



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 53 OF 2018

KANDARA RESIDENTS ASSOCIATION-	1 ST PLAINTIFF/APPLICANT
KARIRA KIMARA	- 2 ND PLAINTIFF/APPLICANT
GEORGE NJIGU	- 3 RD PLAINTIFF/APPLICANT
JUDY WAIRIMU KIMEMIA	- 4 TH PLAINTIFF/APPLICANT
MICHAEL NJOROGE	- 5 TH PLAINTIFF/APPLICANT
VS	
DELMONTE (K) LIMITED	- 1 ST DEFENDANT/RESPONDENT
NATIONAL LAND COMMISSION	- 2 ND DEFENDANT/RESPONDENT
COUNTY GOVERNMENT OF KIAMBU -	3 RD DEFENDANT/RESPONDENT
COUNTY GOVERNMENT OF MURANGA-	4 TH DEFENDANT/RESPONDENT
THE HON. ATTORNEY GENERAL	- 5 TH DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to two applications set out as follows; the Notice of Motion dated the 27/6/18 filed by the Plaintiffs seeking interalia orders of interim injunction restraining the 2nd Defendant from renewing leases, registering subdivisions and or issuance of new leases with regards to the suit properties namely L.R Nos. 12157/2, 12157/3, 12157/4, 12157/5, 12158, 13169, 12203/1, 12203/2 and 13289 currently leased to the 1st Defendant by the Government of Kenya. The second Notice of Motion is dated the 23/7/18 filed by the 1st Defendant seeking orders interalia to stay the proceedings in this suit pending the hearing and determination of Petition No 398 of 2015 **Delmonte Kenya Limited Vs The County Government of Muranga & 2 others (hereinafter called the Petition)** and amended complaint No NLC/HLI/004/2017 (**Kandara Residents Association Vs Delmonte Kenya Limited (hereinafter called the historical land claim)**) or strike out and dismiss the suit for being subjudice.
2. On the 31/7/18 the parties through their learned Counsels on record recorded a consent that both motions dated the 27/6/18 and the one dated the 23/7/18 be heard together and fixed the 3/10/18 for highlighting the written submissions/arguments. Come the 3/10/18 the parties through their

learned Counsels on record sought for time to negotiate a settlement. Having not reached a settlement, the parties finally highlighted their written submissions on the 11/12/19 paving the way for this Ruling.

3. Granted that the Notice of Motion of 23/7/18 seeks interalia prayers for the striking out and dismissal of the suit, I shall start with it and if it fails then move to the motion of 27/6/18. Should it succeed then there will be no necessity to determine the latter. This is because the former motion has the possibility of determining the suit to finality should it be found for striking out/dismissal.

The Notice of Motion dated the 23/7/18 by the 1st Respondent/Defendant.

4. The application is premised on the grounds annexed thereto and the supporting affidavit of Harry Odoni, the Legal officer of the Applicant dated the 23/7/18 who summed up the grounds as thus; the current suit is subjudice on account of the existence of three suits which are ongoing and which raise the same issues, involve similar parties and sameness of the subject matter (suit properties). These suits are **Petition No 398 of 2015**, the **amended complaint No NLC/HLI/004/2017 Kandara Residents Association Vs Delmonte Kenya Limited** (amended complaint) and **Complaint No NLC/HLI/004/2017 Kandara Residents Association Vs Delmonte Kenya Limited** (stayed by the NLC- “the stayed complaint”); that the current suit is a duplication of the same dispute which if left will burden the 1st Defendant with costs and expenses; the suit is an abuse of the process of the Court ; may embarrassed the Court if contradictory outcomes are made, he averred.
5. The 1st Respondent has faulted the Plaintiffs for failing to disclose the pendency of the above cited proceedings in their verifying affidavit thereby concealing material facts despite knowledge and active participation, for instance when it sought to be enjoined as a party in the petition thereof. It opines that the Plaintiffs have committed perjury for which they ought to be punished.
6. The Applicant in its Replying Affidavit filed on 25/4/19 and sworn by Harry Odoni, informed the Court that the amended complaint was determined by the NLC on the 7/2/19 and the decision gazetted on the 1/3/2019 and contended that in view of the determination, this suit which raised similar issues with the amended complaint is now spent.
7. Vide the Replying Affidavit and the supplementary affidavit both sworn by Kirira Kimara filed on the 31/7/18 the Plaintiffs opposed the Applicant’s motion and stated that the suit is not subjudice. That the Plaintiffs are not parties to Petition 389 of 2015 and the subject matter in both suits is different. That the issue in this suit concerns the recognition of the interest of Kandara residents whilst the petition is in respect to the role of the 3rd and 4th Respondents as County Government in the renewal of leases. That the petition has no bearing to this suit. That in respect to its claim of historical land injustice, the NLC issued directions on 16/11/16 which directions are a subject of this suit. However, the issues in the complaints before the NLC were to establish the historical injustices visited on the residents and individual members of the 1st Plaintiff during the eviction and find whether they can be compensated. In conclusion it argued that it has a right to approach this Court with this suit notwithstanding their failure to be enjoined to the Petition No 389 of 2015.
8. Further the Plaintiffs/Respondents contend that they are not opposed to the renewal of the leases in favour of the Applicant except that their claim under historical land injustice should be factored in and that if the renewal is to happen, it should be in a manner that promotes equitable and sustainable land use. Noting that the extension sought by the 1st Defendant is for 99 years, they argue that they and their generations cannot wait for such long period and persist in destitution at the behest of the 1st Defendant. The Plaintiffs/Respondents annexed a list comprising of over 3500 names which they claim to be its members marked KK-1.
9. In a further affidavit the Applicant through Harry Odoni, its legal officer deponed interalia that by consent of the parties recorded on the 20/9/18 the suit in petition No 398 of 2015 was marked as settled in respect to the 3rd Defendant pursuant to a mutual agreement between the 1st Defendant and the 3rd Defendant.
10. In further reference to the recommendations vide the minutes dated the 16/11/16 the Applicant averred that the said recommendations do not bind them as they were not invited to the meeting and no steps were made to seek their views before the said recommendations were made. In

- challenging the alleged list of members of the Plaintiffs/Respondent marked KK-1 the Applicant averred that there is nothing to show that the individuals listed are members and that in any event the list is marked as names of individuals that purportedly participated in a public participation exercise.
11. In opposition to the motion dated the 23/7/18 the 4th Respondent vide its grounds of opposition dated the 27/7/18 and filed on the 30/7/18 objects to the motion for the following reasons;
 - a. The Applicant has not established a proper ground of nexus between this suit and the Petition No 398 of 2015.
 - b. Save for the suit land, the parties in both suits are different and the cause of actions are markedly different.
 - c. A clear distinction ought to be drawn between the National Land Commission committee and this Court.
 - d. No prejudice has been demonstrated as the Applicant is the Petitioner in Petition No 398 of 2015.
 - e. The prayers in Petition No 398 of 2015 and this suit are not remotely related.
 12. The 2nd, 3rd and 5th Respondents did not file any responses to the application save for written submissions. The 3rd Defendant has supported the application.
 13. The Applicant filed written submissions on the 2/10/18 and 29/7/19.
 14. In respect to striking out of the suit and application, the Applicant submitted that the three disputes (the petition, the NLC complaint and this suit) subsisting relate to the same issue, parties and subject matter and therefore the suit is subjudice. The question of renewal of leases is central in the three suits. The petition seeks renewal of leases whilst this suit seeks to stop the said lease renewals. The current suit therefore amounts to duplication of the same dispute occasioning unnecessary costs and expenses to the Applicant. Further that it amounts to an abuse of the process of the Court since the decision likely to be arrived at in this Court may contradict those of another Court of equal status. That the 3rd and 4th Respondents in this suit are parties to the petition and contend that being custodians of the of the interest of their people in their counties, follows that they held brief for the Kandara Residents as well.
 15. The Applicants argued that the suit is subjudice and or in the alternative barred by the doctrine of issue estoppel. That under this doctrine, it is not a prerequisite that the parties be the same in both suits as long as the issues and substantially the same. The Court was referred to the case of **Silas Make Otuke Vs Hon Attorney General & 3 others (2014) EKLR** where the Court held that issue estoppel can arise even when parties were not involved in prior litigation. The Applicant argued that a Court will not allow an issue that is subject of determination before another Court to be raised in a separate proceeding between the different parties arising out of identical facts and dependent on the same evidence since not only was the party seeking to relitigate the issue prevented from doing so by virtue of issue estoppel but it would also be an abuse of the process of the Court for the issue to be relitigated see the case of **Mohamed Dado Hatu Vs Dhadho Gaddae Godhana & 2 others (2017) EKLR**. That the Plaintiffs in bringing a multiplicity of suits in several forums are hoping to obtain judgements which are favorable to them and entertaining the suits will amount to an abuse of the process of the Court. It urged the Court to look into the substance of the matters in the three suits and find for subjudice. See the case of **Thiba Min Hydro Co Ltd Vs Josphat Karu Ndwiga (2013) EKLR** where the Court stated that it is not the form in which the suit is framed that determines whether it is subjudice. Rather it is the substance of the suit.
 16. Secondly, that the Respondent/Plaintiffs actively concealed the pendency of the pending proceedings when filing their plaint. That the Plaintiffs lied on oath when they averred that there was no other pending case in the verifying affidavit thus committed an offence of perjury. Further concealment of material facts was exhibited by the Plaintiffs in their exparte application for injunction aimed at stopping the renewal of the leases. The Applicant argued that a party who approaches the Court exparte is under a duty to disclose all the material facts in the case. That in this instance the Plaintiffs having concealed the material facts are disentitled to any orders from the Court.
 17. In its further submissions filed on the 29/7/19 the Applicant argued that since the complaint and the Petition have been fully determined this suit then becomes resjudicata and this Court is barred

- under section 7 of the Civil Procedure Act from entertaining this suit.
18. The 3rd Defendant /Respondent in its submissions dated the 2/10/18 supported the 1st Defendants/Applicants application on the grounds that the application is subjudice and the Court lacks the jurisdiction to determine the application and the entire suit. That the issues raised in this suit are in consideration in Petition No 398 of 2015 and by dint of section 6 of the Civil Procedure Act, the Court lacks jurisdiction. It agreed with the Applicant that apart from being subjudice, the suit is also barred by the doctrine of issue estoppel which dictates that it is not a requirement that the parties be the same in both suits as long as the issues are directly and substantially the same. It urged the Court to consider the substance of the suit and find that it is subjudice.
19. The 5th Defendant/Respondent through its learned State Counsel Ms. Fatma Ali submitted and agreed with the Applicant that the suit is subjudice and proceeding with it offends the provisions of section 6 of the Civil Procedure Act. With respect to the claim in relation to historical land injustice, the 5th Respondent submitted that this claim is before the NLC and therefore cannot be canvassed in the suit and the Court ought to dismiss the suit to allow the NLC to make the necessary recommendations and appropriate redress as constitutionally mandated. It urged the Court to allow the Applicants' application and dismiss the suit of the Plaintiffs.

The Notice of Motion dated the 27/6/18 by the Plaintiffs/Applicants.

20. The Plaintiffs filed a Notice of Motion dated the 27/6/18 seeking orders set out below;
- a. Spent.
 - b. That the honourable Court be pleased to issue orders restraining the 2nd Respondent from renewing the lease for the suit properties in favour of the 1st Respondent pending the hearing and determination of the application/suit.
 - c. That the honourable Court be pleased to issue orders restraining the 2nd Respondent from registering any subdivision and or issuance of any new leases in favour of the 3rd parties in relation to the suit properties in favour of any party pending the hearing and determination of the application/suit.
 - d. The Court to award any other order it may deem just, fit and expedient to award in the interest of justice.
21. The application is supported by the grounds and the supporting affidavit of Karira Kimara, the 2nd Applicant who reiterated the averments set out in paras 2-4 of the Ruling.
22. In addition, that the Plaintiffs' objection to the renewal of leases is based on section 15 of the National Land Act and is allegedly made on behalf of 4000 residents of Kandara Constituency where most of the properties are situate. That in consideration of their objection the 2nd Respondent directed the Applicants and the 4th Respondent together with the County Land Board to engage in public participation incorporating the proposed land use (see the annexed Kandara Intercity land use proposal annexed to the Replying Affidavit of the 2nd Applicant) which proposal was approved and adopted by the County Assembly of the 4th Respondent culminating in a meeting held on the 16/11/16 which, inter alia, the Chairman of the 2nd Respondent urged that the request for 10,000 acres by the 4th Respondent should be subjected to the interest of the 1st Respondent on one hand as an investor and the Applicants on the other. He urged the parties to adopt a win- win scenario to the dispute.
23. Whilst noting that the 2nd Respondent retains the constitutional mandate to consider renewal of leases in conjunction with the National and County Governments, the Applicants aver that the 1st Defendant has clandestinely commenced negotiations for the surrender of some portions of the suit properties to the 3rd and 4th Respondents. For instance, that the 1st Respondent has relinquished 650 acres to the 3rd Respondent without their involvement and to the exclusion of their interests. The Applicants state that unless the injunction is granted the historical injustice meted against them will continue unabated.
24. The 1st Defendant /Respondent opposed the application terming it incompetent, bad in law on the

- grounds that the claim is based on a time barred claim that is that purported land ownership claim of the 19th century. That the suit should be struck out in view of the subsisting suits and proceedings before the high Court and the NLC, which proceedings were concealed by the Plaintiffs in their pleadings. That the Plaintiffs are estopped from challenging the extension of the leases given their averments in the NLC that they were no longer wished to oppose the extension. Further that the 1st Plaintiff is unincorporated body which has no capacity to sue.
25. In addition, the 1st Respondent contends that the Plaintiffs have not provided any evidence to support their claim to any right to the 1st Defendants lands. That the minutes of the meeting held on the 16/11/16 did not determine or probate any land rights to the Plaintiffs. In any event the NLC supported the 1st Defendant in the renewal of its leases. That the suit properties are still private lands. The 1st Respondent admitted that negotiations in good faith took place between the 3rd and 4th defendants in resolving the stalemate in respect to the renewal of leases, attempts which have been frustrated by the Plaintiffs.
26. Similarly, the 2nd Respondent opposed the application by the Plaintiffs. By its grounds of opposition filed on the 31/7/18, it voiced its objection on the grounds;
- a. The application is incompetent, malafides, misconceived mischievous bad in law and an abuse of the Court process.
 - b. The 2nd Respondent is an independent commission established under Art 67(1) of the constitution and the application seeks to restrain the 2nd Respondent from undertaking its lawfully mandated duty in relation to renewal of leases without demonstrating any breach on its part. That in line with section 13 of the Land Act, section 17 of the NLC Act read together with Articles 10 and 232 of the Constitution mandates the 2nd Respondent to renew leases upon consultation with the County Governments.
 - c. In exercise of its mandate, the 2nd Respondent is further guided by the Land (extension and renewal of leases) Rules 2017 and this application offensive to the guidelines given no breach by the 2nd Respondent has been attributed demonstrated by the Applicant.
 - d. That the 2nd Respondent in encouraging the Plaintiffs and the 4th Respondent to reach an amicable solution in regard to the issue of the objection raised by the Plaintiffs to the renewal of leases, exercised due diligence in conformity with the law.
 - e. Further that the application offends section 36 of the Land (Allocation of Public Land) Regulations, 2017 which provide mandate the 2nd Respondent to prepare and execute leases in respect to the allocation of public land.
 - f. That granting the orders at this stage will amount to restraining what is lawfully authorized by law.
27. The 3rd Respondent opposed the application on grounds inter alia that the suit is subjudice; the Court lacks jurisdiction to hear and determine the application in view of the subsisting suit in the High Court raising the same issues; the existence of a complaint with the NLC committee on historical land injustices raises the same issues as this suit.
28. The Plaintiff/Applicants submitted that it seeks the excision of a portion of the properties held by the 1st Defendant in view of the public needs for the utilisation of the land to meet the achievement of sustainable development of the people of Kandara. The Plaintiffs claim is hinged on the minutes of the meeting held on the 16/11/16. It is clear that the said “recommendations” were comments made by the Chairman of the NLC at the close of the said meeting. The Applicant was not present in the meeting. They aver that upon expiry of the leases all the lands currently held by the 1st Defendant shall convert to public land and placed under the custody of the NLC. That it is on that premise that they lodged an objection against the unconditional renewal of the leases in favour of the 1st Defendant before their claim on historical land injustices is determined by the NLC.
29. As regards whether the Applicant has established a prima facie case the Applicants aver that the 1st Defendant has entered into an arrangement with the 3rd Defendant to cede to it 650 acres and is apprehensive that it might do likewise with the 4th Defendant and thereafter issue a letter of no objection to the renewal of the leases. That therein lies a prima facie case with a high chance of

- success and unless the Court intervenes their suit would be rendered an academic exercise. As regards adequacy of damages, the Applicant holds the view that damages are inadequate to compensate the Applicant. Finally, that the balance of convenience tilts in the Court granting the injunction in favour of the Applicant.
30. The 1st Defendant/Respondent submitted that it acquired the suit lands in 1968 and have continued to make huge investments in the land in form of financial and human capital. It went ahead to describe how it paid in excess of Kshs 524 million to the exchequer in 2014, employs over 7000 workers from the area, and other socio-economic benefits that their enterprise has brought to the country and the people of the two counties over the years in areas inter alia, economic, education, medical and so forth.
31. It argued that the Applicant has not demonstrated any interest in the suit lands either by themselves or their alleged forefathers. Further that the suit is time barred having been instituted after 120 years and cannot found a prima facie case in favour of the Applicants. The Applicants claim being hinged on deliberations of a one-sided meeting held on the 16/11/16 which cannot aid the Applicants in mounting a prima facie case. That the 1st Plaintiff is an incorporated body with no capacity to sue and the entire suit is a non-starter and cannot found a cause of action. Further the suit by the 2nd -5th Plaintiffs should fail because it falls short of the requirements of a representative suit in law. Even then the said Plaintiffs have not proven any claim in the suit lands.
32. As regards adequacy of damages the 1st Defendant argued that the Plaintiffs have failed to demonstrate that they stand to suffer any loss which cannot be compensated in damages. In conclusion that the balance of convenience does not favour the Applicants.
33. The 3rd and 5th Defendants /Respondents made submissions in support of the 1st Defendants' position in opposition to the application.

Determination

34. By way of background to the suit, by a plaint dated the 27/6/18 the Plaintiffs/Applicants filed suit against the Defendants seeking the following orders;
- An order compelling the Defendants to implement the recommendations of the report on the meeting held between the Plaintiffs, the 2nd Defendant and Muranga County Assembly on the 16/11/16.
 - An order nullifying any subdivision or registration of new leases in relation to the properties that have been done after the determination of the 2nd Defendant made pursuant to the letter dated the 24/7/18
 - A permanent injunction against the Defendants from conducting negotiations with the 2nd and 3rd Defendants or any 3rd parties without involvement of the Plaintiffs.
 - The cost of this suit.
 - Interest at above Court rates.
35. The 1st Plaintiff has described itself as a community-based organization registered under the Societies Act and is comprised of more than 4000 residents of Kandara Constituency. Under para 15 of the Plaint, the 2nd -5th Plaintiffs are said to be members of the 1st Plaintiff.
36. In brief, the Plaintiffs case is that the 1st Defendant is registered as leasee from the Government of Kenya of the properties namely L.R Nos. 12157/2, 12157/3, 12157/4, 12157/5, 12158, 13169, 12203/1, 12203/2 and 13289 (the suit properties). The leases expire variously between 2019 and 2022. The Plaintiffs aver that being aware that the Plaintiffs had commenced the process of renewal and extension of the said leases, they filed a memorandum of objection to the extension of the leases with the National Land Commission (NLC) on grounds of historical injustice claims and that the said properties were part of communal land before it was alienated illegally.
37. The Plaintiffs detailed the efforts in pursuit of its claims as directed by the 2nd Defendant including public participation, approval of its proposal by the County Government of Muranga culminating in the recommendations of the meeting held on 16/11/16 between itself, the 2nd Defendant and representatives of the 4th Defendant. That despite the said recommendations, the 1st

- Defendant has commenced discussions to cede land to the 3rd and 4th Defendants before considering their interest and without involving them in the negotiations.
38. It is their opinion that the suit lands are public lands and the NLC has the prerogative to renew the leases and the 3rd and 4th Defendants hold a public interest stake in the said suit lands.
39. The Plaintiffs made an averment that there are no previous proceedings in any Court between the parties.
40. Save for the 4th Defendant none of the Defendants have filed any statement of defence to the suit.
41. There are three issues for determination in the two applications which I shall proceed to determine;
- whether this suit is subjudice; if yes should it be struck out/ dismissed;
 - whether the Plaintiffs are entitled to orders of interim injunction;
 - who meets the cost of the two applications?
42. With regard to the 1st issue, the gist of the 1st Defendant's application is that the Court lacks jurisdiction to determine the application and the suit on grounds that the suit is either subjudice, issue subjudice and/or an abuse of the process of the Court on account of subjudice and duplication of forums in the disputes subsisting, that is to say the **Petition No 398 of 2015, the amended complaint No NLC/HLI/004/2017 Kandara Residents Association Vs Delmonte Kenya Limited** (amended complaint) and **Complaint No NLC/HLI/004/2017 Kandara Residents Association Vs Delmonte Kenya Limited** (stayed by the NLC- "the stayed complaint").
43. Section 6 of the Civil Procedure Act provides as follows;
- "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. Where a suit is instituted in a Court to which the Act applies that Court shall not proceed with the trial of the suit if the matter in issue is directly and substantially in issue in a previous suit; the previous suit is pending in the same or other Court with competent jurisdiction to grant the relief claimed; the parties are the same or litigating under the same title and where the subject matter is the same.
45. The rationale of the doctrine of subjudice which means "thing not adjudged" is to prevent Courts of concurrent jurisdiction from trying two parallel suits in respect to the same subject matter in issue. In the case of **Abdulkadir A. Khalif v Principal Secretary, Ministry of Lands and Physical Planning & 6 others [2018] EKLK** the Court held that; -
- "The basic purpose and the underlying object of Section 6 of the Code is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of 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 is aimed to prevent multiplicity of proceedings."
46. I shall now turn to the impugned disputes in answer to this issue. The parties in Petition No 398 of 2015 are; Delmonte Kenya Limited (petitioner), The County Governments of Muranga and Kiambu and the Hon Attorney General (Respondents). In this case the petitioner sought inter alia orders of mandamus to compel the 3rd and 4th Defendants to issue the letters of no objection for the purpose of renewal of the leases over the suit properties. The Plaintiffs in the current case were not parties. It is said that their application for joinder was declined. It is on record that the petition against the County Government of Kiambu was withdrawn by consent and settled via a memorandum of understanding dated the 7/9/18.
47. The parties in this suit are as stated in the preamble and the Plaintiffs are seeking orders to compel the Defendants to implement the recommendations arising out of the minutes of a meeting dated

the 16/11/16 between the Plaintiffs, the 2nd Defendant and the 4th Defendant and an order injunction the Defendants from conducting any negotiations with the 2nd and 3rd Defendants without involving them. In other words, the Plaintiffs hold the view that the minutes of 16/11/16 made certain recommendations and want the Defendants stopped from excluding them from the implementation of those recommendations.

48. For the record the recommendations alluded to of the 16/11/16 are as follows;

“Final comments by the Chairman, National Land Commission. After discussions of these representations, the chairman gave the following remarks and directions; That the Kandara Residents and the Murang’a County Assembly were within their legal rights to approach the NLC on the imminent expiry of the Delmonte land leases; there is need for them to recognize the fact that Delmonte have legal rights on the land and have made substantial investments on it; that all requests and demands under the law and the constitution must be addressed carefully not to give an indication that Kenya is working against the interests of foreign investors; the request for 10,000 acres by Muranga County Assembly and Kandara Residents leaders shall be subjected to the rights and interests of Delmonte as investors on the one hand and on the other hand those of Kandara Residents as stipulated by the law and the constitution. These would include the special conditions of the lease, laws on preemptive rights and historical land injustices; the chairman advised all parties that the best approach to this matter shall be through the win-win principle applied to the satisfaction of all the parties.”

49. The Plaintiffs filed a claim based on historical land injustice at the NLC where the parties were; Kandara Residents Association, Delmonte, the county Governments of Muranga and Kiambu. This claim was determined by the NLC vide its decision dated the 7/2/19 and gazetted on the 1/3/19.

50. The Petition was determined on the 20/9/19.

51. The two disputes having been determined the issue of subjudice or issue subjudice are spent.

52. In its final submissions and oral arguments made in Court the Applicant urged that in view of the fact that the NLC claim and the petition had been determined, the Court should find that the current suit offends the provisions of section 7 of the Civil Procedure Act which provides as follows;

“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”

53. To test the doctrine of subjudice, the Court would have to apply the twin doctrine of resjudicata, that is whether on a final decision being reached in the previous suits such decision would render the current suit resjudicata. In other words, can the Plaintiff get the same relief in this suit if the earlier suit had been determined. With regard to the Petition the Court found as a fact that it did not have jurisdiction to determine the matter and therefore the matter was not heard and finally decided by the Court. This suit therefore does not run afoul of either the doctrines of sub judice nor resjudicata.

54. From the above analysis it is the view of the Court that although the subject matter revolves around the renewal of the leases of the suit properties belonging to Delmonte, the issues in the three disputes are different. In the Petition the Plaintiff and the 3rd Defendant are not parties. It is on record that the petition was determined by the three-judge bench on the 20/9/19. The contention that issue estoppel applies is unfounded.

55. In this case the previous suits have been determined and the determinations have therefore settled all matters of subjudice and duplication alleged and relied by the Applicant. These are not present now.

56. It is the holding of the Court that this case is not subjudice.

57. With regard to the 2nd issue, the test to apply in an application for injunction is to be found in the

- celebrated case of **Giella Vs Cassman Brown (1973) EA 358**. The Applicant must demonstrate a prima facie case with a probability of success; the Applicant must demonstrate that loss cannot be adequately compensated in damages and if in doubt the Court should decide the case on a balance of convenience.
58. Has the Applicant demonstrated a prima facie case? It is the duty of the Applicant to show that they have a cause of action which has been transgressed by the 1st Defendant or all the Defendants and that right requires protection. The right is a matter of fact which needs to be proven. It is not the evidence which constitutes the cause of action but it is the facts to be proven. The Plaintiffs have sued the Defendant's seeking for recognition/involvement in the lease renewal process. The renewal process constitutes the property of the 1st Defendant. The question is whether the minutes of 16/11/16 conveyed any known property rights to the Plaintiffs. Acquisition of rights of property is written and prescribed in the law through ways such as transfer, transmission, sale, gift purchase etc. The minutes of 16/11/16 constitute a fact which needs to be proven so as to have a cause of action. The fact is whether the minutes conveyed a right in respect to the properties of the 1st Defendant which they are seeking renewal of the leases from the NLC. It is to be noted that the 1st Defendant has sworn an affidavit to state that they were not aware of the said meeting. It cannot reasonably be said that the Plaintiffs have rights to the suit lands of the 1st Defendant. Have the Plaintiffs proved the transfer of any rights in the Plaintiffs properties to them? The answer is no. The probability of success is therefore doubtful.
59. Do the Plaintiffs stand to suffer loss that cannot be compensated by damages? Damages in their nature is a compensation to place a claimant in the same position which otherwise would have been if it were not because of the action of the other party. Section 13 and 15 of the NLCA gives the NLC power to investigate historical injustice and make recommendations. Under section 15 (9) of the NLCA the NLC is entitled to make a raft of forms of compensation such as restitution, land compensation, resettlement on alternative land, sale and sharing of profits. It is therefore not true that the Plaintiffs stand to suffer loss that cannot be compensated with damages
60. Having found that the Applicant has failed to prove any rights or interest in the suit properties pursuant to the minutes of 16/11/16 or howsoever, the Plaintiffs claim to a portion of the suit lands therefore is unsupported at the prima facie stage. There are therefore no damages which the Plaintiffs are entitled legally from the 1st Defendant or any of the Defendants. This limb fails.
61. The balance of convenience tilts to the Court declining to grant the injunction in favour of the Applicants.
62. The 1st Defendant has urged the Court to determine other matters relating to capacity of the 1st Plaintiff to file suit inter alia in their submissions which were not pleaded in their notice of motion. I decline the invitation. Let the parties be at liberty to move the Court appropriately.
63. With regard to the costs of the applications, given that both parties have not succeeded in their applications, I make no orders as to costs.
64. **Final orders;**
- a. The applications dated the 27/6/18 and 23/7/18 are hereby dismissed.
 - b. Each party shall meet the costs of their application.
65. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANGA VIA EMAIL THIS 3RD DAY OF JUNE 2020.

J G KEMEI

JUDGE