



Ibau & 63 others v Lang'ata Development Company Limited & another (Environment & Land Case 129 of 2019) [2023] KEELC 18798 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18798 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 129 OF 2019**

**LN MBUGUA, J
JULY 6, 2023**

BETWEEN

JOSEPH GITHU IBAU & 63 OTHERS & 63 OTHERS PLAINTIFF

AND

LANG'ATA DEVELOPMENT COMPANY LIMITED 1ST DEFENDANT

**MARGARET ESTHER DAMES & JOHN ANDREW DAMES O/B OF ESTATE OF
MARY WAIRIMU DAMES (DECEASED) 2ND DEFENDANT**

JUDGMENT

1. Vide a plaint dated 7.11.2018, the Plaintiffs aver that the 1st Defendant is the registered owner of the parcel of land known as LR No. 7240/23 (the suitland) having purchased the same from the 2nd Defendant on 6.2.1989. It is their case that after the purchase, the 1st Defendant subdivided the suit land and started the process of selling and allocating the same to its shareholders and purchasers thus, the Plaintiffs are some of the original allottees and purchasers of plots excised from the suit land.
2. The Plaintiffs further aver that a dispute was determined by the Environment and land Court and the Court of Appeal in Nairobi Civil Appeal Number 283 of 2016 in a judgement delivered on 28.9.2018 to the effect that the 1st Defendant is holding the 2nd Defendants' portion of land measuring 85.3 Acres from Land Parcel LR No. 7240/23 and should re-transfer the same to the 2nd Defendants. They add that following the judgement, some agents of the 2nd Defendants started encroaching on their portions of the suit land and started threatening them with eviction.
3. The Plaintiffs' case is that they will be highly prejudiced if the area they have all developed and established their livelihood is excised and transferred to the 2nd Defendant, whereas there is an area of similar acreage that is not encumbered that can peacefully be transferred to the 2nd Defendants.
4. They pray for orders against the Defendants jointly and severally that;



- a) A permanent injunction restraining the Defendants, their agents, servants and/or employees from demolishing, evicting, bringing down or in any other way interfering with the Plaintiff's possession and use of the houses and structures on plot Numbers Block B.63/64, A44, A58, A64, A55 A53, A57, A62, A72, A70, A75, A 78, A97, A112, A113, A114, A107, A124, A125, A126, A127, B64, B514, B733, B521, B.15, B485, B7, B4, B806, B868, B141, B88, B47, B342, B1, B66, B67, B164, A60, A8139, A59, B721/811, A115, B570, B9, 5.57, B1, B.15/16, B17, A10/11, A.2, A.25, A36, B.65, A.38, B581/9223, B854, B571, B732, B630, B890, B.66/67, B.3, B.772, C384, B88/89, B382, A60, B.047/048, B824 and B890 respectively of Langata Development Company-Thika within LR No. 7240/23.
 - b) The 1st Defendant do excise the 85.3 acres of land out of land parcel LR No. 7240/23 and allocate the same to the 2nd Defendants in an area of the said parcel of land that does not affect the ownership, possession and use of the Plaintiff's plots and the 2nd Defendants be compelled to accept her said parcel on the said area.
 - c) Cost of this suit be borne by the Defendants.
5. The 1st Defendant vide its statement of defence dated 21.11.2018 admits that there has been litigation between it and the 2nd Defendant in ELC No. 1413 of 2007 (Formerly HCCC No. 1077 of 2004) where the court ordered it to compensate the 2nd Defendants at current rates for land measuring 85.3 acres found to be in excess of the contract acreage between them at the time of the sale transaction relating to the suit land. That in the ensuing appeal being Nairobi Civil Appeal No. 283 of 2016, the court found in favour of the 2nd Defendant and ordered the 1st Defendant to re-transfer to the 2nd Defendant the 85.3 acres forming a portion of Land Parcel LR No. 57550 LR, 7240/23.
 6. It contends that since the Court of Appeal did not declare a particular area nor delineate the position from where the extra 85.3 acres were to be excised, there is sufficient unoccupied/unsettled land from which 85.3 acres can be excised and re-transferred to the 2nd Defendants without antagonizing the Plaintiffs.
 7. The suit is opposed by the 2nd Defendants vide their statement of defence dated 2.10.2020. They aver that the suit is incompetent for want of service of summons upon them and for the reason that the subject matter, LR No. 7240/23 has been litigated upon and determined with finality by the Supreme Court in Supreme Court Application No. 24 of 2019, the Court of Appeal in Nairobi Civil Appeal No. 283 of 2016 and Nairobi Civil Application No. SUP 5 of 2019 (WR 4/2019).
 8. It is the 2nd Defendants' case that the subject matter does not exist for the reason that the judgment of the Court of Appeal was registered at the lands registry on 15.3.2019 and a new survey map was effected on 29.4.2019 showing 2 new parcels namely (a) 35.554 Ha (85.3 acres) and (b) 271.95 Ha (672) acres and that the Estate of Mary Wairimu Dames took possession.

The Evidence

9. The Plaintiffs, 74 in number called 1 witness to advance their case. PW1 was Joseph Githu Ibale, the 1st Plaintiff who adopted his witness statement dated 7.11.2018 as their evidence. He produced documents running from page 16-93 of the Plaintiffs' bundle as P. Exhibit 1-5.
10. In his witness statement, he states that he is the registered allottee and owner of plot number B-63 which is a subdivision of the 1st Defendant's parcel of land known as LR 7240/23 and that the other 73 Plaintiffs are also allottees of plots excised from the suit parcel.



11. He further states that they have come to learn that the 1st Defendant was sued by the 2nd Defendant in Nairobi ELC Case Number 1413 of 2007 (Formerly HCCC NO. 1077 OF 2004) wherein the 2nd Defendant sought re-transfer of 85.3 acres from the suit land and that in the ensuing Court of Appeal case, the court ordered a re-transfer on 28.9.2018 of 85.3 acres, but it did not specify from which area the 85.3 acres would be excised from.
12. He avers that they bought plots excised from the suit land before the suits were filed and they had taken possession and developed their areas, but there is an expansive undeveloped area from which the 1st Defendant can excise 85.3 acres without affecting their homes. He further states that even before the Court of Appeal's orders were clarified, the 2nd Defendant started to enter their plots and has started undertaking acts of waste and destruction.
13. Upon cross-examination by counsel for the 1st defendant, PW1 reiterated that his plot is B63 which is a subplot within LR 7240/23 and that he was issued with an allotment letter on 21.6.2000. He further stated that all the 73 Plaintiffs' plots are within the mother title and that before they purchased their plots, they did their due diligence by conducting a search which showed that the suit parcel was owned by the 1st Defendant.
14. He stated that he took possession of his plot from when he got allocation and has built a 4 roomed house which became his family residence of which his late wife was earning a house owner occupier allowance over that house.
15. He further stated that when he was building, no one ever stopped him from doing so. He came to learn about Nairobi ELC Case Number 1413 of 2007 (Formerly HCCC NO. 1077 OF 2004) when the 2nd Defendant started demolishing houses about 3-5 years ago. He added that he became aware of Civil Appeal No. 283 of 2016 in the year 2018 but when they were buying the land, they were not aware of these cases.
16. He also stated that the 1st Defendant has not encroached on their land or threatened them with eviction and it did not recall the letters of allotment it had earlier issued to them thus they are still waiting for their titles. He added that he is not aware of any negotiations between the 1st and 2nd Defendants on reallocation of land.
17. No cross examination was conducted by the 2nd defendant as their advocate was absent.
18. Upon re-examination, PW1 stated that other Plaintiffs have also constructed on their respective portions of the suit land and that they have photographs and google maps showing the developed and non-developed portions of the suit land.
19. The case of the 1st defendant was advanced by 1 witness namely Eliud Anthony Kariuki, a director of the 1st Defendant. He is DW1. He adopted his witness statement dated 21.11.2018 as their evidence. He also produced a list of documents at page 12-24 of their Trial bundle as D. Exhibit 1 and 2.
20. In his witness statement, Dw1 states that the 1st Defendant has been involved in litigation with the 2nd Defendants for a long time. He points out that in the 1st instance in Nairobi ELC No. 1413 of 2007, the Court by a judgement rendered on 12.2.2016 ordered compensation at current rates of 85.3 acres found to have been transferred to the 1st Defendant in excess of the contractual acreage. However on appeal in case no. Civil Appeal No. 283 of 2016, the 1st Defendant was ordered to re-transfer a portion of 85.3 acres from LR No. 7240/23 back to the 2nd Defendant, but the Court of Appeal did not pin point the portion which was to be affected.



21. He further states that the 2nd Defendants have been threatening to demolish developments existing on the land near Thika-Garissa Highway mainly occupied by the Plaintiffs being part of LR No. 7240/23, and since the suit property is vast and unoccupied, it is only prudent that the 85.3 acres be excised from there without having to destroy the lives of families of the Plaintiffs.
22. Upon cross-examination by counsel for the Plaintiffs, DW1 stated that all Plaintiffs are known to him and that they did purchase land excised from the suit land from 1990-1995 or thereabout. He admitted that the allotment letters in plaintiffs' bundle of documents at page 19-66 were issued by the 1st Defendant in the duration from 1990-1997 or thereabouts and that he is aware that the allottees took possession and some plots are developed as can be deciphered from the photographs at page 85-88 of the Plaintiff's bundle of documents.
23. He also stated that the Plaintiffs were not part of the case between the 1st and 2nd Defendants and that the 1st defendant is ready to surrender 85.5 acres outside where the Plaintiffs have developed as the Plaintiff's had acquired the land before the 1st Defendant was sued by the 2nd Defendants.
24. When counsel for the 2nd Defendant took to his feet to cross-examine DW1, counsel for the 1st Defendant opposed the move on the basis that the 2nd Defendant has no claim against the 1st Defendant specifically in his defence and that there is no notice of claim against a Co-Defendant.
25. In response, counsel for the 2nd Defendants submitted that since paragraphs 5, 6, 8, 9, 10,11 and 12 of the of the 1st Defendant's defence blame the 2nd Defendants, the 2nd Defendants have to cross-examine the 1st Defendant.
26. While counsel for the Plaintiff aligned himself with the submissions of the 1st Defendant in opposing the 2nd Defendant from cross –examining DW1 when the matter was argued orally on 6.3.2023, he abandoned that position in his written submissions dated 6.4.2023.
27. The Court gave directions that the validity of the cross examination would be determined in the final judgment. Nevertheless, the court allowed the cross examination to continue.
28. Upon DW1's cross-examination by counsel for the 2nd Defendants, he stated that he is in support of the Plaintiffs' claim as the Court of Appeal did not specify the specific area of excision of 85.3 acres. He reiterated that by the time the Plaintiffs' came to Court, they were aware of the ELC Judgement as well as the judgement of the Court of Appeal where the suit parcel was the subject of that judgement.
29. He stated that the Plaintiffs bought portions of LR 7240/23 and the 1st Defendant gave them allotment letters. He further stated that the allotments cards from page 19 -16 of the Plaintiff's bundle are similar and that they have LR No. 7240/23 indicated at the back of the cards but for allotment cards at page 19, 21, 22 upto 66 of the Plaintiff's bundle, LR No. 7240/23 is not indicated.
30. DW1 also stated that from the Court of Appeal, they went to the Supreme Court, but he does not remember the Supreme Court's findings. However, they did not win the case. He also stated that he is not aware that his private allotment letters are not known under the current [Land Registration Act](#).
31. Upon re-examination, DW1 stated that the 1st Defendant holds the mother title to the plots held by the Plaintiffs. He avers that by the time the 2nd Defendant filed the original suit, Plaintiffs were on the suit land and that he does not know why the Defendants did not sue the Plaintiffs. He adds that he is supporting the Plaintiff's case because nowhere in the 3 judgments did the court state that 85.3 acres should be excised from the suit land.



32. He also stated that Mary Dames (Deceased) was not claiming the whole of 7240/23; only a portion of it and that there is no order which directs Mary Dames (deceased) to take over the property owned by the Plaintiffs.
33. The case of the 2nd Defendant was advanced by 1 witness, DW2 by the name John Andrew Dames. His witness statement dated 2.10.2020 was adopted as his evidence. He produced documents in their bundle as D. Exhibit 1-6.
34. In his witness statement, DW2 states that the Plaintiffs' averments revolve around LR No. 7240/23 which has been litigated upon and Determined with finality by the Supreme Court in Supreme Court App. No24 of 2019 Lanaga'ta Development Co. Ltd v Margaret Esther Dames & John Andrew Dames, by the Court of Appeal in Appeal No.283 of 2016 and in Nairobi Civil Application No. SUP 5 of 2019 (WR 4/2019).
35. He states that the plot numbers pleaded in paragraph 7 and prayer (a) of the plaint are non-existent at the official Land Registration records hence the Plaintiffs have no cause of action.
36. He further states that pursuant to the Court of Appeal Judgment, new survey maps were generated on 19.4.2019 depicting the new parcels with acreages of a) 35.54 hectares (85.3 acres) and b) 271.95 ha. (672 acres), hence the suit parcel L.R.7240/23 which is the basis of this suit has been destroyed by the law; expunged, and does not exist.
37. Upon cross-examination of DW2 by counsel for the plaintiff, Dw2 stated that the suit land could have been sold to the 1st Defendant from 6.2.1989 and that it is around 2004 when Mary Dames (deceased) discovered that she had sold extra land to the 1st Defendant. So it's more likely that the Plaintiffs had developed the land by then, but he cannot know if there were developments before 2004. He further stated that in the case 1077/2004, the current Plaintiffs were not parties. He added that the Plaintiffs also deserve protection of the law in the same manner that Mary Dames (deceased) was protected.
38. On cross examination by counsel for the 1st defendant, Dw2 stated that the size of LR 7240/23 is 672 acres which is one title where plots developed by the Plaintiffs are located. That the 1st Defendant purchased it but took an extra 85.3 acres. He stated that when the 2nd Defendant sued the 1st Defendant, it was for a portion of 7240/23 and since the suit land was sold to the 1st Defendant on 19.4.1989, in identifying where the 85.3 acres are, he has referred to the map of 19.4.1989 which identified the 85.3 acres.
39. He also stated that they were aware that the Plaintiffs were on the suit land but they did not sue them because they never sold the land to them, they dealt with the 1st Defendant. On the issues of re-transfer, he stated that the 1st Defendant has stated that it will re-transfer the 85.3 acres.
40. Upon re-examination, DW2 stated that 3 courts found that his late mother sold 672 acres and not an additional 85.3 acres and that is why courts have ordered a re-transfer to the 2nd Defendant as per the map of 19.4.1989. He states that this court cannot modify orders of the Court of Appeal and that he cannot be compelled to accept land elsewhere.

Submissions

41. The Plaintiffs filed written submissions date 6.4.2023 where they address the following issues;
 - a) Whether the Plaintiff's right to property as enshrined in Article 40 of *the Constitution* is protected.



- b) Whether the orders sought by the Plaintiffs can be granted.
- c) Whether this suit is res-judicata.
42. On the 1st issues, the Plaintiffs submit that the 1st Defendant's sanctity of title which they claim is anchored on is protected under Section 26 of the *Land Registration Act*. They rely on the case of Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] e KLR.
43. They also argue that they are afforded protection by the principle of innocent purchasers for value without any notice or any defect in title. They rely on the case of Fletcher v Peck 10 U.S 87 (810) cited in Eunice Grace Njambi Kamall and Another v The Honourable Attorney General and 5 others Civil Suit No. 976 of 2012, the case of Lawrence Mukiri v Attorney General & 4 others [2013] eKLR as well as the case of Alice Chemutai Too v Nickson Kipkirui Korir & 2 others [2015] e KLR.
44. On the 2nd issue, the Plaintiffs submit that under Section 13 (2) (c) of the *Environment and Land Court Act*, this court has jurisdiction to determine whether the Plaintiffs' right to property is to be protected vis a vis the order of the Court of Appeal that 85.3 acres of the suit land is due for re-transfer to the 2nd Defendant.
45. On the 3rd issue, the Plaintiffs submit that the 2nd Defendant has misapplied the reliefs sought herein and is fixated with the judgment of the Court of Appeal which is inapplicable to the Plaintiffs since they were not party to the previous suits and their issue of asserting their ownership rights has not been heard. They rely on the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR.
46. They also rely on Article 22 (3) of *the Constitution* as well as the Supreme Court's decision in Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others: Initiative for Strategize Litigation in Africa (Amicus Curiae) Petition (3 of 2018) [2021] KESC 34 [KLR] [11 January 2021] Judgment to submit that this court should craft an order that 85.3 acres of land be excised from LR No. 7240/23 in an area of the said parcel of land that does not affect the ownership of the Plaintiff's property and that the 2nd Defendant be compelled to accept the same. They argue that this Court is not bound by the Judgment of the Court of Appeal in Civil Appeal No. 283 of 2016 other than a positive obligation in giving effect to the Plaintiffs' fundamental rights contained in the Bill of rights under *the Constitution*.
47. The submissions of the 1st defendant are dated 30.5.2022. They address the issue as to whether the threatened eviction and demolition of the Plaintiffs' property and the contemporaneous transfer of the suit property to the 2nd Defendant is lawful.
48. They argue that this suit is not filed in collusion with the Plaintiffs and it does not amount to an invitation to appeal, review, vary or alter the conclusions of the Court in ELC 1413 of 2007 and in Civil Appeal 183 of 2016. It submits that to the extent that the 2nd Defendant seeks to evict the Plaintiffs from property other than which they have a legal right and interest in pursuant to the judgement of the Court of Appeal in Civil Appeal 183 of 2016, then the reliefs sought are merited.
49. It is also the 1st Defendant's submission that that for failing to meet the threshold set in IEBC v Mian Kiai and 5 others [2017] eKLR and the case of Leina Konchellah v IEBC and 2 others; Jubilee Party of Kenya (Interested Party) Const Pet 371 of 2019, [2019] eKLR, the objections on resjudicata is unmerited. It points out that no evidence of any suits exists where the eviction of plaintiffs from the suit property was directly or substantially in issue; and that the former suits were not between the Plaintiffs and the Defendants.



50. On the allegation that the Plaintiff's suit violates the doctrine of precedent, it relies on the case of *Republic v Kenya Revenue Authority Ex Parte Stanley Mombo Amuti* [2018] eKLR to submit that it is not enough to cite a past case and allege that it is binding.
51. The submissions of the 2nd defendant are dated 12.5.2023 where they argue that the Plaintiffs and the 1st Defendant are in collusion to defeat the 2nd Defendants' fruits of the judgement granted by 3 separate courts.
52. They point out that this Court has no jurisdiction to issue a permanent injunction against the eviction of the 74 Plaintiffs from the original survey map of 85.3 acres as that would be contrary to the specific order of the Court of Appeal.
53. They urge this Court to take judicial notice that in Nairobi ELC No. 1413/2007 *Mary Wairimu Dames v Lang'ata Development Co. Ltd*, the 1st Defendant herein called 1 of the 74 Plaintiffs herein; the 38th Plaintiff Jane Wanjiru Wachiuri as its DW4 witness to testify on behalf of the 74 Plaintiffs herein and all buyers /3rd parties citing that they had purchased their respective plots. Thus, Mary Wairimu's claim for her 85.3 acres should be dismissed. They invite the court to see page 5 of the judgement delivered by Lady Justice Gacheru on 12.2.2016.
54. They further submit that the basis of the 1st Defendant's appeal in Civil Appeal No. 283 of 2018 was that 3rd parties like the Plaintiffs would be affected by the decision of the Court below.
55. They submit that the Honourable Court's hands are tied by the 2 specific orders of the Court of Appeal which by precedent are strictly binding to the Court under the doctrine of precedents and resjudicata which they cited in their defence but the Plaintiff did not file a reply to defence. They submit that the 74 allocation cards exhibited by the 74 Plaintiffs as evidence of ownership by the 74 Plaintiffs have no indication of LR 7240/23 and do not confer title under the [Land Registration Act](#) or the repealed Registered [Land Act](#).
56. It is also the 2nd Defendant's submission that the Plaintiffs did not call makers of the photographs produced, and that in any case, they do not confer title. They rely on the case of *Moses Mbatia v Joseph Wamburu Kihara* [2021] eKLR as well as the case of *Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited* [2005] KLR 97, *Christopher Kenyariri v Salama Beach* [2017] eKLR, *Alfred Sagero Omweri v Kennedy Omweri Sagero* [2021] eKLR and *ET V Attorney General & Another* [2012] eKLR.

Determination

57. Before delving into the substantive issues for determination, this court will first deal with a preliminary issue relating to the question as to whether the cross examination upon the 1st defendant by the 2nd defendant is valid. The 1st defendant had contested the aforementioned cross examination on the basis that no claim had been made against them by the 2nd defendant.



58. I make reference to the case of Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & another [2014] eKLR. In that matter, the court held as follows after considering an objection raised against cross-examining upon a Co-Defendant,

“...In my view, the above passage clearly details that a Court has a complete discretion as to whether to allow examination or cross-examination of a witness whether by plaintiff, defendant, co-defendant or any other party to a suit.”

59. I discern that the history of the dispute is deeply rooted between the two defendants as indicated in paragraph 5 of 1st defendant’s defence and the entire statement of defence of the 2nd defendant.

Guided by the above analysis, I find that the cross examination of the 1st defendant by the 2nd defendant was proper.

60. I now come to the main issues for determination which I frame as follows;

- a. Whether this suit is res judicata.
- b. Whether this court can pin point where 85.3 acres will be excised from, out of the parcel of land known as LR No. 7240/23 in light of the judgment in the Court of Appeal Civil Appeal No. 283 of 2016.

61. There is no controversy that there was litigation between the two defendants culminating in a Court of Appeal Judgment dated 28.9.2018 which decreed that the 1st defendant was to re-transfer 85.3 acres back to the 2nd defendant.

62. The Plaintiffs claim to be a hybrid of allottees and buyers of plots excised from the parcel of land known as LR No. 7240/23. Their claim which is supported by the 1st Defendant is that while it has been determined by the Environment and land Court and the Court of Appeal in Nairobi Civil Appeal Number 283 of 2016 that 1st defendant should re-transfer 85.3 acres from Land Parcel LR No. 7240/23 to the 2nd Defendants, the later should accept to excise the same far from the Plaintiffs’ portions of land.

63. The 2nd Defendants on the other hand have argued that allowing this suit would amount to varying the orders of the Court of Appeal issued on 28.9.2018. They also argue that this suit is res-judicata.

64. I find that the decision in the Court of Appeal of 28.9.2018 in Civil Appeal No. 283 of 2016 is final, there being no stay of the said judgment. Section 7 of the *Civil Procedure Act* 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.”

65. In *Independent & Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR the Court stated that;

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

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



- b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.
66. Was the issue of the 3rd parties rights over the Land Parcel LR No. 7240/23 in issue in ELC No. 1413 of 2007 formerly HCC No. 1077 of 2004 and in Civil Appeal 283 of 2016? In the Court of Appeal judgment at page 5, one of the prayers sought by the current 2nd defendant was;
- “An order for eviction of the 1st defendant itself/its agents/servants/tenants/employees/members/ directors or any other person or entity claiming proprietary rights or any interests whatsoever through it on land parcel L.R. 7240/23.”
67. At page 7 of the aforementioned Judgment, the Court of Appeal noted that Gacheru J in ELC No. 1413 of 2007 had taken the testimony of DW4, Jane Wanjiru Waciuri, a plot buyer. The said witness happens to be a plaintiff (36th) in the current suit. It is noted that the said witness was giving evidence in their quest to counter the 2nd defendants prayer for eviction from the suit property 7240/23.
68. Further, the said Court of Appeal expressed itself at page 16 -17 of its judgement thus;
- “There was no proper basis laid for the conclusion that there was subdivision of the 85.3 acres, the subject of the dispute, or that there was occupation of the same. But even if there was, the land was clearly the Respondents’ and the Appellant had no basis for getting third parties onto it. If at all it did so, that was in violation of the injunction given in the suit and also contrary to the lis pendens principle...” Emphasis added.
69. What resonates from the decision of the Court of Appeal in Civil Appeal No. 238 of 2016 was that even though the case was between the 1st Defendant and the 2nd Defendants, the same permeated and affected 3rd parties who were claiming under the 1st Defendant’s title. The plaintiffs fall in this category.
70. Still in the same Court of Appeal judgment, the court determined with finality that 85.3 cares of the title held by the 1st Defendant should be re-transferred to the 2nd Defendants. The Court held as follows;
- “...We substitute therefore an order that the transfer and registration of the extra 85.3 acres forming a portion of land parcel I.R 57550 LR 7240/23 to the Respondent is null and void and that the said 85.3 acres shall be re-transferred to the Respondent forthwith”.
71. It is the view of this court that this suit is a red herring to scuttle the Court of Appeal judgment and is just twisted to appear as if it raises fresh issues that have never been determined but, that court.
72. In Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR, the court stated that;
- “However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked



since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else”.

Also see my decisions in Daniel Mesiri Kasoo & 7 Others v Fredrick Nkange Mutwiri & Another [2020] eKLR and Joshua Ngatu v Jane Mpinda & 3 Others [2019] eKLR.

73. In light of the above analysis, I find that this suit is resjudicata to the two suits ELC No. 1413 of 2007 (Formerly HCCC No. 1077 of 2004) and Court of Appeal Nairobi Civil Appeal No. 283 of 2016. The court need not delve into an analysis as to whether this court can pin point where 85.3 acres will be excised from out of the parcel of land known LR No. 7240/23 in light of the judgment in Civil Appeal No. 283 of 2016.
74. In the final analysis, I find that plaintiffs case is not merited, the same is hereby dismissed with costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6th DAY OF JULY 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mr. Kirwa for the Plaintiffs

Lusi for 1st Defendant

Gitau Mwaura for 2nd Defendant

Court Assistant: Betsy

