



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 122 OF 2014**

**JOSHUA SAMBAYA ELENDI.....PLAINTIFF**

**VERSUS**

**JEPHTHER OPANDE.....DEFENDANT**

**RULING**

**The Application**

1. By a Notice of Motion dated 29/3/2021 and filed in court on 30/3/2021 brought under **Order 24 Rule 5** and **Order 51 Rule 1** of the **Civil Procedure Rules**, the plaintiff/applicant sought the following orders:

- a) **That judgment be entered in favour of the plaintiff/applicant as prayed in the plaint.**
- b) **That the costs of this application be provided for.**

2) The application is supported by the affidavit of the plaintiff sworn on 29/3/2021. The grounds on the face of the application are that the plaintiff seeks a declaration that he is the sole owner of the suit land and eviction orders; that on 1/2/2018 the court was informed that a similar case has been decided by this court and that the decision of the Court of Appeal in **Eldoret CA No. 28 of 2017** could impact on the present suit; that the Court of Appeal judgement was read on 30/12/2020 and it upheld this court's decision in **Kitale ELC No. 54 of 2016 – Mary Gathiriga –vs- Jephther Opande**; that the court decision in the ELC case was that the land belongs to the plaintiff therein and the defendant was ordered to be evicted and that the facts in that case are similar to those in the present case.

**The Response**

3. The defendant filed grounds of opposition dated 11/5/2021 and opposed the plaintiff's application dated 29/3/2021 on the following grounds:

- (1) **That every case has to be determined on its own merit.**
- (2) **That the defendant's Appeal No. 28 of 2017, Jephther Opande (Appellant) -vs- Mary Atemo Gathiriga (Respondent) was dismissed on the basis of insufficient evidence, which evidence can be tendered in this matter.**
- (3) **That the defendant/respondent has a chance to enjoin the Land Registrar, Trans-Nzoia County by amending his defence and call for particulars under Section 69 of the Evidence Act.**
- (4) **That evidence tendered in ELC No. 54 of 2016 may be different from the evidence to be tendered in this case.**

**Submissions**

4. The court on 18/5/2021 directed that the parties to file written. The plaintiff filed his written submissions on 25/5/2021. I have perused the court record and I have found no submissions filed on behalf of the defendant.

**Analysis and Determination**

5. I have perused the application, the supporting affidavit, the grounds of opposition and the submissions filed. The main issue that arises from the instant application is whether judgment should be entered in favour of the plaintiff as prayed in the plaint.

6. The applicant thinks this should be the case but the defendant thinks otherwise.

7. There is no doubt that another case preceded this suit but it involved the defendant and another party. In that case the defendant was sued by one **Mary Atemo Gachiriga** seeking an order of eviction from **LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /177**. The defendant filed a defence and raised a counterclaim in that matter. He sought a declaration that the title held by the plaintiff was obtained fraudulently and that the caution he had lodged on the title should remain in place. The defendant's counterclaim was dismissed and judgment was entered against him in favour of the plaintiff in the suit. Upon appeal against that judgment, the Court Of Appeal in **Eldoret Civil Appeal No 28 of 2017** upheld the decision of this court on **30/12/2019**.

8. In the present suit however, the plaintiff is not claiming the same land parcel that was the subject matter of that earlier suit. He is claiming **LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /180**. He states in his plaint that the defendants trespassed on the suit land and converted the same for his own benefit and he seeks a declaration that he is the owner of the suit land and an order that the defendant do vacate the suit land and in default be evicted therefrom.

9. In his defence the defendant states that he purchased **5.5 acres** of land from **LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /20**.

10. The defendant's defence is ambivalent on the proper genealogy of the plaintiff's title.

11. **Paragraph 3** of that defence reads as follows:

**“The defendant states that on 12/3/2003 he bought an additional 5.5 acres out of land parcel no LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /20 which later resulted to LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /90, 171,172,173,178,179,180, 181, and 182.”**

12. In the decision by this court in **Kitale ELC No. 54 of 2016 – Mary Gathiriga –vs- Jepther Opande** it was observed at **paragraph 4** that upon subdivision of **LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /20**, plot no **LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /90** was created and the **5.5 acres** that he had bought from **LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /20** fell on that new plot. **Plot no LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /90** was later subdivided after the alleged illegal and irregular removal of the caution that he had lodged over its title.

13. In paragraph 4 of his defence the defendant states as follows:

**“ On or about 16<sup>th</sup> June 2005, the defendant registered a caution on land parcel no LR Number Waitaluk/Kapkoi Sisal Block 1 /Kibormos /90 which was purportedly removed on 6<sup>th</sup> november 2003, hence no 90 (sic) resulted into No 171 to 173 and 178 to 182.”**

14. From the contents of the defence it is clear that plot no **171** and **180** the latter which is the subject matter of this case came into being by virtue of the same mutation. The same subdivision transaction having given birth to both parcels any separate suits that challenge the legality of the two plots would of necessity raise the same legal and factual issues.

15. Therefore I agree with the applicant when he states that the facts in **Kitale ELC No. 54 of 2016 – Mary Gathiriga –vs- Jepther Opande** are similar to the facts of this case.

16. In this court's opinion, the defendant was accorded a chance to present evidence to prove fraud on the part of the plaintiff in **Kitale ELC No. 54 of 2016 – Mary Gathiriga –vs- Jepther Opande** but he failed to do so and this court granted the plaintiff in that case judgment against the defendant as prayed which the Court Of Appeal affirmed. It is clear that the facts that were or which should have been in issue in **Kitale ELC No. 54 of 2016 – Mary Gathiriga –vs- Jepther Opande** are the same facts that would be in issue in the instant suit perchance it went to hearing on the merits. Similarly, the evidence that was or should have been tendered by the parties in **Kitale ELC No. 54 of 2016 – Mary Gathiriga –vs- Jepther Opande** is the same evidence that would be needed by the parties in the instant suit perchance it went to hearing on the merits.

17. There is one more issue to address in determining the instant application though. The plaintiff in this suit is different from the plaintiff in **Kitale ELC No. 54 of 2016 – Mary Gathiriga –vs- Jepther Opande**. However it can not be ignored that the plaintiffs in both suits were purchasing the land from a third party who was the proprietor at that time and it is clear that the plaintiffs must be deemed to be claiming their right under that former proprietor as the two plots emanated from the subdivision of one parcel which he owned

18. The provisions of **Section 7** of the **Civil Procedure Act** are as follows:

**“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.”**

19. 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.”*

20. In 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.”**

21. Though it was not the plaintiff that commenced this suit the writing was on the wall immediately the Court Of Appeal passed its decision affirming the judgment of this court in **Kitale ELC No. 54 of 2016 – Mary Gathiriga –vs- Jephther Opande**. Indeed the plaintiff’s counsel cites the conduct of the defendant’s counsel in this matter as having indicated that the defendant would concede to this claim once the decision of the Court Of Appeal was rendered, if it was in favour of the plaintiff. I have perused the record and I find that to be the case in that Ms Arunga holding brief for Mr Barongo for the defendant on the **1/3/2018**, instead of prosecuting the suit stated as follows:

**“Mr Barongo is seeking a mention in 2 months’ time. There is a C.A. (court of Appeal) matter. Depending on the outcome of the appeal this matter may or may not proceed. It is CA 28 of 2012- Eldoret. The subject matter is the same.”**

22. Upon and owing to that address this court adjourned the matter to **21/5/2018** when the matter failed to be listed. The matter came up for hearing on **7/12/2018** when Mr Wafula holding brief for Mr Barongo echoed the sentiments of Mrs Arunga set out in **paragraph 21** herein above.

23. The plaintiff’s counsel cited the cases of **Collogne Investments Ltd Vs KCB Bank Ltd And Another 2020 eKLR** and **Emidan Enterprises Co Ltd v Kenneth Nyaga Getaweru 2019 eKLR** in support of the proposition that the words and conduct of counsel for the defendant form an estoppel against the defendant’s opposition to the instant application since the defendant’s counsel’s undertakings bound his client.

24. In the case the court observed as follows: .

**“17. The jurisprudence relating to applications made for judgment on admission is set out in the in the case of Choitram v Nazari [1984] KLR 327 where the at Madan, JA stated as follows: -**

**“For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.” (emphasis added)**

**18. In the same judgment, as per Chesoni Ag. JA,**

**“Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words “otherwise” which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions.....It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.”**

**19. It is important to note that the current Order 13 is replica of Order XII in the now repealed Civil Procedure Rules before the 2010 version was enacted.**

**20. Thus, a court of law will act to strike out a defence and enter judgment on admission, if the admission relied on is clear and unambiguous. It is trite law that an admission need not only be in a pleading but can be discerned in any other way.”**

25. In **Collogne Investments Ltd Vs KCB Bank Ltd And Another 2020 eKLR** the court stated as follows:

**“35. The next issue for consideration is whether there was any undertaking given by the defendant on 22/9/2020. What the Court has before it is the Judge’s handwritten court proceedings for that day. In that record, there is no reference whatsoever to any undertaking. There is also no mention of the impending sale of 25/9/2020. Neither is there any reference to any undertaking.**

**36. In Halsbury’s Laws of England, 4th Edition Vol. 44 (1), pgs 222, 223 and 224, it is observed that: -**

***“Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the court in the course of proceedings, that undertaking may be enforced summarily upon application to the court.***

- It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.***
- It must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.***
- The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the court, and the undertaking must be one which is not impossible ab initio for the solicitor to perform.***
- If the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.”***

**37. From the foregoing, it is clear that an undertaking must be clear in its terms. The same must be before Court and capable of being enforced and/or which an advocate is capable of performing.”**

26. The plaintiff’s counsel therefore submits that there was an admission of the plaintiff’s claim by the defendant, and going by the foregoing decisions and the analysis of the facts of this case as outlined herein above, I agree with that submission.

27. The upshot of the foregoing is that the plaintiff’s instant application has merit. I therefore grant **prayer no. (1)** in the application dated **29/3/2021**. Judgment is hereby entered against the defendant as prayed in **prayers nos (i), (ii), (iii) and (iv)** of the plaint dated **16/6/2014**.

28. The costs of the application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 28<sup>TH</sup> DAY OF JULY, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC, KITALE.**