



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 24 OF 2021**

**RICHARD SATIA & PARTNERS**

**JESTIMORE SIMWENYI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SAMSON SICHANGI.....1<sup>ST</sup> DEFENDANT**

**EMMANUEL CHONGE SICHANGI.....2<sup>ND</sup> DEFENDANT**

**RASMI WASILWA KICHOTI.....3<sup>RD</sup> DEFENDANT**

**MOHAMMED WEKESA.....4<sup>TH</sup> DEFENDANT**

**TOM SIRENGO.....5<sup>TH</sup> DEFENDANT**

**WILLIAM KIRWA.....6<sup>TH</sup> DEFENDANT**

**RONALD SICHANGI.....7<sup>TH</sup> DEFENDANT**

**NICK SICHANGI.....8<sup>TH</sup> DEFENDANT**

**JULIUS TIRIKOI.....9<sup>TH</sup> DEFENDANT**

**DAVIS BARASA.....10<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me for determination is a Notice of Motion dated **18/3/2021** brought under Certificate of Urgency and under **Sections 3, 3A, 6, 7** and **63** of the CPA, **Order 51 Rule 1 & 2** of the CPR and **Section 13** of the E&LC Act. The applicants seek for orders:

(1) ...spent

(2) That the Honourable Court be pleased to issue an order of stay of the eviction orders issued on 23/7/2014, re-issued on 28/11/2018 and further re-issued on 3/2/2021 pending the hearing and determination of this application inter-parties.

(3) That this Honourable Court be pleased to issue an order for stay of the eviction orders issued on 23/7/2014, reissued on 28/11/2018 and further re-issued on 3/2/2021 pending the hearing and determination of this application

(4) That this Honourable Court be pleased to issue an order for Notice to show cause to:

(a) Mr. Rioba Omboto -Advocate;

(b) County Commander, Trans-Nzoia County;

(c) OCPD, Endebess;

**(d) The OCS, Endebess Polica Station; and**

**(e) The Deputy County Commissioner, Trans-Nzoia County for deliberately ignoring the order issued on 7/10/202, and they are in the process of evicting the applicants herein in a manner likely to suggest favouritism and corrupt practice**

**(5) That these persons be committed to civil jail for a period not exceeding six months for purporting to execute court orders not directed to them and do not have any legal powers to execute the court orders herein as they are not court bailiffs.**

**(6) That this matter be transferred to Kitale Environment and Land Court for consolidation with ELC No. 100/2018.**

**(7) That the costs of the application be provided for.**

2. The application is premised on the grounds that: on **7/10/2020** this Honourable Court delivered a ruling to the effect that the applicants herein were not parties to the present suit and the orders issued on **23/7/2014** do not apply to them; that on **21/1/2021**, the Plaintiff/Respondents' advocate applied for re-issuance of the said orders without considering the ruling of this court delivered on **7/10/2021**; that the Respondent now wants to use the eviction orders further re-issued on **3/2/2021** against the applicants who are not parties to the suit; that the only persons whom the orders were directed to is the defendant herein **Samson Sichangi (deceased)** who died in the year **2018** and has not yet been substituted to date; that the Honourable Court Eldoret directed that this file be transferred to **Kitale ELC** for consolidation with **Kitale ELC No. 100 of 2018** in which the applicants herein are parties and that the orders further re-issued cannot be executed when the same ruling has not been challenged.

3. The Application is supported by the supporting affidavit and a further affidavit of **Emmanuel Chonge Sichangi** sworn on the **18/3/2021** and **16/4/2021** respectively. The supporting affidavit reiterates the grounds on the face of the application.

4. The application is opposed vide a Replying Affidavit sworn by **Wilson Walunywa Simwenyi** the legal representative of the late **Jestimore Simwenyi** the Plaintiff/Respondent dated **6/4/2021**. It is his contention that the Notice of Motion is frivolous, vexatious, devoid of merit, full of falsehoods and an abuse of the court process hence should be dismissed with costs; that the Applicants are "*cantankerous litigants*" who have abused the court process to deprive the respondents enjoyment of the fruits of judgment delivered way back in **1995**; that the applicants have been shopping for courts including **Nakuru High Court, Eldoret ELC** and **Kitale ELC** seeking for the same remedies and using different entities or individuals which the courts have dismissed; that the applicants are using weird gimmicks by filing a myriad of applications seeking for similar orders to the respondents' detriment; that the application is *res-judicata* as similar applications for stay of eviction were lodged in several courts including **Eldoret ELC No. 42 of 2015** where the application dated **6/3/2015** seeking orders that eviction orders issued on **23/7/2014** be set aside and entire eviction be terminated /stayed was dismissed by **Ombwayo J.**; in the same suit, the application dated **6/12/2016** seeking a stay of eviction orders was also dismissed; in **Kitale ELC No. 139 of 2014** an application for stay of eviction orders was dismissed with costs by **Obaga J.** on **11/12/2014**; that in **ELC No. 100 of 2018 (O.S)** an application dated **20/9/2019** was dismissed by **Njoro J.** on **13/11/2019**; that the defendants are guilty of non-disclosure of material facts to this honourable court hence the application before it must be dismissed; that the impugned orders being sought against the counsel on record (**Rioba Omboto Advocate**) and Government Officials being the **OCPC, OCS**, acting on orders issued by a competent court of law is "*farfetched, inept and unethical*" hence the same should be disregarded as the applicants have been in court perpetually and they should be reprimanded for abusing court process. The respondents aver that they do not object to the matter being transferred to Kitale High Court for consolidation with **ELC No. 100 of 2018 (O.S)**

5. The applicants in a rejoinder filed a further affidavit dated **16/4/2021** where they denied all the averments of the respondent. They denied being parties to **Eldoret ELC No. 42 of 2015** (now **Kitale ELC No. 24/2021**;) that in **Kitale Land Case No. 14 of 2003, Hon. M.C Chepseba** ruled in their favour and ordered that they are the rightful owners of the land; that the ruling was never appealed against by the respondents; that in the Memorandum of Understanding dated **24/10/2015**, it was agreed that the applicants are entitled to their **40 acres** share in **L.R. No. 5335/24**; that the respondents are abusing the court process to defeat the applicants' claim based on adverse possession; that the issue of *res judicata* should be dealt with at the hearing of the main suit; that they have been in occupation of the land for more than **12 years** and the issues raised in regard to adverse possession can only be disputed in **ELC No. 100 of 2018 (O.S)** which is a new cause of action altogether.

6. This Honourable Court issued directions to the effect that the application be disposed by way of written submissions. The applicants filed theirs on the **16/4/2021** whereas the respondents filed theirs on **26/4/2021**.

#### **ANALYSIS AND DETERMINATION**

7. I have carefully considered the Application, the affidavits filed in support and in opposition, all the annexures thereto and the submissions of parties and I find that the issues arising for determination are as follows:

**(a) Should a stay of eviction orders issued on 23/7/2014, re-issued on the 28/11/2018 and further reissued on 30/02/2021 be issued?**

**(b) Is the application Res judicata?**

**(c) Should a Notice to show cause do issue against Rioba Omboto Advocate, County Commander Trans-Nzoia County, OCPC and the OCS-Endebess Police Station and the Deputy County Commissioner Trans-Nzoia County?**

**(d) Should the matter be consolidated with Kitale ELC No. 100 of 2018?**

(e) *Who bears the cost?*

(f) *What Orders should issue?*

8. I will begin with the issue of *res judicata* first before I deal with the rest of the issues which largely depends on whether the application is *res judicata* or not.

(a) ***Is the Application Res judicata?***

9. The doctrine of *res judicata* is governed by the provisions of **Section 7** of the **Civil Procedure Act**. The provision provides that:

***“No court shall try any suit 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 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.”***

10. As stated, the doctrine of *res judicata* has been explained in a plethora of decided cases. In the recent case of the **Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others [2017] eKLR**, the Court of Appeal held as follows:

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

***a) The suit or issue was directly and subsequently in issue in the former suit.***

***b) The 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.”***

11. The court explained the role of the doctrine thus:

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

12. Further, the doctrine of *res judicata* is aimed at ensuring that litigation must come to an end and affords litigants an end, a respite from being faced with a vicious circle of disputes which have been determined by a competent being taken back and forth. It is designed to protect litigants from time- and resource-consuming litigation. Without such control which the doctrine is meant to assert, there would be endless litigation by parties filing multiplicity of suits in different courts on the same issues hoping to obtain favourable outcomes. Judicial process would thus be abused and brought to disrepute. The basis for the doctrine being embedded in the Civil Procedure is to ensure public confidence in the finality of decision made by the courts.

13. Has the respondent met the conditions set out to warrant the application to be deemed as *res judicata*?

14. I have carefully perused the court file and find that in the instant application, the applicants seek for the orders of stay of eviction orders which were issued and thereafter re-issued for the eviction of the original defendant Samson Sichangi, *his agents, family and all those claiming through him*; other prayers are set out on the face of the application and in page 1 of this ruling. The respondent on the other hand in his replying affidavit raises an issue that the application is *res judicata*, citing reasons that the same issues had been raised and finally adjudicated by similar applications before other courts including Eldoret ELC No. 42 of 2015, Kitale ELC No. 139 of 2014 and ELC No. 100 of 2018 (O.S).

15. I have carefully perused the court file and find that there are other applications which have been previously heard and concluded by other courts of competent jurisdiction which raise issues similar to the present one.

16. To begin with, in Kitale ELC No. 130 of 2014, vide an application dated 3/9/2014 the applicants (Emmanuel Sichangi, David Tiaba Wekesa and Joseph Wanyonyi Wataka) sought for orders of injunction restraining the respondents from evicting them from LR. No. 5335/24 Endebeess within Trans-Nzoia County, the respondents raised a preliminary objection that the application was *res judicata*. The court delivered its ruling dated 11/12/2014 when it found that the application was *res judicata*.

17. Similarly in the Eldoret ELC No. 42 of 2015 in an application dated 6/12/2016 brought by Endeless Farmers Investment Co. Ltd against Jestimore Simwenyi, the applicants sought for orders for a temporary order of stay of execution restraining the Plaintiff/Respondent's agents, assigns and/or servants and/or any other person acting under their instructions from further evicting, destroying, demolishing, threatening to further eviction and/or any other manner interfering with the interested party's quiet possession of all that parcel of land known as LR No. 5335/24 situated in Endeless area, Trans-Nzoia County pending hearing and determination of the application. The application was dismissed.

18. An application dated 6/3/2015 in Eldoret ELC No. 42 of 2015 was also dismissed. That application sought among other orders that the eviction orders issued on 23/7/2014 be set aside and the entire eviction be terminated or stayed.

19. Yet another application dated 22/12/2014 in Eldoret ELC No. 141 of 1991 which was dismissed, had sought for stay of execution of the orders issued on 23/7/2014 seeking to evict the applicants; the application was filed by the objector Wekesa Kimungui; in another application dated 6/3/2015 in Eldoret ELC No. 42 of 2015, the applicants sought for orders for review and setting aside of the orders issued on 23/4/2014 and that the entire execution be terminated because the order was time-barred and that the objectors were not aware of the proceedings and yet they are affected by the execution process. The application was dismissed and the court held that the order was not statute-barred since the same had been executed in 1999 as against the defendant his agents, family and all who claimed through him but some later re-entered into the suit land forcing the plaintiff to apply to be reissued with the eviction order.

20. The record speaks for itself, for precisely the same issues that were litigated in the former applications mentioned above, are a replica of the issues in present application.

21. On the issue touching on the parties to the suit, from the courts' record, this application has been brought by the 2<sup>nd</sup> defendant/applicant **Emmanuel Chonge Sichangi** on behalf of all the other nine (9) applicants against the plaintiffs/respondent **Richard Satia & Partners-Jestimore Simwenyi**; in the former suits, the respondents and the subject matter, **LR 5335/24 - Endeless** have remained the same whereas the Applicants keep changing.

22. In **E.T. v Attorney General & another [2012] eKLR** Majanja, J correctly warned that:

**“The courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”**

23. The learned Judge went ahead and cited the case of **Omondi v National Bank of Kenya Limited & others [2001] EA 177** where it was stated that:-

**“Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.”**

24. It is my considered view that the applicants herein even though having introduced other parties to move the court to file applications to have the eviction orders set aside, the mere change of parties and introduction of new parties to the suit who claim that they were not parties to the proceedings does not defeat the intention of **Order 7** of the **Civil Procedure Act**.

25. The instant application only introduces two new prayers; that of consolidating the present file with the **ELC No. 100 of 2018 (O.S)** and that of issuing a notice to show cause to Rioba Omboto advocate and the OCPD, OCS - Edeless Police Station and the DCC Trans-Nzoia for **“ignoring the orders issued on 7/10/2020”** and for their committal to civil jail for contempt of court orders. However I am left wondering what the intent of including those prayers was. First, on consolidation, it was forgotten by the drafter that this is a concluded suit where a determination of issues had already been articulated by the courts to finality. There are no pending issues to be addressed in the instant suit. Suits can only be consolidated during the pendency of the suits but not at the execution stage; counsel has not cited any enabling statute or case law to support this prayer. This one is not one for consolidation. The fresh suit in **ELC No. 100 of 2018** is pegged on fresh issues which have not been determined. Secondly, on the prayer requiring this court to issue a notice to show cause to the respondents' advocate Rioba Omboto, the OCPD, OCS-Edeless and the DCC Trans-Nzoia County for deliberately ignoring the order issued on **7/10/2020**, and committing them to civil jail for a period not exceeding **6** months for purporting to execute orders not directed to them, this court notes that there is no application citing the above mentioned persons for contempt of court and have not been found guilty of contempt of any court order by any court. The applicants clearly state that they have **“purported”** to execute the eviction order against them. The issue of contempt is a serious one which need to be articulated and proved the required standards before penalties are meted out. The applicants herein have not proved their claim against the above stated persons therefore this court cannot issue the order as prayed.

26. In conclusion, I find that the application before me raises issues that had already been adjudicated and finalized by other courts with competent jurisdiction over the same subject matter and therefore it falls nothing less of being *res judicata*.

27. Accordingly and on the basis of my above exposition of the law and cited authorities, I find that there are no other matters that need to be canvassed in determination of the applicants' application dated **18/3/2021** on the merits and elements thereof as the doctrine of *res judicata* disposes of it in its entirety.

28. In conclusion, the application dated **18/3/2021** is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 15<sup>TH</sup> DAY OF JUNE, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC, KITALE.**