of Olomismis Group Ranch and in fact label them to be imposters and/or persons who purported to act on behalf of the OLOMISMUS GROUP RANCH without any valid authority.
22. However, the main ground why the Respondents are claiming that the Applicants do not have locus standi to bring the present Application is because they are neither of ficials of Olomismis Group Ranch nor have the authority from the said Olomismis Group Ranch to oppose the pending Petition at all.
23. Clearly, the Respondents herein are the ones who filed the pending Petition and sued the Applicants jointly with other Respondents.
24. The mere fact that the Respondents included the Applicants in the pending Petition is an admission that the Applicants are necessary parties in the proceedings.
25. It therefore goes without saying that the Applicants are entitled to a right to be heard which includes an opportunity to defend themselves and/or challenge the Respondents' pending Petition and/or any other proceedings thereof .
26. The Respondents submission that the Applicants do not have the right to file the present application and/or defend the pending Petition together with any other proceedings is in fact self-defecting as it points to the conclusion that there is no infringement and/or violation occasioned by the Applicants to the Respondents herein and therefore the Applicants are not necessary parties therein.
27. Be as it may, as long as the Applicants are still parties in the pending Petition, then they have the capacity and locus standi to file the present Petition and/or file any applications that are necessary for them to enjoy the right to a fair hearing as enshrined under Article 50 of the Kenyan Constitution, 2010.

Issue No. 2- Is the present petition res-judicata the proceedings known as Kisii ELC Case No. 249 of 2013?

28. The second issue for determination is whether or not the pending Petition is Res-Judicata the proceedings known as Kisii ELC Case No. 249 of 2013.
29. The Applicants pleaded in the present Application that during the sub-division of the property known as LR.No.transmara/Olomismis/1 which belonged to Olomismis Group Ranch, a number of members therein were aggrieved by the manner and procedure in which the then of ficials were conducting business and filed the proceedings known as KISII ELC CASE NO. 249 of 2021.
30. The Applicants proceeded to produce the pleadings relating to Kisii ELC Case No. 249 of 2013 as Annexure KNN 5, 6 and 7 (a) and (b).
31. The Respondents on being served with the present Application which included the above pleadings did not file any response to dispute the validity of the said documents.



32. Looking at the Annexure KNN 5 which was the Plaint dated 31.05.2013, this Court notes the following salient facts and issues in the Plaint dated 31.05.2013; -
- i. That the Plaintiffs therein described themselves as MEMBERS of Olomismis Group Ranch who represented all other aggrieved members of the said Group Ranch.
 - ii. The 1st to 10th Defendants were described as officials of the 11th Defendant who was Olomismis Group Ranch with the 1st, 2nd and 3rd Defendants being the Chairman, Secretary and Treasurer respectively.
 - iii. That the entity known as Olomismis Group Ranch was the lawful owner of the property known as LR.No.transmara/Olomismis/1.
 - iv. The issues for determination in the proceedings known as KISII ELC CASE NO.249 of 2013 was the manner in which the 1st to 10th Defendants who were the office bearers had unlawfully and without following procedure sub-divided the property known as LR.No.transmara/Olomismis/1 belonging to the 11th Defendant Olomismis Group Ranch.
 - v. Paragraph 12 of the Plaint dated 31.05.2013 in particular specified the omissions and/or failures to adhere to procedures that resulted to the Plaintiffs therein seeking various reliefs from the Court therein.
 - vi. The judgement in determination of the proceedings known as Kisii ELC Case No. 249 of 2013 which is annexed as KNN 7 (a) was pronounced on the 05.10.2018 and it was held that the sub-division of the property known as LR.No.transmara/Olomismis/1 TO 1699 was done validly and procedurally and all persons registered in the Area List and the Mutation Form registered on the 13.05.2013 should be issued with Titles thereof .
33. In the pending Petition before this Court, the Respondents are raising the following issues for determination by this Court; -
- a. The legality and/or authority of the 1st to 3rd Respondents to manage and/or undertake the sub-division of the property known as LR.No.transmara/Olomismis/1 into the properties known as LR.No.transmara/Olomismis/1699.
 - b. The Legality and/or authority of the List of beneficiaries to the properties known as LR.No.transmara/Olomismis/1-1699 prepared and used by the 1st to 3rd Applicants which is alleged to included non-members Olomismis Group Ranch.
 - c. The legality and/or lawfulness of the Applicants decision to use a private licensed Surveyor to undertake the sub-division of the property known as LR.No.transmara/Olomismis/1 and the creation of the sub-divisions known as LR.No.transmara/Olomismis/1-1699.
 - d. The Applicants authority and/or powers to deal with the properties known as LR.No.transmara/Olomismis/1329, 971 and 972 in the name of the 6th and 7th Respondents in the pending Petition.
34. The reliefs sought by the Respondents in the pending Petition are as follows; -
- a. A declaration that the Applicants herein were not the bona fide and lawful officials of Olomismis Group Ranch which owned the property known as LR.No.transmara/Olomismis/1.



- b. A declaration that the sub-division of the property known as LR.No.transmara/Olomismis/1 undertaken by the Applicants as of ficials of Olomismis Group Ranch be declared invalid, null and void.
 - c. The documents and/or instruments used to sub-divide the property known as LR.No.transmara/Olomismis/1 and register the sub-divisions known as LR.No.transmara/Olomismis/1-1699 be declared unlawful, illegal, null and void.
 - d. The Registration of the Sub-Divisions known as LR.No.transmara/Olomismis/1-1699 undertaken by the Applicants herein on behalf of Olomismis Group Ranch be cancelled and the original property known as LR.No.transmara/Olomismis/1 be reinstated.
 - e. A permanent prohibitory injunction be and is issued against the 6th and 7th Respondents in the pending Petition from dealing and/or occupying the properties known as LR.No.transmara/Olomismis/972 and 1329.
35. Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya provides as follows; -

“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”

36. In the case of Independent Electoral & Boundaries Commission-versus-maina Kiai & 5 Others (2017) eKLR, the Court of Appeal observed as follows regarding the doctrine of Res Judicata; -

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

37. In the case of Lotta-versus- Tanaki (2003) 2 EA 556 the Court held as follows; -

“The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.”



38. In the case of ET-Versus- Attorney General & Another (2012) eKLR, the Court made the following finding; -

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

39. Lastly, in the case of Christopher Kenyariri-versus- Salama Beach (2017) eKLR, the Court outlined the followings legal ingredients in determining an issue of Res Judicata; -

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

- a) The suit or issue was directly and substantially in issue in the former suit
- b) Former suit between same parties or parties under whom they or any of them claim
- c) Those parties are litigating under the same title
- d) The issue was heard and finally determined.
- e) The court was competent to try the subsequent suit in which the suit is raised.”

40. . The Court having underscored the intention and the principles dealing with the doctrine of Res-Judicata, the same will now be evaluated hereinbelow.

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

41. . The first ingredient to be evaluation in an issue of Res Judicata is whether the pending issue in the pending proceedings is similar to the issue in the former proceeding.

42. In the pending Petition, the issues for determination include the legality of the Applicants as of fice bearers of Olomismis Group Ranch, the manner and legality of the sub-division of the property known as LR.No.transmara/Olomismis/1, the revocation and/or cancellation of the property known as LR.No.transmara/Olomismis/1-1699 and the reinstatement of the property known as LR.No.transmara/Olomismis/1 to the name of Olomismis Group Ranch.

43. In the previous suit known as Kisii ELC 249 of 2013, the issues for determination was the legality of the Applicants herein as of fice bearers of Olomismis Group Ranch, the manner and legality of the sub-division of the property known as LR.No.transmara/Olomismis/1, an Order for revocation and/or cancellation of the resultant sub-divisions known as LR.No.transmara/Olomismis 1-1699 and the reinstatement of the property known as LR.No.transmara/Olomismis/1 in the name of Olomismis Group Ranch.



44. This Court therefore makes a finding that the issues in the pending Petition are similar and/or substantially similar to the issues raised in the previous proceedings known as Kisii ELC Case No. 249 of 2013.

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

45. The second ingredient is to confirm whether or not the parties in the former suit or under whom they claim is the same as those in the subsequent suit.
46. In the pending Petition, the Petitioners in Paragraph 2 of the Petition state that they have brought the said Petition in their own capacities and also on behalf of all original members of Olomismis Group Ranch that were aggrieved by the sub-division of the property known as LR.No.transmara/Olomismis/1.
47. In the previous suit known as Kisii Elc Case No.249 of 2013, the Plaintiffs in Paragraph 1 of the Plaint dated 31.05.2013 introduced themselves as members of Olomismis Group Ranch who was the 11th Defendant therein.
48. On the other hand, the 1st, 2nd, 3rd, 4th and 5th Respondents in the pending Petition were the 1st, 2nd, 3rd, 4th and 5th Defendants in the previous proceedings known as Kisii ELC Case No. 249 of 2013.
49. The only new Respondents in the pending Petition are the 6th and 7th Respondents who are alleged to have purchased two sub-divisions undertaken by the 1st to 3rd Respondents herein.
50. In essence, this Court makes a finding that the parties in the pending Petition and the previous suit known as Kisii ELC Case No. 249 of 2013 are substantively similar.

c) Those parties are litigating under the same title

51. The third ingredient is whether the subject matter in the pending Petition is similar to the subject matter in the proceedings known as Kisii ELC Case No. 249 of 2013.
52. In the pending Petition, the title under litigation is the property known as LR.No.transmara/Olomismis/1 which belonged to Olomismis Group Ranch.
53. In the proceedings known as Kisii ELC Case No. 249 of 2013, the property under litigation was again LR.No.transmara/Olomismis/1 which belonged to Olomismis Group Ranch.
54. It therefore goes without saying that the parties in the pending Petition are litigating on the same title as that which was litigated upon in the proceedings known as Kisii ELC Case No.249 of 2013.

d) The issue was heard and finally determined.

55. . The fourth ingredient is whether the issues that are raised in the pending Petition were heard on merit and determined.
56. The Applicants in the present Application have pleaded that all the issues in the proceedings known as Kisii ELC Case No. 249 of 2013 were fully heard on merit and finally determined on the 05.10.2018.
57. The Applicants placed before this Court the Judgement and Decree dated 05.10.2018 as KNN 7 (a) and (b).
58. Consequently therefore, this Court is satisfied and hereby makes a finding that the issues raised in the previous proceedings known as Kisii ELC Case No. 249 of 2013 were indeed heard on merit and a final determination made thereof on the 05.10.2018.



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

59. The last ingredient is whether or not the Court that entertained and determined the previous proceedings had the competent jurisdiction to do so.
60. The proceedings known as Kisii ELC Case No. 249 of 2013 were filed in the Environment & Land Court which has the jurisdiction to hear matters relating to land.
61. Both the Plaintiffs in the proceedings known as Kisii ELC Case No. 249 of 2013 as well as the Defendants herein expressly admitted that the Environment & Land Court had the necessarily Constitutional and Statutory jurisdiction to hear and determine the issues before it.
62. This Court is therefore clear that indeed the Court that handled the proceedings known as Kisii ELC Case No. 249 of 2013 had the relevant Constitutional and Statutory jurisdiction to heard and determine the issues therein.
63. In essence, this Court is of the opinion and finding that the issues and reliefs sought in the pending Petition are Res-Judicata to the issues and reliefs sought for in the proceedings known as Kisii ELC Case No. 249 of 2013.

Issue No. 3- IS The Pending Petition Sub-judice The Proceedings Known As Kisumu Court of Appeal Case No. 27 of 2021?

64. The third issue for determination is whether or not the pending Petition is sub-judice to the proceedings known as Kisumu Court of Appeal Civil Appeal NO. 27 of 2021.
65. The Applicants pleaded that after the determination of the proceedings known as Kisii ELC Case No. 249 of 2013 through the Judgement dated 05.10.2018, the Plaintiffs therein who are some of the Original Members of Olomismis Group Ranch proceeded to file an Appeal before the Court of Appeal in Kisumu.
66. The Applicants placed before this Court a copy of the first page of the Record of Appeal which is dated 19.03.2021 as KNN 8.
67. The Appeal known as Kisumu Court of Appeal Civil Appeal NO. 27 of 2021 relates to the Judgement and Decree pronounced on the proceedings known as Kisii Elc Case No. 249 of 2018.
68. The Petitioners in the pending Petition did not dispute the existence of the Appeal before the Court of Appeal at Kisumu.
69. This being the scenario, this Court takes judicial notice that the issues which were litigated in the proceedings known as Kisii ELC Case No. 249 of 2013 and are again raised in the pending Petition are well within the jurisdiction of the Court of Appeal which is yet to hear and make its determination thereof .
70. This Court therefore is of the opinion and finding that the issues and/or reliefs contained in the pending Petition are duly seized by the Court of Appeal through the Kisumu Court of Appeal Civil Appeal NO.27 of 2021 and this Court has not jurisdiction to hear and determine the same.

Issue No. 4- IS The Present Petition An Abuse Of The Court Process?

71. The fourth issue is whether this pending Petition is an abuse of the Court process or not.



72. The Applicants pleaded that the pending Petition is an abuse of the Court process keeping in mind that the same issues and reliefs had been sought for in the previous proceedings known as Kisii ELC Case No. 249 of 2013 and are still a subject of an Appeal in the Court of Appeal in Kisumu.
73. The Applicants submitted that the Petitioners in the present Petition were merely forum shopping and this Court should not entertain such mischievous and frivolous actions.
74. The Respondents who were the Petitioners in the pending Petition did not really address themselves to this issue in their Replying Affidavit but rather decided to submit extensively on the merit of the Petition itself.
75. As earlier found, the issues, the parties and subject matter between the pending Petition and the previous proceedings known as Kisii ELC Case No. 249 of 2013 are one and the same.
76. The differences in this pending Petition is that the persons who allege to represent the Original Members of Olomismis Group Ranch have changed and there is a reduction of the Respondents from the previous proceedings known as Kisii ELC Case No. 249 of 2013.
77. In addition to the above, the Petitioners who allege to file the pending Petition elected to file a Constitutional Petition to litigate the same issues over the same property known as LR.No.transmara/Olomismis/1 instead of joining the already existing the proceedings which are pending before the Court of Appeal sitting in Kisumu.
78. This Court is therefore of the considered opinion that the pending Petition is an abuse of the Court process especially keeping in mind that they are aware of the pending Appeal before the Court of Appeal.

Issue No.5- IS The Present Application Merited?

79. Based on the finding in Issue No. 2,3 and 4 hereinabove, this Court is satisfied that the present Application is merited.

Issue No.6- WHO Should Pay The Costs Of The Present Application?

80. On the issue of costs, the Court hereby makes a finding that the Petitioners and/or Respondents in the present application shall bear the costs of the substantive Petition and the present application.

Conclusion

81. In conclusion, the Court hereby makes the following Orders are relates to the Application dated 03.07.2024; -
 - A. The notice of motion application dated 3rd july 2024 is merited.
 - B. The petition dated 15.04.2024 be & is hereby struck out for being res-judicata to the proceedings known as kisii ELC Case no.249 of 2013 & Sub-judice The Court of Appeal Civil Appeal No.27 of 2021.
 - C. The petitioners shall meet the costs of the respondents relating to the substantive petition as well as the present application.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 15TH of OCTOBER 2024.

EMMANUEL.M.WASHE



JUDGE

IN The Presence of :

Court Assistant: Mr. Ngeno

Advocate For The Petitioners/respondents: In
Person

Advocate For The 1st To 3rd Respondents/applicants:

Ms. Ochwal

