Gitau & 635 others v Principal Secretary,Ministry of Lands, Public Works, Housing & Urban Development,State Department for Housing & Urban Development & 5 others; National Land Commission (Interested Party) (Environment & Land Petition E19 of 2022) [2023] KEELC 16004 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16004 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E19 OF 2022

JO MBOYA, J

MARCH 9, 2023

BETWEEN

JOSEPH MBURU GITAU ..... 1ST PETITIONER

FELISTA WARIARA NDUKU ..... 2ND PETITIONER

ISAAC MBURU NJUGUNA ..... 3RD PETITIONER

KEZIA WANJA NJUGUNA ..... 4TH PETITIONER

CECILIA WANJIRU GICHURU ..... 5TH PETITIONER

FLACIA NJOKI MUIRURI ..... 6TH PETITIONER

CHRISTIAN MUNJANJI AJIAMBO ..... 7TH PETITIONER

MARY WAMBUI KARARI ..... 8TH PETITIONER

FRIDA KHAVERE AMBANI ..... 9TH PETITIONER

JOSEPHAT NJUGUNA MWANGI & 626 OTHERS ..... 10TH PETITIONER

AND

PRINCIPAL SECRETARY,MINISTRY OF LANDS, PUBLIC WORKS, HOUSING & URBAN DEVELOPMENT,STATE DEPARTMENT FOR HOUSING & URBAN DEVELOPMENT ..... 1ST RESPONDENT

CABINET SECRETARY,MINISTRY OF INTERIOR, NATIONAL,NATIONAL SECURITY & COORDINATION OF NATIONAL GOVERNMENT .... 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

HON.ATTORNEY GENERAL ..... 5TH RESPONDENT

CHINA ROAD & BRIDGE CORPORATION LTD ..... 6TH RESPONDENT

AND

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

RULING

Background And Background.

1. Vide Notice of Motion Application dated the November 30, 2022, the Petitioners/Applicants have approached the Honourable court seeking for the following Reliefs;

    i. That this application be certified as urgent and be heard ex parte in the first instance.

    ii. That pending the hearing and determination of this application, this Honourable Court be pleased to grant/issue conservatory orders staying the decision of 1st , 2nd , 3rd ,4th and 5th Respondents to award Tender and advertisement for Tender No MLPWHUD/SDHUD/AHP/067/2022-2023 for development, design, building, financing and transfer, selling of housing units and associated infrastructure for National Police Service on the Applicants property, namely, LR No 209/14582, West Park Housing Project, Langata in Nairobi County.

    iii. That pending the hearing and determination of this application, conservatory orders do issue restraining any further dealings, alienation, sale or transfer of the Applicants property, namely, LR No 209/14582 by the Respondents, their servants and/or agents, or whoever is working under them.

    iv. That this Honourable Court do direct/order that Notice Of Institution of this Petition, service thereof and orders be published or served in Daily Newspaper with national circulation in accordance with Rule 9 (1) of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules, 2013.

    v. That upon Inter-partes hearing of this Application orders (ii) and (iii) above be issued/or granted pending the hearing and determination of the Petition herein.

    vi. That this Honourable Court do issue/grant appropriate orders to preserve, protect and preserve the subject property pending further orders of this Honourable Court.

    vii. That costs of this application.

2. The instant application is premised and anchored on various grounds contained and enumerated at the foot thereof. Besides, the application is supported by the affidavit of Cecilia Wanjiru Gichuru, who is the 5th Petitioner/Applicant herein. For clarity, the supporting affidavit is sworn on the November 30, 2022.

3. Upon being served with the Petition and the instant application, the 1st, 2nd, 3rd , 4th and 5th Respondents herein (hereinafter referred to as the named Respondents) filed grounds of opposition dated the December 19, 2022, as well as a Replying affidavit sworn by one Geoffrey Waruru Kinyua, wherein the named Respondents contended inter-alia, that the Petitioners'/Applicants' title to and in respect of LR No 209/14582 was found and established to be a forgery.

4. Furthermore, the named Respondents have averred and contended that the Petitioners/Applicants herein have previously filed various suits, including ELC No 2028 of 2007, which touch on and concern ownership of and title to the suit property herein.

5. Suffice it to point out that upon being served with the grounds of opposition and the Replying affidavit, (details in terms of the preceding paragraph), the Petitioners/Applicants sought for and obtained leave to file a Supplementary affidavit. In this regard, it is worthy to underscore that a supplementary affidavit was thereafter crafted and filed.

6. Other than the foregoing, the advocate for the respective Parties agreed to canvass and ventilate the subject application by way of written submissions. In this regard, the Honourable court thereafter proceeded to and set timeline for the filing and exchange of the written submissions.

7. Pursuant to and in line with the directions of the Honourable court, the Petitioners/Applicants filed written submissions dated the February 24, 2023, whilst the named Respondents filed written submissions dated the February 20, 2023. For completeness, the two sets of written submissions forms part and parcel of the record of the court.

Submissions By The Parties

A. Applicants' Submissions:

8. The learned counsel for the Applicants herein has adopted the grounds at the foot of the instant application, as well as the contents of the Supporting affidavit and the Supplementary affidavit, respectively. Furthermore, learned counsel for the Applicants has thereafter proceeded to and highlighted four pertinent and salient issues for consideration by the court.

9. Firstly, learned counsel for the Applicants has submitted that the Applicants herein are the lawful and legitimate owners and proprietors in respect of LR No 209/14582 (Original LR No 209/10610), hereinafter referred to as the suit property.

10. Furthermore, learned counsel has contended that by virtue of being the registered owners and proprietor of the suit property, the Applicants herein are entitled to exclusive occupation, possession and use of the suit property.

11. However, counsel has contended that despite being the lawful and legitimate owners of the suit property, the 1st to 5th Respondents herein, have interfered with and violated the Applicants rights to and in respect of the suit property. In this regard, counsel added that the impugned actions and activities by the 1st to the 5th Respondents are illegal, unlawful and unconstitutional.

12. Secondly, learned counsel has submitted that the 1st to 5th Respondents have also subjected the Applicants to harassment, intimidation and unnecessary arrest and prosecution, which are intended to prohibit and bar the Applicants from entering and benefiting from the suit property.

13. To this end, learned counsel for the Applicants has cited and quoted various criminal cases, inter-alia, Criminal case No 1542 of 2013 Between Republic v Kariuki Kinyanjui & 2 others; Criminal Case No 1145 of 2006 Between Republic v Joseph Mburu Gitau & 2 Others and Criminal Case No 1733 of

2008 Between Republic v Joseph Mburu Gitau & 2 Others, wherein the named accused persons were charged with offenses pertaining to and concerning the suit property.

14. Notwithstanding the foregoing, counsel has further submitted that the named criminal proceedings, which were instigated by the 1st to the 5th Respondents, albeit without lawful basis, were heard and dismissed by various courts.

15. Furthermore, learned counsel has contended that despite the dismissal of the various criminal cases, the 1st to the 5th Respondent have failed to vacate and hand over possession of the suit property to the Applicants.

16. Thirdly, learned counsel for the Applicants has submitted that even though the 1st to the 5th Respondent do not lawfully or legally own the suit property, same have however advertised an award of tender for the development, design, building, financing and transfer, selling of housing units and associated infrastructure for the National Police Service on the suit property.

17. To this end, counsel has submitted that the impugned actions and/or activities, including the advertised tender, pertaining to and concerning the suit property are intended to violate and infringe upon the Applicants rights to and in respect to the suit property.

18. Owing to the foregoing, learned counsel has therefore submitted that unless the impugned actions and/or activities are prohibited or restrained vide court order, the named Respondents shall proceed with the disputed developments and thereby alter the character of the suit property, to the prejudice and detriment of the Applicants.

19. Fourthly, learned counsel for the Applicants has submitted that the Applicants herein have established and met the requisite threshold to warrant the grant and issuance of a conservatory order barring the threatened developments by the named Respondents on the suit property.

20. As concerns the issuance of a conservatory orders, the counsel for the Applicants has cited and quoted various cases, *inter-alia*, *Platinum Distillers Ltd v Kenya Revenue Authority* (2019) eKLR, *Gitarau Peter Munya v Dickson Mwenda Githinji & 2 others* (2014) eKLR and *Center for Rights Education and Awareness (CREAW) & 7 others v The Attorney General* (2011) eKLR.

21. Additionally, learned counsel for the Applicants has also submitted that the impugned actions and/or activities by the named Respondents, inter-alia, the advertised tender for the development, design and construction of housing units on the suit property shall amounts to alienation of the suit property during the pendency of the suit. In this regard, learned counsel has invited the court to apply the doctrine of *lis pendens*.

22. In support of the submissions pertaining to the doctrine of Lis Pendens, the counsel for the Applicants has invited the court to take cognizance of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* (2015) eKLR, *Rose Wakanyi Karanja v Geoffrey Chege Kirundi* (2016) eKLR and *Mavji v International University & another* (1976) eKLR, respectively.

23. In a nutshell, learned counsel for the Applicants has therefore invited the court to find and hold that the Applicants herein have established and demonstrated the existence of a Prima facie case and thus same are entitled to the grant/issuance of Conservatory Orders.

b. Respondents' Submissions:

24. Learned counsel for the 1st, 2nd, 3rd 4th and 5th Respondents has adopted and relied upon the Grounds of opposition dated the December 19, 2022, as well as the Replying affidavit sworn on the December 19, 2022; and same has thereafter highlighted and amplified four issues for consideration by the court.

25. First and foremost, learned counsel for the named Respondents has submitted that the Applicants herein have previously filed various proceedings touching and concerning the suit property. In this regard, counsel for the named Respondents pointed out and referred to ELC Case No 2028 of 2007 and ELC Case No 2012 of 2021, respectively, which are suits between the current Applicants and the Respondents herein.

26. Owing to the existence of the previous suits, which touch on and concerns the suit property, learned counsel for the named Respondents has thus contended and submitted that the instant suit/Petition violates the doctrine of Res-sub-judice.

27. Additionally, learned counsel for the Respondents has submitted that to the extent that there are previous and existing suits between the same parties and touching on the same issues, pertaining to and concerning the suit property, the current suit ought to be struck out or better still, stayed.

28. In pursuance of the submissions touching and concerning the doctrine of *res sub judice*, learned counsel has invited the court to take cognizance of and to apply the provision of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

29. In any event, learned counsel for the Respondents has also invited the court to take cognizance of the case in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* (2019) eKLR, *Kenya Bankers Association v Kenya Revenue Authority* (2019) eKLR and *David Ndii & Others v The Attorney General & others* (2021)eKLR, respectively.

30. Secondly, learned counsel for the named Respondents has also submitted that the Applicants herein have neither established nor demonstrated the existence of a *prima facie* case with probability of success.

31. In this regard, learned counsel has contended that in the absence of a *prima facie* case with overwhelming chances of success, the Applicants herein are not entitled to the conservatory orders which have been sought for at the foot of the instant application.

32. Furthermore, learned counsel has further contended that the Applicants' title to and in respect of the suit property, which is the subject of the current suit and by extension the Application for conservatory orders, was found to have been procured and obtained by fraud.

33. In the circumstances, counsel has therefore submitted that in the absence of a prima facie case with probability of success, the Honourable court cannot proceed to and grant the conservatory orders sought by the Applicants or otherwise.

34. To vindicate the submissions touching on and concerning proof of the existence of a *prima facie* case, learned counsel for the Respondents has cited and quoted the case of *Giella v Cassman Brown & Co, Ltd* (1973) EA 358, *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) eKLR, *Moses C Muhia Njoroge & 2 others v Jane W Lesaloi & 5 others* (2014) eKLR and *Lucia Wambui Kariuki & another v Grace Wanjiru & another* (2022) eKLR.

35. Thirdly, learned counsel for the named Respondents has submitted that the suit property lawfully belongs to and is currently registered in the name of the Permanent Secretary to the Treasury, to hold in trust for Ministry of State for Provincial Administration and Internal Security.

36. In the premises, learned counsel has therefore submitted that to the extent that the suit property lawfully belongs to and is registered in the name of the Permanent Secretary to the Treasury, same is therefore a public property reserved for public use and development.

37. Additionally, it has been submitted that to the extent that the suit property constitute and comprises of public land, the conservatory orders sought cannot therefore issue, either in the manner contended or at all.

38. At any rate, learned counsel has submitted that the grant and or issuance of the conservatory orders, either in the manner sought or otherwise, shall prejudice the intended public activities thereon and hence breach and infringe upon public interest.

39. To this end, learned counsel for the named Respondents has submitted that the conservatory orders, which have been sought by and at the instant of the Petitioners are not merited and ought not to be granted.

40. In support of the submissions that the grant of the conservatory orders will be contrary to public interests, learned counsel has cited and quoted the case of Simon Otwori v Lake Basin Water Services Board, Kisii ELC Petition No 2 of 2018; *Abdul majid Ramadhan v Kenya Urban Roads Authority & others* (2017)eKLR and *George Odero v Lake Victoria Environment Management Program* (2015) eKLR.

41. Lastly, learned counsel for the named Respondents has submitted that the Applicants herein have neither proved nor demonstrated that same are disposed to suffer any irreparable loss or otherwise, if the conservatory orders are not granted.

42. Additionally, it has been contended that having failed to prove that irreparable loss will accrue and or arise, if the orders sought are not granted, learned counsel for the named Respondents has therefore submitted that the Applicants have neither met nor established the requisite basis to warrant the grant of the orders sought.

43. In view of the foregoing, learned counsel for the named Respondents has therefore implored the Honourable court to find and hold that the Applicants herein have failed to lay a basis for the grant/ issuance of the conservatory orders.

44. Consequently and in the circumstances, the named Respondents have sought that the instant application ought to be dismissed for being misconceived and an abuse of the due process of the court, as well as for lacking merits.

Issues For Determination

45. Having reviewed and evaluated the Petition filed by the Petitioners, the instant Application, as well as the Responses filed thereto; and upon considering the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for determination;

    i. Whether the subject Petition is barred and/or prohibited by the Doctrine of res-sub-judice.

    ii. Whether the Petition and the current application constitutes and amounts to and abuse of the Due process of the court.

    iii. Whether the Petitioners/Applicants are entitled to issuance of Conservatory orders, either as sought or otherwise.

Analysis And Determination

Issue Number 1 Whether the subject Petition is barred and/or prohibited by the Doctrine of Res-sub-judice.

46. It is common ground that the dispute between the Applicants herein and the 1st to the 5th Respondent, has been around for quite some time. For clarity, the Applicants herein had hitherto filed and mounted Judicial Review Proceedings vide HCC Misc. Application No 673 of 2005 (JR), wherein the Applicants herein sought for various prerogative orders, inter-alia, an order of Prohibition.

47. Following the filing and lodgment of the judicial review proceedings, details in terms of the preceding paragraph, same was heard and determined vide Judgment rendered on the May 2, 2008. For clarity, the Honourable court granted and issued an order of Prohibition.

48. Be that as it may, Honourable Attorney General on behalf of National Police Service thereafter lodged an appeal to the Honourable Court of Appeal, against the said decision vide Civil Appeal No 179 of 2019, which was heard and determined vide Judgment rendered and delivered on the August 7, 2020.

49. Other than the foregoing proceedings, which were heard and determined by the various courts, the Applicants herein proceeded to and filed ELC No 2028 of 2007, which is still pending before the Environment and Land Court.

50. For completeness, the suit vide ELC No 2028 of 2007, pits the current Petitioners on one hand and the Attorney General and the National Police Service, on the other hand. For good measure, the dispute in respect of the said suit touches on and concerns ownership of and titled to the suit property.

51. On the other hand, it is also appropriate to state and underscore that the current Applicants herein have also filed an application under certificate of urgency dated the November 23, 2022, in the said Suit; and in respect of which same have sought for orders of temporary injunction to bar and prohibit the Defendants therein (read the Attorney general and the Police Service) from carrying out and/or undertaking further developments over and in respect of the suit property.

52. Furthermore, it is also important to point out that the named application was thereafter certified as urgent and same was canvassed before the designated court (different Honourable Judge) and is currently pending ruling, scheduled for delivery on the March 9, 2023.

53. In addition, the Applicants herein have also confirmed that same have similarly filed and lodged another suit, namely, ELC Case No 51 of 2019 (JR), involving the Applicants and the Respondents and in respect of which the Applicants are seeking to enforce the recommendations/decisions of the National Land Commission.

54. In respect of ELC No 2028 of 2007, the Applicants herein have sought for a plethora of reliefs, inter-alia, declaration that same are the lawful and legitimate owners of the suit property as well as orders Eviction and Permanent injunction.

55. On the other hand, the current Petition, which has been filed and mounted by the Applicants also seeks for a plethora of reliefs, which primarily touch on and concern declaratory orders pertaining to ownership pertaining to the suit property and consequential orders, including mandatory injunction to compel the Respondents to vacate the suit property and hand over vacant possession.

56. From the pleadings, which have been filed by and on behalf of the Applicants herein, the golden thread that runs across the current Petition and ELC No 2028 of 2007, is one that touches on ownership of and title to the suit property.

57. Essentially, the previous suit, namely, ELC No 2028 of 2007 and the current Petition, both touch on and concern the same subject matter, relating to ownership and title to the suit property.

58. In view of the foregoing, the question that does arise is whether the Applicants herein were at liberty to file and commence the instant Petition, during the life span of the previous suit, touching on and concerning the subject issues.

59. Furthermore, the ancillary question that also arises, relates to whether the filing of the current Petition therefore constitute and amounts to a violation of the Doctrine of res-sub-judice.

60. Suffice it to point out that a Litigant/Party, (the Applicants herein not excepted), are obligated to file and prosecute one particular matter at a time. In this regard, the Doctrine of Res-sub-judice, prohibits the filing of two or more suits/proceedings pertaining to the same subject matter before various courts with competent jurisdiction.

61. Despite being aware of the existence of the previous suits, namely, ELC No 2028 of 2007, the Applicants herein proceeded to and filed the current Petition. Clearly, the filing of the current petition, which touches on and concerns the same subject matter, contravenes and offends the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

62. To this end, it is appropriate to reproduce the provisions of Section 6 of the *Civil Procedure Act*.

63. For reference, same are reproduced as hereunder;

> 6. Stay of suit 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.
>
> Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

64. Other than the foregoing, the doctrine of Res-sub-judice was also discussed and deliberated upon in the case of *Kenya Bankers Association v Kenya Revenue Authority* (2019)eKLR, where the Honourable court stated and held as hereunder;

> 36. In addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The ex parte applicant herein is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed.
>
> 37. A cursory look at the prayers sought in this case show that they relate to the same subject matter. However the principle of sub judice does not talk about the "prayers sought" but rather "the matter in issue." I find that the matters in issue in the suits are substantially the same. In Re the Matter of

The Interim Independent Electoral Commission[31]the Supreme Court cited with approval the an Australian decision where it was held:-[32]

> "...we do not think that the word 'matter'...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court..."

65. Furthermore, the meaning, tenor and scope of the doctrine of Res-sub-judice was also re-visited and discussed by the Supreme Court of Kenya in the case of *Kenya National Commission of Human Rights v The Attorney General & 16 others (Interested Parties)* (2020)eKLR, where the court stated as hereunder;

> (67) 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 a 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 res 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.

66. Premised on the foregoing, there is no gainsaying that the current Petition touches on and concerns the issues of ownership of and title to the suit property, which are also alive in the previous suit, filed and mounted by the same Applicants.

67. Consequently and in this regard, the Applicants herein cannot be allowed to prosecute both the previous suit, namely, ELC No 2028 of 2007 and the current Petition, contemporaneously. Clearly, one of the suit must give way.

68. In any event, it is not lost on the Honourable court that where two suits have been filed and commenced by the same Party then the latter suit, ought and should be stayed to await (sic) the determination of the previous/earlier suit.

69. To this end, it is appropriate to take cognizance of and reiterate the holding in the case of *David Ndii & others v Attorney General & others* 2021 eKLR, where a bench of five Judges inter alia stated;

> "The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....

70. To surmise, it is imperative to underscore that the current Petition cannot be allowed to proceed, simultaneously with the previous suit, which was filed by the same Applicants and which suit remains alive and active.

71. Premised on the foregoing and taking into account the various caselaw cited, the current Petition and the Application thereunder are obviously candidates for stay of proceedings.

Issue Number 2 Whether the Petition and the current Application constitutes and amounts to an abuse of the Due process of the court.

72. Despite the current petition being sub-judice the previous suit, namely, ELC No 2028 of 2007, there is also another perspective, which arises from the filing and prosecution of two separate suits, but which (sic) raise and canvass the same or substantially the same reliefs.

73. It is not lost on the court that vide the current Petition, the Applicants herein are seeking *inter-alia*, orders of declaration that same are the lawful and legitimate owners of the suit property and that the impugned actions by the Respondents, constitutes and amounts to violation of the Applicants rights.

74. Additionally, the Applicants herein have also sought for compensation on account of breach and infringement of their rights to the suit property, as well as a claim for Mesne Profits.

75. Nevertheless, it is worth recollecting that the same reliefs are also the reliefs which have been sought at the foot of the previous suit. Consequently, what arises is that the Applicants herein have adopted a two-pronged approach, in respect of the same suit property.

76. In the premises, what is bound to arise is that the Applicants herein will be disposed to procure and obtain two sets of orders from the various courts and thereby accrue double compensation and unjust enrichment. Surely, such an endeavor raises the prospect of abuse of the Due process of the court.

77. Other than the existence ELC No 2028 of 2007, it is also worthy to note that the same Applicants herein also have filed ELC No 51 of 2019 (JR), wherein same are seeking to enforce the recommendations/decisions of the National Land Commission arising from (sic) Gazette Notice published on the March 1, 2019.

78. However, despite having filed the said judicial review proceedings, (which is still pending), the Applicants have yet again sought from this Honourable court an order of Judicial review touching on and concerning the same recommendations/decision of the National Land Commission Published on the 1st march 2019.

79. Clearly, the Applicants herein are intentionally and deliberately engaging the court in Lottery. In my humble view the court process ought not to be used in the manner in which the Applicants herein are operating.

80. In short, it behooves the Applicants to discern which of the many subsisting suits will foster and propagate their claims and once same have determined the appropriate vehicle (suit), then the rest of the proceedings must be terminated, one way or the other.

81. Be that as it may, for as long as the previous suit, namely, ELC No 2028 of 2007 and ELC No 51 of 2019 (JR) are alive and existing, then the current Petition which seeks the same or substantially the same reliefs, cannot be allowed to subsist.

82. To my mind, the Applicants herein cannot engage in a game of numbers, wherein same are filing a multiplicity of suits, aimed at and intended to achieve collateral advantage or better still, undue mileage.

83. Consequently, I come to the conclusion that the filing of the current Petition and the incidental application, (whilst knowledgeable of the existence of the previous proceedings) which are indeed ongoing, amount to an abuse of the court process and hence same ought not to be condoned.

84. In respect of the Doctrine of abuse of the court process, it is worthy to reiterate the dictum in the holding of the Court of Appeal in the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002; [2009] KLR 229, had delineated the parameters of abuse of process thus:

> " The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice.
>
> It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -
>
> i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
>
> ii Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
>
> iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
>
> iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness." (Underline, mine)

85. Additionally, the issue of what constitutes and amounts to an abuse of the due process of the court was also canvassed and addressed in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, where the court stated and held as hereunder;

> 22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
>
> 23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
>
> (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

86. Having come to the conclusion that the filing of the current Petition amounts to and constitutes an abuse of the Due process of the court, the question that now remains to be determined is what ought to be done to the current Petition.

87. Respectfully, where a court finds and holds that certain proceedings constitutes and amounts to an abuse of the court process then the court is obliged to resort to and invoke the Inherent Jurisdiction, with a view to protecting her process from being misused or otherwise abused.

88. In this respect, I beg to adopt, restate and reiterate the holding of the Court in the case of *Madara Evans Okanga Dondo v Housing Finance Company of Kenya* [2005] eKLR, where the court stated as hereunder;

> This court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. As was stated by the Authors of Halbury's Laws of England, 4th Edition Volume 37 Para 14 under the heading "Inherent Jurisdiction of the Court" at Page 23;
>
> > "The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it

> may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

89. In a nutshell, I come to the conclusion that the subject Petition as well as the application for conservatory orders made thereunder, constitutes to an abuse of the due process of the court and same thus courts striking out.

90. Nevertheless and before departing from the subject issue herein, it is appropriate to state and underscore that despite the fact that the issue and question of existence of various suits having been raised and canvassed by the named Respondents, learned counsel for the Petitioners, did not find it fit or expedient to respond thereto and even to address the implication emanating from the plethora of suits.

91. Furthermore, learned counsel for the Petitioners also remained quiet and kept silent on the issue of doctrine of res-sub-judice. For clarity, the written submissions dated the February 24, 2023, did not allude to and/or respond to the contention touching on sub-Judice.

92. Simply put, it appears that the Petitioners herein as well as their learned counsel, were never concerned with the multiplicity of suits, which have hitherto been filed pertaining to and concerning the suit property.

Issue Number 3 Whether the Petitioners/Applicants are entitled to issuance of Conservatory orders, either as sought or otherwise.

93. Even though I have come to the conclusion that the Petition by and on behalf of the Applicants, as well as the application made thereunder, constitutes and amounts to an abuse of the due process of the court, I am still called upon to venture and determine whether the Applicants herein have met and satisfied the threshold for the grant of conservatory orders.

94. Suffice it to point out that the Applicants have contended that same are the lawful and legitimate proprietors and owners in respect of the suit property. In this regard, the Applicants have therefore invited the court to find and hold that by virtue of such ownership, same are entitled to the protection and benefit of the law.

95. To the contrary, the 1st to the 5th Respondents have submitted that the certificate of title held and possessed by the Applicants herein was found and established to be a forgery.

96. Furthermore, the named Respondents have also contended that what is claimed by the Applicants constitutes LR No 209/10610, Which is stated to be registered in the name of the Permanent Secretary to the Treasury, albeit to hold in trust for the Ministry of State for Provincial Administration for Internal Security.

97. In addition, there is also evidence that the 2nd and 3rd Respondents herein entered upon and took possession of the suit property on the March 24, 2005, when the Applicants herein were (sic) evicted therefrom.

98. For clarity, the fact that the 2nd and 3rd Respondents have been in occupation of the suit property since March 2005, was confirmed by the court of appeal vide judgment delivered on the August 7, 2020 in respect of Civil Appeal No 179 of 2019.

99. In view of the foregoing, the issue that deserves mention and determination is whether the conservatory orders sought ought to be granted, taking into account the obtaining circumstances, inter-alia, the challenge of the certificate of title held by the Applicants and coupled with the fact that the Applicants have not been in occupation of the suit property for more than 17 years.

100. Other than the foregoing, there is also the other aspect pertaining to and concerning the fact that the current Applicants herein have also filed an application under certificate of urgency dated the November 23, 2022 in respect of ELC No 2028 of 2007 and which application is similarly scheduled for ruling on the March 9, 2023.

101. In my humble view, conservatory orders ought and should issue in clear cut instances where the Applicants are propagating a genuine claim before the court without engaging and indulging in nuances that fosters/ propagate abuse of the court process.

102. In addition, conservatory orders are issued taking into account the inherent merits of a case that has been placed before the court but bearing in mind the public interests attendant thereto and (sic) the constitutional values sought to be vindicated or protected.

103. In any event, where the obtaining circumstances do not merit the grant of a conservatory order, then the court must say so and decline to grant such an order.

104. To this end, it suffices to adopt and reiterate the holding of the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014)eKLR, where the court stated and observed as hereunder;

> (86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

105. Additionally, the threshold to be met and satisfied prior to and before the issuance of a Conservatory order were also deliberated upon in the case of *Platinum Distillers Ltd v Kenya Revenue Authority* (2019)eKLR, where the Honourable court stated and held as hereunder;

> 7. I have carefully considered the grounds upon which the application for conservatory orders is based, the parties' rival affidavits and submissions and it is my view that the issue the court is called upon to decide at this point is whether the Applicant has met the conditions for the grant of conservatory orders.
>
> 8. The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of

Article 23 of *the Constitution* are settled. The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.

9. The tenor, import and scope of a conservatory order was highlighted by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:

> "[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

10. At this stage, the Applicant is only required to establish a prima facie case with a likelihood of success and the prejudice to be suffered if orders are not granted. Musinga, J (as he then was) clearly explained this in the case of the Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General, Nairobi High Court Petition No 16 of 2011; [2011] eKLR when he stated that:

> "It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*."

11. As it has been held in various decisions, a prima facie case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses

arguable issues and in a case alleging violation of rights, arguable constitutional issues.

106. Have the Applicants herein established and demonstrated a *prima facie* case? I am afraid that no prima facie case can arise and/or ensue where the impugned actions have been found to constitute or amounts to an abuse of the due process of the court.

107. Consequently and in the premises, I am constrained to and do hold that the Applicants herein have neither met nor satisfied the requisite threshold to warrant the grant of a conservatory order, either as sought or otherwise.

Final Disposition

108. Having evaluated and analyzed the various perspectives arising from the subject matter and having taken into account the relevant and applicable laws, I come to the conclusion that the Petition as well as the Application made thereunder, are not only misconceived, but constitute an abuse of the Due process of the court.

109. Consequently and in the premises, the petition dated the November 30, 2022, and the application made thereunder be and are hereby struck out with costs to the 1st to 5th respondents.

110. Furthermore, the interim conservatory orders which were issued on the December 9, 2022; and which were evidently procured on the basis of material non-disclosure, be and are hereby vacated and discharged.

111. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MARCH 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant

Mr. Ashford Muriuki Mugwuku for the Petitioners/Applicants

N/A for the 1st, 2nd, 3rd, 4th and 5th Respondents

N/A appearance for the 6th Respondent

N/A for the Interested Party