



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 39 OF 2020**

**1. KACHE HARISSON SHUTU**

**2. KACHE CHARO SHUTU**

**3. JOHN FONDO SHUTU**

**4. MAGDALENE TUMAINI SHUTU.....PLAINTIFFS**

**VERSUS**

**1. HARRISON CHARO SHUTU**

**2. ALFRED AGUNGA**

**3. SHABIRALI FARKRUDDIN**

**4. FRANCIS XAVIER ONGORO**

**5. MARY PETERS.....DEFENDANTS**

**RULING**

1. Before me for determination are two applications. By their First Application dated and filed herein on 15<sup>th</sup> June 2020, Kache Harisson Shutu, Kache Charo Shutu, John Fondo Shutu and Magdaline Tumaini Shutu (the Plaintiffs) pray for an order restraining the five Defendants either by themselves, their agents, servants, employees and/or assigns from trespassing, transferring or interfering with the Plaintiffs' possession of LR No. 8897 Malindi pending the hearing and determination of the suit herein.

2. The application which is supported by an Affidavit sworn by the 1<sup>st</sup> Plaintiff- Kache Harrison Shutu is premised on the grounds that: -

*i. The Court of Appeal at Malindi in Civil Appeal No. 17 of 2016; Chevron (K) Ltd –vs- Harrison Charo Wa Shutu reiterated and affirmed the decision of the Superior Court which held that the 1<sup>st</sup> Defendant had acquired ownership rights to the property by way of adverse possession;*

*ii. Upon securing registration, the 1<sup>st</sup> Defendant went about clandestinely selling off portions of the subject property to third parties, receiving consideration, but has yet to demarcate and transfer the said portions to the said third parties;*

*iii. The 1<sup>st</sup> Plaintiff is the wife to the 1<sup>st</sup> Defendant and resided on the subject property whereat the matrimonial home was located;*

*iv. The 2<sup>nd</sup> Plaintiff is the mother to the 1<sup>st</sup> Defendant and whom the Court of Appeal noted in its decision, to have resided on the property for more than 45 years;*

*v. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are son and daughter respectively of the 1<sup>st</sup> Defendant.*

*vi. All the Plaintiffs were never consulted to consent to the 1<sup>st</sup> Defendant's sale of portions of the subject property to any third*

*party, and in particular, the 1<sup>st</sup> Plaintiff's spousal consent was not secured in any of the transactions with third parties;*

*vii. All the Plaintiffs were adults at the time the 1<sup>st</sup> Defendant was sued in the Superior Court for vacant possession with equal rights as the 1<sup>st</sup> Defendant to claim adverse possession but the Claimant only sued the 1<sup>st</sup> Defendant presumably on behalf of his family which comprises of the Plaintiffs herein;*

*viii. The Plaintiffs will argue that the decision to register the 1<sup>st</sup> Defendant as the owner of the subject property by way of adverse possession created an implied trust in favour of the Plaintiffs and the 1<sup>st</sup> Defendant held the land in trust for his family.*

*ix. Regrettably on 6<sup>th</sup> June 2020 at 3.00 p.m., without any notice whatsoever, a gang of violent youth bearing menacing weapons descended on the subject property and proceeded to forcefully eject the Plaintiffs after destroying their permanent houses and structures thereon including the matrimonial home.*

*x. The Plaintiffs were perplexed to learn that the invaders who acted violently and in the most inhumane manner, were agents of the Defendants alleging to have paid the 1<sup>st</sup> Defendant some monies towards the purchase of the suit property; and*

*xi. The Plaintiffs pray for the temporary reliefs sought in order to allow them to ventilate their grievances before this Court.*

3. The First Application is opposed by the Defendants/Respondents. In a Replying Affidavit sworn and filed herein on 29<sup>th</sup> June 2020, Harrison Charo Wa Shutu (the 1<sup>st</sup> Defendant) concedes that he was indeed wedded to the 1<sup>st</sup> Plaintiff and that they have children from the said marriage all of whom are now above the age of majority.

4. The 1<sup>st</sup> Defendant however denies that the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs were and/or are residing on the suit premises as they are residing on their own portions of land elsewhere. The 1<sup>st</sup> Defendant avers that he personally and individually sued in the case referred to and that he won the case both in the Superior Court and in the Court of Appeal but there was no decision relating to an express or implied trust in both Judgments.

5. The 1<sup>st</sup> Defendant denies selling portions of the said property to the 2<sup>nd</sup> and 4<sup>th</sup> Defendants as alleged and asserts that the two are strangers to himself. He however concedes that he sold portions of the land to the 3<sup>rd</sup> and 5<sup>th</sup> Defendants but they have since failed to settle or clear the purchase price. The 1<sup>st</sup> Defendant further asserts that since he had not obtained Spousal consent, he did not pursue completion of the said transactions and hence the said transactions are unlawful, null and void.

6. On his part, Alfred Agunga – the 2<sup>nd</sup> Defendant has raised a Notice of Preliminary Objection dated 26<sup>th</sup> June 2020 objecting to the suit on the grounds: -

*1. That there is no cause of action in law disclosed against the 2<sup>nd</sup> Defendant as there is no specific allegation against him as a person;*

*2. That the 2<sup>nd</sup> to the 4<sup>th</sup> Plaintiff have no known rights in law that can be legally enforced against the 1<sup>st</sup> Defendant and therefore conversely against the 2<sup>nd</sup> Defendant or any other Defendant;*

*3. That the 2<sup>nd</sup> Defendant has no interest in the property nor is there any specific allegation against him;*

*4. That the entire suit and application are therefore bad in law and amounts to an abuse of the Court process; and*

*5. That the orders sought are not available to the Applicants.*

7. Similarly, Francis Xavier Ongoro (the 4<sup>th</sup> Defendant) is opposed to the application. In Grounds of Opposition dated 26<sup>th</sup> June 2020, he faults the suit and the Plaintiffs' application on the grounds: -

*1. That the suit is incompetent and bad in law together with the application.*

*2. That there is no evidence that the 4<sup>th</sup> Defendant purchased the suit property(from) the 1<sup>st</sup> Defendant and in fact the Plaintiffs are aware of the position having filed an application to join(in) Malindi CMCC Land Case No. 27 of 2020 now still pending in the Chief Magistrates Court;*

*3. That the 2<sup>nd</sup> and 4<sup>th</sup> Defendants have no known rights to enforce against any of the Defendants and therefore their application has no basis and should be dismissed;*

*4. That the 1<sup>st</sup> Plaintiff's suit is sub judice her application dated 15<sup>th</sup> June 2020 and (is) accordingly an abuse of the Court process;*

*5. That the 4<sup>th</sup> Defendant is aware of Malindi CMCC Land Case No. 27 of 2020 in which the 1<sup>st</sup> Defendant had sought to be joined (and) accordingly the filing of the current suit is an abuse of the Court process; and*

**6. That the orders sought are not available to the Applicants.**

8. Shabirali Fakruddin (the 3<sup>rd</sup> Respondent) is equally opposed to the Plaintiffs' application. In his Replying Affidavit filed herein on 13<sup>th</sup> July 2020, the 3<sup>rd</sup> Defendant avers that he bought a portion measuring ½ an acre of LR No. 8897 Malindi from the 1<sup>st</sup> Defendant in the year 2008 for valuable consideration. The 3<sup>rd</sup> Defendant further asserts that the need for spousal consent is a recent development and had no application prior to the Land Act 2012 and hence cannot apply to his case.

9. The 3<sup>rd</sup> Defendant further avers that upon purchase of the said portion of the suit property, he put up a go-down on the land which has remained thereon ever since and hence the Plaintiffs are estopped from lodging a complaint on the same.

10. Sometime in August 2019, the 3<sup>rd</sup> Defendant executed an agreement with the 4<sup>th</sup> Defendant selling to him the property at a consideration of Kshs 5,000,000/-. The 4<sup>th</sup> Defendant did not however fulfill the terms of the Agreement although he did without the 3<sup>rd</sup> Defendant's consent move into the land on 2<sup>nd</sup> June 2020 whereupon he proceeded to demolish the 3<sup>rd</sup> Defendant's go-down.

11. The 3<sup>rd</sup> Defendant avers that as a result of the 4<sup>th</sup> Defendant's actions, he moved to Court and filed *Malindi CMCC No. 27 of 2020; Shabirali Fakruddin –vs- Francis Xavier Ongoro* seeking orders of injunction. On 3<sup>rd</sup> June 2020 temporary orders of injunction were issued in the said suit against the 4<sup>th</sup> Defendant. The 1<sup>st</sup> Plaintiff subsequently filed an application to be enjoined in the said suit.

12. The 3<sup>rd</sup> Defendant accuses the Plaintiffs of filing the present suit in abuse of the Court process as they failed to disclose the existence of the suit in the Lower Court which suit remains pending for hearing and determination.

13. In addition to the Replying Affidavit, the 3<sup>rd</sup> Defendant by way of a Preliminary Objection dated 9<sup>th</sup> July 2020 objects to the suit herein on the grounds: -

***a. That this Court lacks jurisdiction to hear the suit by virtue of the express provisions of Section 6 of the Civil Procedure Act.***

***b. That there is another suit which is pending before Malindi Chief Magistrates Court in Civil Suit No. 27 of 2020 between the same parties touching on the same subject matter herein hence this suit is thus sub judice.***

***c. That this suit is therefore frivolous, vexatious and (an) abuse of (the) Court process and ought to be struck off with costs to the 3<sup>rd</sup> Defendant.***

14. Mary Syevutha Peter (the 5<sup>th</sup> Defendant) is similarly opposed to the Plaintiffs application dated 15<sup>th</sup> June 2020. In her Replying Affidavit as filed herein on 29<sup>th</sup> June 2020, the 5<sup>th</sup> Defendant avers that he is a beneficial owner of a portion of the suit property measuring 19.50 by 43.20 meters as well as another portion measuring 0.12 Ha having bought the same from the 1<sup>st</sup> Defendant on 30<sup>th</sup> October 2008. The 5<sup>th</sup> Defendant asserts that upon purchase of the land, she went on and developed a hotel whose business she has carried thereon for the last ten years.

15. The 5<sup>th</sup> Defendant further avers that the Plaintiffs are persons well known to her and they have co-existed on the land ever since she bought her portions in the year 2008 and 2011. She accuses the Plaintiffs of being economical with the truth in purporting that they were unaware of the transactions involving the suit property and asserts that the 1<sup>st</sup> Defendant has at all times been the representative of the larger Shutu family on whose authority the 1<sup>st</sup> Defendant has been representing them even in litigation in Courts.

16. The 5<sup>th</sup> Defendant avers that she is in agreement with the 1<sup>st</sup> Plaintiff however where she states that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sanctioned the demolition of the Plaintiffs house as on 13<sup>th</sup> and 14<sup>th</sup> June 2020, the 2<sup>nd</sup> Defendant again sanctioned the same style of demolition on the 5<sup>th</sup> Defendant's property on the subject property. The 5<sup>th</sup> Defendant asserts that the subject property is divided into six portions and that she occupies two of them on both ends while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also hold portions thereon and have held the same for a long period of time.

17. The 5<sup>th</sup> Defendant further avers that upon buying the suit properties, she went ahead and built a perimeter wall thereon. On 13<sup>th</sup> and 14<sup>th</sup> June 2020 however, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sent goons who demolished the perimeter wall and looted everything inside. The 5<sup>th</sup> Defendant asserts that as a result, she instituted *Malindi CMCC No. 34 of 2020; Mary Syevutha Peter vs- Alfred Agunga & Others* which she has applied to have consolidated with this suit.

18. The Plaintiffs Second Application is another Notice of Motion dated 19<sup>th</sup> June 2020 and filed herein on 24<sup>th</sup> June 2020. By the said application the Plaintiffs pray for orders: -

***2. That the subject property Malindi LR No. 8897 measuring approximately 0.504 Ha and all chattels and movable properties found present on the subject property, be attached by the Court Bailiff pending the hearing and determination of the Application herein.***

***3. That the Honourable Court (does) commit the 2<sup>nd</sup> Defendant, Alfred Agunga and his servants, agents, employees found present, in the subject property Malindi LR No. 8897 measuring approximately 0.504 Ha to imprisonment for a period not exceeding six (6) months.***

4. *That the Officer Commanding Police Station, Malindi Police Station render protection for the Bailiff's enforcement of the orders herein.*

5. *That the 1<sup>st</sup> Plaintiff be reinstated back into the subject property.*

19. The Second Application is equally supported by an affidavit sworn by Kache Harrison Shutu and is premised on the grounds that: -

*i. The Order dated 16<sup>th</sup> June 2020 unequivocally restrains the 2<sup>nd</sup> Defendant from trespassing or interfering with the Plaintiffs possession of the Subject Property;*

*ii. Upon having notice by way of service, the 2<sup>nd</sup> Defendant sent his agents and employees to violently evict the 1<sup>st</sup> Plaintiff from the subject property on the evening on 17<sup>th</sup> June 2020;*

*iii. The 2<sup>nd</sup> Defendant proceeded to drive and park several lorries within the subject property and installed several armed watchmen;*

*iv. By night and day, the 2<sup>nd</sup> Defendant commenced and continued the construction of a Perimeter Wall around the Subject Property to mask from the public eye heavy buildings the 2<sup>nd</sup> Defendant is undertaking on the subject property;*

*v. In spite of the 2<sup>nd</sup> Defendant's attempts to be clandestine about his activities within the enclosed subject property, his contempt of this Court's orders can clearly be viewed from the elevation of a storied building adjacent to the property;*

*vi. To aggravate the contempt, the 2<sup>nd</sup> Defendant is drilling a well on the Subject property;*

*vii. Order 3(1) of the Civil Procedure Rules empowers this court to attach the property of a Contemnor and to imprison him for disobedience of Court Orders; and*

*viii. It is just and fair that the Subject Property including any property found present therein be attached and to remain under the Court Bailiff pending hearing and determination of the application.*

20. I was unable to find any response to the Plaintiffs' Second application by any of the Respondents herein save by way of submissions. I have carefully considered the two applications and the respective responses thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

21. A party found to be in contempt of Court orders may face dire consequences including denial of audience by the Court. That being the case, it behoves this Court to first and foremost deal with the Plaintiffs Second application dated 19<sup>th</sup> June 2020. The substantive Prayer in the said application is to be found at the Plaintiffs' Prayer No. 3 which is worded as follows: -

***"3. That the Honourable Court (does) commit the 2<sup>nd</sup> Defendant, Alfred Agunga, and his servants, agents, employees found present in the subject property Malindi LR No. 8897 measuring 0.504 Ha to imprisonment for a period not exceeding six (6) months."***

22. That prayer appears to me to be quite mixed-up as the 2<sup>nd</sup> Defendant in the suit before me is listed as one Shabirali Farkruddin and not Alfred Agunga as stated in the Plaintiffs prayer. The said Alfred Agunga however is listed as the 3<sup>rd</sup> Defendant herein.

23. Be that as it may, contempt of Court is defined in the Black's Law Dictionary, 9<sup>th</sup> Edition as: -

***"Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by a fine or imprisonment."***

24. Consequent, upon the above definition, Order 40 Rule 3 (1) of the Civil Procedure Rules under which the Second application is brought before this Court provides that: -

***"In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release."***

25. In granting this Court jurisdiction to punish contempt of Court however, Section 29 of the Environment and Land Court Act enhances the consequences of contempt of Court for would be offenders and provides as follows: -

***"Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years or to both."***

26. Given the possible consequences, the standard of proof in cases of alleged contempt of Court is well established. In *Mutirika –vs- Baharini Farm Ltd (1985) KLR 229, 234*, the Court of Appeal explained that standard as follows: -

***“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt....***

***The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”***

27. Indeed, as the Supreme Court observed in *Republic –vs- Ahmad Abolfathi Mohamed & Another, Criminal Application No. 2 of 2018, eKLR: -*

***“The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort, it is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court order.”***

28. The question that begs an answer thus, is have the Plaintiffs made out a case for contempt of the Court order issued herein on 16<sup>th</sup> June 2020. The said Orders as extracted by the Plaintiffs read as follows: -

***“IT IS HEREBY ORDERED:***

***1. That the application be and is hereby certified urgent.***

***2. That an interim order be and is hereby issued for a period of 14 days restraining the Defendants either by themselves, their agents, servants, employees and/or assigns from trespassing, transferring or interfering with the Plaintiffs possession of the subject property Malindi Land Reference Number 8897 measuring approximately 0.504 Ha or thereabouts.***

***3. That the said application to be served upon all the Respondents for inter-partes consideration on 30<sup>th</sup> June 2020.***

29. The said Orders were apparently served upon the Respondents on 17<sup>th</sup> June 2020 in the afternoon. In support of the application for contempt thereof, the 1<sup>st</sup> Plaintiff avers as follows at Paragraphs 3 to 7 of her Supporting Affidavit: -

***“3. That on the 6<sup>th</sup> June 2020, my matrimonial house was demolished and my family thrown out of the subject property without a Court Order, and notice by the 3<sup>rd</sup> Defendant (and his agents) who alleges to have purchased the same from my husband and without my consent;***

***4. That in spite of the 2<sup>nd</sup> Defendants (sic) actions, I managed to remain on the property, residing in the derelict shells of my former house;***

***5. That on the 6<sup>th</sup> June 2020, an order of this Honourable Court restrained the 2<sup>nd</sup> Defendant from trespassing or interfering with my possession, (sic) was served upon the 2<sup>nd</sup> Defendant on the afternoon of the 17<sup>th</sup> June 2020. Attached hereto and marked “KHS 2” is a copy of the detailed Affidavit of Service of Samson Nyangena sworn on the 18<sup>th</sup> June 2002);***

***6. That under the cover of darkness that very evening 17<sup>th</sup> June 2020, the 2<sup>nd</sup> Defendants agents and employees descended on the subject property, threw me out and drove vehicles into the subject property. The true photographs taken from an adjacent elevated position annexed to this Affidavit, reflect the presence of several lorries within the subject property; and***

***7. That the 2<sup>nd</sup> Defendant’s agents and employees continued to construct to completion one-side of the perimeter with a wall. The true photographs annexed to this Affidavit reflect the 3<sup>rd</sup> Defendant’s agents busy working on a wall, dripping wet with cement.”***

30. As it were arising from these averments, this Court was left with great doubt as to whom the Plaintiffs sought to have committed for contempt. As already pointed out above, the Plaintiffs in their prayers herein urge the Court to commit the 2<sup>nd</sup> Defendant whom they name as Alfred Agunga to imprisonment for a period not exceeding six (6) months.

31. A perusal of the heading to their own application as well as the Affidavit in support however reveals that the 2<sup>nd</sup> Defendant is listed as Shabirali Fakruddin and that the said Alfred Agunga is listed as the 3<sup>rd</sup> Defendant. While that was possibly a mistake in drafting as the Plaintiff places the said Alfred Agunga as the 2<sup>nd</sup> Defendant in the list of Defendants, the averments at Paragraphs 3 to 7 of the Supporting Affidavit still inter-changeably refer to both the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants.

32. Thus while the 3<sup>rd</sup> Defendant and his agents are said to have thrown out the Plaintiffs from the suit property on 6<sup>th</sup> June 2020 at paragraph 3, the 2<sup>nd</sup> Defendant is blamed for the very same actions at paragraph 4 of the Supporting Affidavit. Similarly, at paragraph 7 of

the Affidavit, the 2<sup>nd</sup> Defendant agents are said to be engaged in the construction of some perimeter wall while the photos annexed in evidence refer to the 3<sup>rd</sup> Defendants agents working on the wall.

33. As it were, these are averments made on oath and this Court cannot just on its own assume there was a mistake and/or that a reference to the 2<sup>nd</sup> Defendant in one paragraph meant a reference to the 3<sup>rd</sup> Defendant in the next paragraph and or vice versa.

34. In addition, even if it were to be assumed that the application refers solely to the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Plaintiff does not explain how she came to the knowledge that those who descended on the subject property in the cover of darkness on 17<sup>th</sup> June 2020 and threw her out of the premises were agents and/or employees of the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Plaintiff has not stated that she saw the 2<sup>nd</sup> Defendant in the suit premises that night either throwing her out of the premises or driving in the vehicles said to be now parked therein.

35. As a result, it was clear to me that the Second application is based on nothing but speculation. The same is misconceived and without merit. I disallow the same and dismiss it with costs.

36. Turning to the Plaintiffs First Application dated 15<sup>th</sup> June 2020, the Plaintiffs pray for an order of injunction restraining all the five Defendants from trespassing, transferring or interfering with her possession of the suit property. The application arises from the Plaintiff's contention that the 1<sup>st</sup> Defendant acquired ownership rights over the suit property by way of adverse possession.

37. The Plaintiffs being the wife, mother and children respectively of the 1<sup>st</sup> Defendant aver that there was subsequently an implied trust in their favour as they lived on the suitland with the 1<sup>st</sup> Defendant. Separately, the 1<sup>st</sup> Plaintiff equally asserts that the suit property was their matrimonial property and that her consent as a spouse of the 1<sup>st</sup> Defendant ought to have been obtained prior to any disposal of any portion thereof.

38. All the five Defendants filed Grounds of Opposition and or Affidavits in reply in opposition to the injunction application. In addition, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants raised separate Preliminary Objections dated 26<sup>th</sup> June 2020 and 9<sup>th</sup> July 2020 respectively wherein they object to this suit on a number of grounds. I have again perused and considered the applications and the objection thereto.

39. In my view, the contention by the 2<sup>nd</sup> Defendant that it has no interest in the suit property and that the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs have no known rights in law that can be legally enforced against himself are certainly matters that would require the calling of evidence to be ascertained. That similarly applies to the 2<sup>nd</sup> Defendant's contention that there is no cause of action in law disclosed against himself.

40. As Law JA observed in *Mukisa Biscuits Manufacturers Ltd –vs- Westend Distributors Ltd (1969) EA 696*: -

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

41. Speaking to the issue in *the Mukisa Biscuits Case (Supra)*, Sir Charles Newbold P stated as follows: -

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

42. As stated hereinabove, it is my view that the existence of a cause of action or rights and interests of the parties in the circumstances herein would require to be ascertained by way of evidence and I did not therefore find any basis for that Preliminary Objection.

43. On his part, the 3<sup>rd</sup> Defendant in particular objects to the jurisdiction of this Court to hear the suit on the basis that the same offends the provisions of Section 6 of the Civil Procedure Act as there is another suit pending between the parties. Section 6 of the Civil Procedure Act encapsulates the doctrine of res sub-judice in our laws and provides as hereunder: -

“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.”

44. Pronouncing itself on the subject of res sub-judice in *Kenya National Commission on Human Rights –vs- The Attorney General & Another (2020) eKLR*, the Supreme Court of Kenya aptly observed as follows: -

“(67) The term ‘sub-judice’ is defined in *Black’s Law Dictionary 9<sup>th</sup> 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.” (Emphasis mine)

45. In the matter before me, it is not in dispute that some of the parties herein had filed some two suits which remain pending before the Chief Magistrates Court at Malindi for determination. From the material placed before me, the 3<sup>rd</sup> Defendant- Shabirali Fakruddin instituted **Malindi CMCC No. 27 of 2020** against the 4<sup>th</sup> Defendant herein- Francis Xavier Ongoro on 3<sup>rd</sup> June 2020 praying for orders as follows: -

**a. A declaration that the Plaintiff being a lawful purchaser of Plot No. 8897 Malindi Municipality situate at Ngalla Stage Junction (Formerly Kwa Charo Wa Shutu Estate) within Kilifi County of the Republic of Kenya is the absolute owner of the said parcel of land.**

**b. An order of Permanent injunction do issue restraining the Defendant by himself, his servants, workmen, agents, heirs and/or successors, personal representatives and/or assigns or otherwise howsoever from in any way interfering with the Plaintiff's quiet possession and absolute ownership over Plot No. 8897 Malindi Municipality.**

**c. An order of Permanent injunction do issue stopping the Defendant from in any way putting up any sort of construction on the Plaintiff's Plot Number 8897 Malindi Municipality situate at Ngalla Stage Junction (Formerly Kwa Charo Washutu Estate) within Kilifi County of the Republic of Kenya.**

**d. An order that the amount already deposited by the Defendant, his agents, servants or assigns which now stands at Kshs 4,500,000/- in the Plaintiff's account be refunded to the Defendant upon deducting the costs of the damage done in the suit property occasioned by the Defendant's acts.**

**e. Costs of the suit.**

**f. Any other relief the Court deems fit to grant.**

46. Some two weeks later on 17<sup>th</sup> June 2020, the 5<sup>th</sup> Defendant- Mary Syevutha Peter instituted **Malindi CMCC Land Case No. 34 of 2020** against Alfred Agung (the 2<sup>nd</sup> Defendant herein) one Naftali Owino, Harrison Charo Shutu (the 1<sup>st</sup> Defendant herein) and Francis Xavier Ongoro (the 4<sup>th</sup> Defendant herein) praying for the following reliefs: -

**a. An order of permanent injunction restraining the defendants in person or through their agents, assigns, employees, paid casual labourers or any other person working under their instructions from entering, demolishing the perimeter wall or any part thereof, creating any way inside, erecting any structures, or in any manner interfering with the Plaintiff's portion of LR No. 8897 registered under Title No. CR 25828- the suit property.**

**b. A mandatory order of injunction directed to the defendants compelling the defendants to remove the gate erected on the Western side of the Plaintiff's property.**

**c. Special damages in terms of paragraph 16 (sic) of the Plaintiff.**

**d. Costs of the suit.**

**e. Interest thereon at Court rates.**

47. While the Plaintiffs herein were as at the time of filing this suit not yet parties to the two suits, it was apparent from the material placed before me that vide an application dated 15<sup>th</sup> June 2020 – the same date this suit was filed- the 1<sup>st</sup> Plaintiffs applied to be enjoined as Interested Party in **Malindi CMCC No. 27 of 2020** claiming interest on the land as the wife to the 1<sup>st</sup> Defendant herein who is said to have sold the portions of land in question to the disputants therein.

48. Arising from the totality of the circumstances herein, this Court was persuaded that this present suit is res sub-judice the two suits already filed and pending before the Malindi Chief Magistrates Court. I say so because whether or not all the Plaintiffs are or any of them is enjoined in the pending cases would not significantly change the character of the dispute herein.

49. The Plaintiffs claim herein is that they are the Spouse, and Children respectively of the 1<sup>st</sup> Defendant. They are all in agreement that the 1<sup>st</sup> Defendant was adjudged to be the proprietor of the suit properties by way of adverse possession. The Plaintiffs contend that the 1<sup>st</sup> Defendant was solely sued on behalf of his family and that the decision to deregister the 1<sup>st</sup> Defendant as the proprietor of the suitland created an implied trust in their favour.

50. From the material placed before me, it is apparent not only that the alleged disposition of portions of the suitland occurred as far back as the year 2008 before the adverse possession determination but that the 1<sup>st</sup> Defendant himself disputes selling portions of the land for among other reasons, want of spousal consent from the 1<sup>st</sup> Plaintiff herein.

51. That being the case, the only other person in the pending suits who is not a party herein is Naftali Owino- the 2<sup>nd</sup> Defendant in **Malindi CMCC No. 34 of 2010**. A perusal of the pleadings availed herein however reveals that the said Naftali Owino is sued for acts said to have been committed by himself as an agent of the 2<sup>nd</sup> Defendant herein.

52. As was stated in **Barclays Bank of Kenya Ltd –vs- Elizabeth Agidza & 2 Others (2012) e KLR: -**

*“.....if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for the expeditious and proportionate resolution of civil disputes between parties....”*

53. As it were, the sub-judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub-judice is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter, and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two Courts in respect of the same relief and as we already seen is aimed at preventing a multiplicity of proceedings.

54. Thus, having applied to be enjoined in the proceedings pending in the Lower Court over the same subject matter, it was not open for the Plaintiffs to institute this parallel litigation against the parties whose case is pending in the Lower Court seeking the same relief over the same subject matter. Indeed, as was stated in *Thiba Min Hydro Co. Ltd –vs- Josphat Kairu Ndwiga (2013) eKLR*, it is not the form in which the suit is framed that determines whether it is sub-judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other.

55. At paragraph 17 of their Complaint dated and filed herein on 15<sup>th</sup> June 2020, the Plaintiffs aver that there is no prior or pending suit in any Court between the Plaintiffs and the Defendants touching on the issues that are the subject matter of this suit. That averment is certainly not factual. In her Supporting Affidavit to the Notice of Motion sworn and dated the same 15<sup>th</sup> June 2020 seeking to be enjoined in *Malindi CMCC No. 27 of 2020*, the 1<sup>st</sup> Plaintiff avers as follows at paragraphs 8 to 12 thereof: -

*“8. That on the 6<sup>th</sup> of June 2020 at 3 p.m. without no notice whatsoever, a gang of violent youth bearing weapons descended on the Subject Property, and finding us present, proceeded to forcefully eject us from the subject property, and completely hammered and destroyed our permanent house and structures including my matrimonial house. Attached hereto and marked “KHS 2” are true before and after photos of the destroyed buildings.*

*9. That the youth claimed that they were enforcing the Plaintiff herein directions (sic), the said Plaintiff having allegedly purchased the subject property from my husband.*

*10. That the incident, which was televised on news media, caught me in great surprise and anger for I hold no knowledge of any sale entered by my husband.*

*11. I have neither been approached to be informed or notified of any sale of the Subject Property (or portions thereof) to any party nor have I given my spousal consent to any such purported sale.*

*12. That I am aware that the Plaintiff obtained a temporary injunction against the Defendant herein restraining him from interfering with the Plaintiff's ownership of all that parcel of land Malindi Land Reference No. LR Portion Number 8897. Hereto attached and marked “KHS 3” is a copy of the Order dated 3<sup>rd</sup> June 2020.”*

56. That being the case, it was evident to me that this present suit was filed by the Plaintiffs in abuse of the Court process. As Mativo J observed in *Republic –vs- Paul Kihara Kariuki & 2 Others Ex-parte Law Society of Kenya (2020) eKLR*: -

*“Abuse of the Court process creates a factual scenario where a party is pursuing the same matter by a two-Court process. In other words, a party by the two Court process is involved in some gamble; a game of chance to get the best in the Judicial process.*

*A litigant has no right to pursue pari pasu two processes which will have the same effect in two Courts at the same time with a view to obtaining victory in one of the processes or in both.”*

57. The Learned Judge went on to state in the *Law Society of Kenya Case (Supra)* thus: -

*“.....litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by Judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of the Court/Legal process.”*

58. I concur with the Learned Judge. By filing this matter and proceeding to obtain orders of injunction without disclosing that they were aware of other orders issued in favour of one of the parties they have sued, which orders were obtained in another Court of competent jurisdiction, the Plaintiffs sought to take advantage of the Judicial process and this Court cannot idly stand by and let its processes be abused.

59. In the premises, I find merit in the Preliminary Objection dated 9<sup>th</sup> July 2020 as filed by the 3<sup>rd</sup> Defendants. This suit and the Plaintiffs application were instituted in abuse of the Court process. Both the Motion and the suit are hereby struck out with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF JULY, 2021.**

**J.O. OLOLA**

JUDGE