



Tiony & another v Raiply Wood (K) Limited & 3 others (Environment & Land Case 916 'B' of 2012) [2024] KEELC 14174 (KLR) (2 October 2024) (Ruling)

Neutral citation: [2024] KEELC 14174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 916 'B' OF 2012
JM ONYANGO, J
OCTOBER 2, 2024**

BETWEEN

KIMAIYO TIONY 1ST PLAINTIFF

MOSES KINIYA NENE 2ND PLAINTIFF

AND

RAIPLY WOOD (K) LIMITED 1ST DEFENDANT

DANIEL TOROITICH ARAP MOI 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The 1st Defendant/ Applicant filed a Notice of Motion dated July 10, 2023 brought pursuant to Order 51 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act* seeking orders that the suit herein be struck out in its entirety as the same is unsustainable and moot in law.
2. The application is based on the grounds that the parcel of land known as Eldoret Municipality Block 15/10 is non-existent thus a suit premised on its existence is a nullity. That the parcel of land known as Eldoret Municipality Block 15/10 was subsequently sub-divided to create parcels No. Eldoret Municipality Block 15/237,238 and 239. Further, that parcel No. Eldoret Municipality Block 15/239 measuring 21.454 Ha (approximately) was sub-divided to create parcel Eldoret Municipality Block 15/2369,2370 and 2371. That the 1st Defendant/Applicant is the proprietor of parcels 2369 and 2370 having purchased them for valuable consideration without notice of the Respondents' alleged interest therein.
3. The application is predicated on the grounds that the issues concerning parcel No. Eldoret Municipality Block 15/10 have already been addressed with finality by a court of competent



jurisdiction in the judgment in Eldoret ELC Case No. 9 of 2014 Susan Cherubet & Another V Raiply Woods (k) Limited & 5 Others. In support of the application is the affidavit of Koome Gitonga sworn on the 10th July, 2023 in which he reiterates the above-mentioned grounds and prays that the suit be struck out as it is not sustainable in law.

4. The application is opposed by the Plaintiffs through the Replying Affidavit and Grounds of Opposition dated 18.9.2023 and 17.10.2023 in which they set out various reasons why they oppose the application. They start by asserting that the application is a blessing in disguise as their replies are summaries of their suit which has the relevant facts demonstrating the owner of land parcel number Eldoret Municipality Block 15/10 contained in the original file No. 7289/111 for I.R No. 10492 Certificate No. I.R No. 17542/1 in both Ardhi House and Survey of Kenya at Nairobi . They aver that their response will lay bare what they refer to as the “cheeky game” of rendering this suit res judicata after the determination of Petition No. 17 (E021) of 2022 by the Supreme Court and that understanding their replies will demystify the shenanigans perpetuated by the defendants since 2012.
5. They assert that the Notice of Motion is incurably defective, incompetent, frivolous and vexatious and devoid of substance as it is based on unsupported conveyance documents aimed at hoodwinking the Honourable court.
6. The Respondents provide a background of the case as follows; That the original land parcel L.R No. 10492 measuring 3235 acres was extinguished after 5 Lagat Partners were each allocated their parcels according to the shares each of them had purchase as follows:
 - a. Nathaniel Kiptalam Lagat 280.39Ha
 - b. Thomas Kipkosgei Yator 227.3 Ha
 - c. William Kipngeny Letting 229.5Ha
 - d. Cherwon Maritim 270Ha
 - e. Noah Kipngeny Chelugui 215.7Ha
7. The remaining parcel was transferred to the following:
 - a. Huruma Company Ltd Eldoret 55 Ha
 - b. Eldoret Sewage plant 15acres
 - c. Kenya Police Rifle Range 10 acres.
8. That parcel number Eldoret Municipality Block 15/10 measuring 35.89 acres was allocated to their donor and the same has never been sub-divided to create parcels No. Eldoret Municipality Block 15/237, 238 and 239 nor has parcel 239 been sub-divided to create parcels 2369, 2370 and 2371 as all the purported sub-divisions were done fraudulently.
9. It is their contention that the Applicants failed to disclose the existence of this suit to the Court of Appeal and Supreme Court in Petition No. 17(E021) of 2022 which are between the same parties and purportedly the same subject matter. In response to the assertion that the suit is res judicata as the issues herein were determined in ELC Petition No. 9 of 2014, they contend that the said suit ought to have been ventilated as a normal suit and not a Constitutional Petition and that the same was camouflaged as a Constitutional Petition to escape consolidation with similar suits and shield it from the defence of limitation.



10. They insist that their land has never been the subject of compulsory acquisition and that their suit ought to proceed to full hearing in order to unravel the fraud that was perpetrated by the Applicants as no transfer forms were produced nor did they Defendants seek the revocation of the donor's title. They accuse the courts of authenticating forged documents by failing to call for forensic examination by experts, independent surveyors, DCI and EACC. Additionally, they accuse their former advocates of delaying their case and turning against them.
11. They admit that their application to join Petition No. 9 of 2014 was declined by the ELC and that their appeal to the Supreme Court was dismissed hence the need to have their suit heard and determined by this Honourable Court. They urge that land is an emotive matter and that land matters ought to be handled carefully by addressing all the issues yet their case has delayed in court for 11 years. They urge that the application be dismissed with costs.
12. The application was canvassed by way of written submissions and both parties field their submissions which I have read and considered.

Applicant's Submissions

13. In his submissions dated 7th December, 2023 learned counsel for the 1st Defendant/Applicant has given a background of the matter. It is his submission that the Plaintiff's suit which is instituted on behalf of Mr. Nathaniel Kiptalam Lagat is based on the assertion that the said Nathaniel Lagat was the registered owner of land parcel L.R Number 10492/2 delineated on DP 106636 now referred to as Eldoret Municipality Block 15/10 measuring 35a. The said parcel was further sub-divided among five purchasers including Noah Kipngeny Chelugui, Parcel No. Eldoret Municipality Block 15/10 was further sub-divided giving rise to parcel Eldoret Municipality Block 15/2369-2371. The Applicant is alleged to have purchased parcel 2369 and 2370 in 2007 and it has substantially developed the land. Counsel further submits that it is the Applicant's developments that the Plaintiff terms as encroachment and seeks to have the Applicant's titles cancelled.
14. In its Application the Applicant seeks to strike out the Plaintiffs' suit terming it unsustainable in law on the ground that the issues raised by the Plaintiffs in this suit have already been determined by a court of competent jurisdiction in Eldoret ELC Petition No. 9 of 2014 Susan Cherubet & Another vs Daniel Toroitich Arap Moi & 5 Others. The decision of the ELC was challenged in the Court of Appeal and this Court's decision was upheld. According to the Applicant, the Respondents failed to file a proper response to the application and the Applicant claims that the application is unopposed. The court however holds a different view.
15. Counsel has relied on the case of D.T Dobie & Co Ltd vs Muchina (1982) 1 KLR for the proposition that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.
16. It is counsel's contention that the suit property no longer exists as the same was sub-divided to create parcels Nos. 237, 238 and 239. The latter parcel was further sub-divided to create parcels 2369, 2370 and 2371. He therefore submits that the suit is premised on a non-existent parcel of land and the Plaintiffs have thus failed to disclose any reasonable cause of action.
17. Additionally, counsel submits that the question of ownership of the suit property was finally determined by a court of competent jurisdiction in Petition No. 9 of 2014 by the judgment of Justice Ombwayo delivered on 9th May 2019 and that this suit is therefore an abuse of the court process.



18. Counsel has relied on Section 7 of the *Civil Procedure Act* which sets out the doctrine of res judicata. He has also relied on the cases of John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited (2014) eKLR and Njangu vs Wambugu & Another HCCC no. 2340 of 1991 (Unreported). In relying on Raila Odinga & 2 Others vs IIEBC & 3 Others (2013) eKLR he submits that this court is functus officio.

Respondents' Submissions

19. In their submissions, the Plaintiffs/Respondents submitted that the lawyers/law firms in the Supreme Court are not parties to the law firm (sic) that is in the present proceedings and thus their matters must not be associated to this suit in any way. They submitted that the Applicant's submissions failed to tackle critical issues raised in the Respondents Replying Affidavit to the Application herein. They reiterated that Eldoret/Municipality Block 15/10 belonged to their Donor as did Eldoret/Municipality Block 15/11 and that these are the parcels of land they were claiming.
20. The Respondents submitted that they sought to represent themselves in the supreme court because what happened at the ELC in Eldoret and the Court of Appeal at Kisumu was a sham. They added that the parties therein all hid the existence of this suit from the court in a bid to render it res judicata. The Respondents urged that the instant motion is an afterthought as the claim was not part of the applications filed in the court of the appeal and the supreme court. They submitted that they were deceived by attempted negotiations which stalled only to learn later that the suit had moved to the court of appeal and later the supreme court.
21. The Respondents submitted that their suit did not offend the doctrine of res judicata and neither is the court functus officio. They insisted that the 1st Defendant/Applicant had not offered any plausible reason why the suit ought to be struck off. The Respondents submitted that courts must manage cases in a manner that upholds the constitutional requirements of fair trial and further that delayed justice is not one of them. The Respondents submitted that the instant application is an abuse of court process and must not be entertained, and prayed that this court hears the suit speedily to its conclusion.

Analysis and Determination

22. The Applicants seek to have the suit herein struck out for reason that it is unsustainable and moot in law. The Applicants' basis for seeking the said prayers is that the suit herein is res judicata. Upon consideration of the Application, the response thereto and the submissions of the parties, the main issue is whether indeed the suit is res judicata.
23. The substantive law on res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”



24. The Black's law Dictionary 10th Edition defines "res judicata" as:
- "An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."
25. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the previous Application as against the subsequent Application to ascertain;
- i. What issues were really determined in the previous Application;
 - ii. Whether they are the same in the subsequent Application and were covered by the Decision.
 - iii. Whether the parties are the same or are litigating under the same Title and
 - iv. Whether the previous suit was determined by a court of competent jurisdiction.
26. There is no dispute that the court that determined the previous suit had the requisite jurisdiction. This court now needs to look at the issues in the previous suit and determine whether they are the same issues raised herein. The Court will also need to determine whether the parties in the two case were similar or were litigating under the same title.

a. Whether the issues were raised and determined in the previous suit are the same issues raised herein;

27. The Applicant herein claims that the instant suit is res judicata by virtue of the Eldoret ELC Petition No. 9 of 2014. I have had an opportunity to look at the judgement in the said case. The Petitioners' case in Susan Cherubet Chelugui & Another vs Daniel Toroitich Arap Moi & 5 Others, Eldoret ELC Petition No. 9 of 2014. at paragraph 6 thereof is summarized as:-
6. The petitioners state that L.R. No. 10492 was acquired in the year 1965 from Jacobus Hendrik EngelBrecht by Nathaniel Kiptalam Arap Langat, Thomas Kipkosgei Arap Yator, Noah Kimngeny Arap Chelugui, Cherwon Arap Maritim and William Kimngeny Arap Leting.
 7. The parcel of land which ended up in the hands of His Excellency Retired President Daniel Toroitich Arap Moi traces itself to the Noah Kimngeny Arap Chelugui share and further up from Noah Kimngeny Arap Chelugui Shareholding at N. K. Langat & Partners and further up from Jacobus Hendrik EngelBrecht, a private Titleholder/Seller."
28. In his determination of the case, Justice Ombwayo also noted that:
81. His Excellency Retired President Daniel Toroitich Arap Moi was not a member of N. K. Langat & Partners the original owners of the Land Reference Number 10492 (original No part of 5742) but was given the portion of land meant for Noah Kimngeny Arap Chelugui. There is no explanation as to how he got the title to the property.
 82. The parcel of land which ended up in possession of His Excellency retired President Daniel Toroitich Arap Moi traces itself to the Noah Kimngeny Arap Chelugui share and further up from Noah Kimngeny Arap Chelugui



Shareholding at N. K. Lagat & Partners and further up from Jacobus Hendrik EngelBrecht, a private Titleholder/Seller.”

29. There is no dispute that the 5 partners purchased L.R. No. 10492 (Original No. 5742) and subdivided it into 6 portions. These portions were allocated to the 5 partners and the 6th portion given to Huruma Company Limited, from which the Kenya Police was to get 10 Acres for a shooting range. One of the subdivisions is what is known as Eldoret Municipality/Block 15/10 which was subsequently subdivided to create parcels No. Eldoret Municipality/Block 15/237, 238 and 239. The latter parcel was registered in the name of the Late President Moi, who then subdivided it into Plot Nos. 2369, 2370 and 2371 two of which were sold to Rai Plywood. The Petitioners in Eldoret ELC Petition No. 9 of 2014 claimed ownership of Eldoret Municipality/Block 15/239 and in extension the resultant parcels that were ultimately sold to Rai Plywood by the late retired President of the Republic of Kenya, Daniel Toroitich Arap Moi. In its determination in Eldoret ELC Petition 9 of 2014, the court found that:-

“a. A declaration that the petitioners constitutional right to property and/or interest in or over the property Eldoret Municipality/Block 15/239 (53 acres) registered in the name of His Excellency the Retired President Daniel Toroitich Arap Moi and subsequently Rai Plywood(K) Ltd all in Uasin Gishu District deserves the protection by the Honourable court and that the protection do issue accordingly in terms of the declarations that the acquisition of the said properties by the 1st and 2nd respondents were arbitrary unconstitutional, irregular, unprocedural, tainted, a nullity ab initio and therefore not worthy of any constitutional protection.”

30. In *Jan Mohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another vs District Land Registrar Uasin Gishu & 4 others* [2024] KESC 39 (KLR), the Supreme Court in its judgement delivered on 2nd August, 2024 also noted that the Petitioners in Eldoret ELC Petition No. 9 of 2014 decried the irregular subdivision of Eldoret Municipality/Block 15/10, and only lay claim to one sub-plot thereto, being Eldoret Municipality/Block 239.

31. The instant suit is interested with the portion that was given to Nathaniel K. Lagat who was not a party to the previous suit before Justice Ombwayo. From the Respondents’ pleadings, the suit herein challenges the allegation that Eldoret/Municipality Block 15/10 was allocated to Mr. Noah Chelugui, asserting instead that the said parcel was allotted to Mr. Nathaniel Lagat. The Respondents have submitted that Noah Chelugui’s land was Eldoret Municipality/ Block 15/13. Additionally, from the averments and the prayers sought in the Plaint, the Respondents herein seek a determination with regards to parcel numbers Eldoret Municipality/Block 15/2369-2371 which were all carved out of Eldoret Municipality/Block 15/10 that belonged to their Donor.

32. The suit herein therefore asks the court to look at who the owner of Eldoret Municipality/Block 15/10 was between the initial partners of N.K. Lagat & partners. In that regard, the Respondents have alleged that the said Eldoret Municipality/Block 15/10 belonged to Nathaniel Lagat and not Noah Chelugui. Indeed even the Supreme Court in *Jan Mohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another vs District Land Registrar Uasin Gishu* (Supra) further noted that:-

“(114) From the six referenced subdivisions of L.R. No. 10492, it is contended that Eldoret Municipality/ Block 15/10 was assigned to Noah Chelugui. However, there is no evidence on record to this effect. On the contrary, there is evidence



that Eldoret Municipality/ Block 15/10 was registered in the Government of Kenya as an absolute title. (See Vol II page 202).”

33. The Supreme court however only noted this lack of proof of ownership of Eldoret Municipality/Block 15/10 by Noah Chelugui, but never went into detail to determine who among the 5 partners was allocated the said parcel after the original subdivision. This issue was therefore not in contention in the previous suit being Eldoret Petition No. 9 of 2014 and the ensuing appeals, thus it was neither deliberated on nor was a decision made on it.
34. The suit also asks the court to look into the subdivision thereto into Eldoret Municipality/Block 15/237, 238 and 239 and the subsequent subdivision into Eldoret Municipality/Block 15/2369-2371. The Respondent’s claim herein from their Replying Affidavit is that their Donor never subdivided the said Eldoret municipality/Block 15/10 to form Parcel No. Eldoret Municipality/Block 15/237, 238 and 239 and its registration in favour of the 2nd Defendant and later the 1st Defendant. As a result, the Respondents herein also dispute the further subdivision into Eldoret Municipality/Block 15/2369, 2370 and 2371. Although the subject matter of the two suits is the same being that they all circle back to L.R. Number 10492 and the resultant parcel being Eldoret Municipality/Block 15/10, it cannot however be said that the issues in the two cases are similar.
35. It follows therefore that the issues raised in this instant suit have never been dealt with by any court of competent jurisdiction. I note from my reading of the record of the ELC Petition 9 of 2014 there was a proposal on 4th June, 2015 to have all the matters related to the Petition consolidated. The instant suit was listed as one of the suits that were being considered for consolidation alongside ELC No. 415 of 2012 and ELC 367B of 2012. On 28th January, 2016 the Petitioner’s Advocate in Eldoret ELC Petition 9 of 2014 opposed the intended consolidation of the Petition with any other matter and thus the suits were not consolidated. The two cases were again brought up on 14th May, 2018 and Counsel for the Petitioners therein told the court that the suits by other parties did not cover the Petitioners’ case. Again, the court did not address itself on the matter.
36. The same proposal was made in this instant suit on 29th October, 2015 when the court directed that ELC 415 of 2012, ELC 367B of 2012 and ELC Petition 9 of 2014 as matters relating to the same parcel of land be mentioned on 7th December, 2015. Notably, there was no appearance by the Advocates in ELC petition No. 9 of 2014 or the parties therein on the said date. There were several consultative meetings between advocates for the parties in the aforementioned cases as well as counsels in ELC 404 of 2013 & ELC 190 of 2012. On 13th July, 2016 the Advocates all registered their opposition to the consolidation of the suits, but as is clear from the above paragraphs, as of 28th January, 2016 the consolidation had already been opposed in ELC Petition 9 of 2014.
37. Had these proposed consolidations been allowed, then there would have been grounds to invoke the doctrine of res judicata. This court needs to point out that the suit herein was filed in 2012, 2 years before ELC Petition No. 9 of 2014 was commenced. It is against the interest of justice that the Respondent herein should be denied their day in court by reason of a suit that was filed after they moved to court to protect their proprietary interest, or of the Donor of their Power of Attorney to be precise, yet they filed their case first. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to.

b. Whether the parties are the same or are litigating under the same title

38. As to whether the parties are the same, I note that in Petition No. 9 the Petitioners were Susan Cheburet Chelugui and David K. Chelugui who were suing as the Administrators to the Estate of the late Noah



Kipngeny Chelugui. The Respondents were the late Retired President Daniel Toroitich Arap Moi, Rai Plywood (K) Limited, District Land Registrar, Uasin Gishu District, the Registrar of Titles and the National Land Commission.

39. Although the Supreme Court in SC Petition No. 17 (E012) of 2022 & No. 24 (E027) of 2022 made the finding that Nathan K. Lagat had been party of the proceedings, the same cannot be further from the truth. The claim that Nathaniel Lagat made an Application for joinder and was denied arose in the Court of Appeal in Kisumu Civil Appeal 159 & 254 of 2019. This was an appeal lodged Nathaniel Lagat against the judgment of Justice Ombwayo, and although this court has not had a chance to see the memorandum of appeal filed by Nathaniel Lagat, the Court of Appeal in its judgment noted that:-

“Similarly, the appellant in Civil Appeal No. 254, Nathaniel K. Lagat (Nathaniel), lodged a Notice of Appeal and a Memorandum of Appeal complaining that the learned Judge erred by;

- a. Delivering the impugned judgment which affects the appellant when he was not a party in the original case.
- b. Conferring to the 3rd respondent ownership of the disputed land and depriving the appellant his land reference Eldoret Municipality/Block/15/10.
- c. Delivering judgment per in curiam without dealing with all issues before court.
- d. Declining to enjoin the Appellant as an interested party in the matter.”

40. It was reiterated by a Mrs. Ndugire who was his advocate on record in the Appeal. Mrs. Ndugire is quoted in the Judgement thereof as having informed the court that her client did not participate in the ELC proceedings because “he had applied to be joined in that matter at the trial court but the application was dismissed”. Senior Counsel Mr. Ahmednasir Abdulahi who also appeared for the 1st Respondent in the said appeal is quoted as having submitted that:-

“Beginning with Civil Appeal No. 254, counsel noted that following a ruling dated 1st October 2015, the court had declined the joinder of Nathaniel and no appeal had been preferred against that decision.”

41. In my attempt to unravel the mystery as to why Nathaniel Lagat was not allowed to join the suit, I took time to peruse the file that was Eldoret ELC Petition No. 9 of 2014. From my reading of the file, there was an application for joinder of parties in the ELC dated 15th December, 2014 but it was not made by or on behalf of Nathaniel Lagat. The said application was brought by Ezekiel Kiptoo and Ernest Kibet who claimed to be the legal representatives of the Estate of William Kingeny Arap Letting, one of the partners who bought the land from Jacobus Hendrik EngelBrecht. It is this application that was declined vide the ruling delivered on 1st October, 2015.

42. Apart from the said Application of 15th December, 2014 the court only handled two more applications in ELC Petition No. 9 of 2014. The first is the Petitioners’ Application dated 28th July, 2014 which sought to have the Petition certified urgent owing to the 1st Petitioners age and ill-health and be fixed for interpartes hearing. The other Application which was also filed by the Petitioners is dated 5th February, 2018 sought to arrest the delivery of the judgment and allow them to introduce into the court record a Valuation report.

43. Neither Nathaniel Lagat nor his Attorneys herein applied to be joined to the suit. It is clear therefore that the two superior courts were misled in this regard. Having taken time to read through the



proceedings in Eldoret ELC Petition No. 9 of 2014 file, it is clear that Justice Ombwayo never dealt with any application for joinder that was made by Nathaniel Lagat. Consequently, it follows that the said Nathaniel Lagat was never a party in the previous suit, and neither was any person claiming under or through him. In addition, the joinder of the said Nathaniel Lagat ought not have formed a ground upon which an appeal could be raised.

44. As to whether the parties in the said petition were litigating under the same title as the Respondents herein, once again, nothing could be further from the truth. Although the subject matter of the suit herein can be traced to L.R. No. 10492 (Original No. 5742), both the Petitioners therein and the Respondents herein are claiming an interest in the subdivisions arising therefrom being Eldoret/ Municipality Bock 15/10. As explained earlier, the Petitioners in the earlier suit were claiming their interest as administrators of the estate of Noah Chelugui. The Plaintiffs herein are claiming for and on behalf of the share belonging to Nathaniel Lagat.
45. That being the case, there can be no possibility that the Petitioners in the previous suit could have been claiming under the same title as the Respondents herein. For the foregoing reason, it is clear that the 1st Defendant/Applicant has failed to satisfy the conditions for the application of the doctrine of res judicata. The doctrine of res judicata cannot therefore apply as bar to the hearing and determination of the instant suit.

c. Whether the suit property is non-existent owing to the initial subdivision of the suit property and issuance of new titles/numbers

46. The other ground that the Applicant raised is that the suit property no longer exists as the same was sub-divided to create parcels Nos. 237, 238 and 239, and the latter parcel further sub-divided to create parcels 2369, 2370 and 2371. It was thus submitted that the suit is premised on a non-existent parcel of land, and that the Respondents have thus failed to disclose any reasonable cause of action.
47. The principle behind this contention is that a suit cannot be based on a non-existent property. The issue of existence or non-existence of a suit property is pertinent because a court cannot make an order in vain, as would be the case where the subject matter or substratum of the suit no longer exists. This was the finding of the Court of Appeal, which was dealing with a similar issue, in *Maina & 87 others vs Kagiri* (Civil Appeal 6, 26 & 27 of 2011 (Consolidated)) [2014] KECA 880 (KLR). On this same issue, the Court of Appeal went on to hold that:-

“If at all the character and nature of the suit property changed, it was changed by the Respondent. A party cannot change the nature and character of the suit property and then plead the change as a defence to an action in relation to the said property; this is more so when the party had actual knowledge of existing claims to the property. We hold that the registration of LR No 6324/10 in the name of the Respondent under the Registered Land Act cannot be to defeat any claims that existed prior to the creation and registration this title. Tracing is an equitable remedy and equity shall trace the suit property for ends of justice to be served. The notion that the suit property no longer exists is not tenable. We find that the suit property exists and is presently registered as LR No 6324/10 in the name of the Respondent.”

48. It is very evident that the subdivision of the property was perpetuated by the 2nd Defendant/Applicant with the intention of selling it to the 1st Defendant/Applicant. Going by the rationale in the above case, the Applicants cannot therefore plead the change in the nature and character of the suit property as a Defence to this suit. My position is reinforced by the Respondents’ allegation that the subsequent title deeds were issued under questionable circumstances. This brings into question the validity of



the titles issued after the said subdivision a matter which this court will have to examine with respect to the proprietary rights of Nathaniel Lagat as against his co-partners. In these circumstances, the Respondents' case cannot be deemed unsustainable and moot in law on grounds of the existence or non-existence of the suit property.

49. The upshot of the foregoing is that the Notice of Motion Application dated July 10, 2023 lacks merit. The same is dismissed with costs to the Plaintiffs/Respondents.

DATED SIGNED AND DELIVERED THIS 2ND DAY OF OCTOBER 2024.

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J.M ONYANGO

JUDGE

In the presence of;

1. Plaintiffs present in person
2. No appearance for the Defendant

Court Assistant: Brian

