



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT HOMA BAY**

**ELC CASE NO. OS 31 OF 2021**

**(FORMERLY MIGORI ELCC NO. E19 OF 2020 (OS))**

**PETER OKOTH GUMO & 14 OTHERS.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**JOKODHUL GROUP alias JOKODHUL RANCHING GROUP.....1<sup>ST</sup> RESPONDENT**

**JOKAETE GROUP alias JOKAETE RANCHING GROUP.....2<sup>ND</sup> RESPONDENT**

**JULIUS OUMA JWAN.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of motion dated 14<sup>th</sup> December 2020 and duly lodged in this court on 15<sup>th</sup> December 2020 pursuant to sections 1A and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and Article 159 (2) (d) of the Constitution of Kenya 2010, among other provisions (The application herein), the fifteen (15) applicants through the firm of O.H Bunde and Company Advocates, have sought the following orders;

a) Spent

b) Spent

c) Spent

d) There be issued a temporary order maintaining *status quo* over and in respect of parcel of land known as **Kanyamwa/Kabonyo Kwandiku/1940 & 1941** more particularly, pertaining to the title, occupation and possession; pending hearing and determination of the main suit.

e) There be issued an inhibition against any dealings, transactions or dispositions, relating to or concerning transactions in respect of parcel of land known as **Kanyamwa Kabonyo Kwandiku/1940 & 1941**; pending hearing and determination of the main suit.

f) Costs of this Application be borne by the defendants/respondents.

2. The application is anchored on the 1<sup>st</sup> plaintiff/applicant's 21-paragraphed supporting affidavit of even date and copies of documents marked as "POG-1 to POG-4" and annexed thereto. The same is further anchored on grounds (i) to (xviii) stated on its face and are all noted herein.

3. Briefly, the applicants allege that they have been residing on the suit parcels of land, LR No. Kanyamwa/Kabonyo Kwandiku/1940 and 1941. Besides, that the defendants have initiated the process of sale of the suit parcels of land. That unless the process is stopped by this court, the applicants shall be rendered landless.

4. The three (3) defendants/respondents opposed the application by way of grounds of opposition dated 12<sup>th</sup> January 2021 and filed herein on 15<sup>th</sup> January 2021. They stated that entertaining this suit will prejudice and delay the course of justice and interfere with the rights of bona fide purchasers of the suit parcels of land. They termed the application frivolous, vexatious and that the whole suit is an abuse of the court process by virtue of the judgments in Kisii High Court Civil Appeal No. 102 of 2003 (OS) and Kisumu Court of Appeal Civil Appeal No. 277 of 2012.

5. Simultaneously filed with the said grounds, the respondents further opposed the application by way of an 11-paragraphed replying affidavit sworn on even date by John Otete Achienga, the chairman of the 2<sup>nd</sup> respondent. He deposed in part that the 2<sup>nd</sup> respondent is the sole registered proprietor of part of the suit parcels of land which were acquired through a process which started during land adjudication in Kabonyo-Kwandiku Adjudication Section. That in December 2020, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sold the whole land to the 3<sup>rd</sup> respondent and others but some members of Jokobunga Group entered the land and planted sugarcane thereon.

6. It is noteworthy that the instant suit was commenced by way of an originating summons Ex parte dated 14<sup>th</sup> December 2020 filed together with the application. The plaintiffs are claiming to have acquired title over the suit parcels of land by way of adverse possession. The originating summons is supported by the 1<sup>st</sup> plaintiff/applicant's affidavit of even date and accompanying documents including photographs marked as 'POG 2 and POG 3' and annexed to his affidavit.

7. In a replying affidavit of sixteen (16) paragraphs sworn on 22<sup>nd</sup> January 2021 and filed herein on 4<sup>th</sup> February 2021, John Otete Achienga, the chairman of the 2<sup>nd</sup> defendant/respondent, termed the plaintiffs' claim misconceived and is aimed at prejudicing, embarrassing and delaying the course of justice. He deposed, inter alia, that all the plaintiffs are members of the Jokobunga Ranching Group who are the registered proprietors of PNo. 475 and none of them is in possession and occupation of the suit parcels of land. That the dispute was determined by a judgment delivered on 29<sup>th</sup> October 2010 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants in Kisii High Court Civil Suit No. 102 of 2003 (OS) as shown in copies of the judgment (JRG-6A) and decree (JRG-6B), among other documents annexed to the affidavit. That the appeal therefrom by Jokobunga Ranching Group (The defendant therein) as disclosed in, inter alia, the notice of appeal marked as "JRG-7A" and annexed thereto, was dismissed in April 2015. That the court therefore, should summarily dismiss the suit with costs.

8. Being guided by **Order 51 Rule 16 of the Civil Procedure Rules, 2010**, this application was canvassed by written submissions. The same followed this court's orders and directions given on 15<sup>th</sup> December 2020.

9. In the submissions dated 19<sup>th</sup> April 2021, learned counsel for the applicants gave a brief background and factual basis of the application as well as framed and discussed triple issues for determination, inter alia, whether the application has met the criteria as laid down in the case of **Giella-vs-Cassman Brown and Company Ltd (1973) EA 358**, in favour of the application. Counsel further relied on authorities, including the Court of Appeal decision in **Hutchings Biemer Ltd-vs-Barclays Bank of Kenya Ltd and another (2006) eKLR** that injunctive orders are meant to preserve property and maintain status quo hence urged the court to allow the application.

10. On the other hand, learned counsel for the respondents duly filed submissions dated 18<sup>th</sup> May 2021 on 19<sup>th</sup> April 2021 and made reference to the plaint dated 15<sup>th</sup> December 2020 and the application. Counsel termed the latter devoid of merits as the dispute is res judicata by dint of the decisions in Kisii High Court Civil Suit No. 102 of 2003 (OS) and Kisumu Court of Appeal Civil Appeal No. 277 of 2012. Counsel urged this court to disallow the application and dismiss the suit with costs. Reliance was made on **Order 40 Rule 1 of the Civil Procedure Rules 2010**, "**Principles of Injunctions**" by Justice (Rtd) Richard Kuloba, sections 25 (1) and 68 (1) of the **Land Registration Act, 2016 (2012)**, **The Black's Law Dictionary on the definition of Res Judicata doctrine**, the case of **Christopher Kenyariri-vs-Salama Beach (2017) eKLR** and the decision in **Dr Ali Wario-vs-Dr John Ngundu (20110) ECLR**, among other authorities.

11. I have anxiously studied the application, the grounds of opposition, the replying affidavit and the rival pleadings as well as the rival submissions and all the authorities cited therein. On that account, the issues that emerge therefrom for determination are whether;

- a) The suit is res judicata
- b) The application and the entire suit are tenable?
- c) The appropriate orders to make to attain the ends of justice

12. At the outset, it must be observed that the grounds of opposition raise a preliminary objection on a point of law (res judicata) to the instant suit. Paragraph 10 of the replying affidavit to the originating summons and paragraph 6 of the replying affidavit to the application do disclose that the instant dispute was heard and determined on merits by courts of competent jurisdiction as also revealed in paragraph 7 hereinabove.

13. In addition, Mr G S Okoth, learned counsel for the defendants/ respondents submitted that this suit is res judicata. Counsel urged the court to dismiss the suit on account of the same.

14. In the case of **Mukisa Biscuits Manufacturing Co. Ltd-vs-West End Distributors (1969) EA 696**, Law JA held-

"...a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of the pleadings and if argued as a preliminary objection, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea on limitation or a submission....."

15. It is trite law that a preliminary objection is a threshold question best taken at inception of a case. It calls for a definitive, determinative and prompt pronouncement; see the Court of Appeal decision in the case of **Kakuta Maimai Hamisi-vs- Peris Pesi Tobiko and 2-others (2013) eKLR**.

16. The principle of res judicata is captured in **Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya**. I bear in mind its essential elements as set out in the legal provision.

17. In the **Black's Law Dictionary 10<sup>th</sup> Edition at page 1504**, the term "res judicata" is defined thus-

"An issue that has been definitively settled by judicial decision"

18. Furthermore, the three essential elements of the aforesaid term as stated thereunder, are as follows-

- a) An earlier decision on the issue
- b) A final judgment on the merits, and
- c) The involvement of the same parties or parties in privity with original parties

19. Similarly, the **Concise Oxford English Dictionary 12th Edition by Oxford University Press** defines the term "res judicata" as follows-

"A matter that has been adjudicated by a competent court and may not be pursued further by the same parties"

20. Clearly, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were the plaintiffs in Kisii High Court Civil Suit No. 102 of 2003 (OS) as discerned in the replying affidavit to the originating summons and the replying affidavit to the application and their respective annexed documents. The plaintiffs herein are in privity with the defendant in the said suit where there was a final judgment on merits as noted in, inter alia, **Section 7 of the Civil Procedure Act and The Black's Law Dictionary** (supra). Moreover, the subject matter in the determined case on merits and the instant matter, is the same.

21. On that score, it is a cardinal principle that litigation has to come to an end; see **The Halsbury's Laws of England 4<sup>th</sup> Ed Vol 22 at page 273**

22. In view of the defendants' pleadings, the response to the application and the respondents' submissions, the present dispute is barred by the principle of res judicata. I find the assertion by the respondents meritorious.

23. Wherefore, the application dated 14<sup>th</sup> December 2020 and the instant suit mounted by way of an originating summons Ex parte of even date and filed herein on 15<sup>th</sup> December 2020 in its entirety, be and are hereby dismissed.

24. The interim orders and inhibition sought and granted on 15<sup>th</sup> December 2020 in the application, are hereby vacated forthwith.

25. By dint of the proviso **section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya**, the costs of the application and the entire suit be borne by the plaintiffs/applicants.

26. It is so ordered.

**DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 27TH DAY OF OCTOBER 2021**

**G M A ONGONDO**

**JUDGE**

**In the presence of:**

Mr Migele holding brief for Mr H. Bunde learned counsel for the plaintiffs/applicants

Mr G S Okoth learned counsel for the defendants/respondents

Okello A , Court assistant

**G M A ONGONDO**

**JUDGE**