



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.23 OF 2020**

**MOHAN GALOT.....PLAINTIFF/APPLICANT**

**VERSUS**

**WALTER OMOSA NYAKUNDI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DANIEL KWEYA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JARED MORARA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RICHARD PONDO.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**HILLARY CHEPKWONY NGENO.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**VISTOR MBITHI.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**PETER ONG'ONGO ONDUMBU.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**TITUS SHITAMBASI ANDUKU.....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOHN MUTUMA.....9<sup>TH</sup> DEFENDANT/RESPONDENT**

**BENJAMIN MUYA.....10<sup>TH</sup> DEFENDANT/RESPONDENT**

**MICHAEL MUTUNE.....11<sup>TH</sup> DEFENDANT/RESPONDENT**

**ELIJAH MWAURA WAWERU.....12<sup>TH</sup> DEFENDANT/RESPONDENT**

**BERNARD PETER.....13<sup>TH</sup> DEFENDANT/RESPONDENT**

**JANE KARAMBU MUGAMBI.....14<sup>TH</sup> DEFENDANT/RESPONDENT**

**RUTH JEPKORIR KANGONGO.....15<sup>TH</sup> DEFENDANT/RESPONDENT**

**BEATRICE ACHIENG.....16<sup>TH</sup> DEFENDANT/RESPONDENT**

**VINCENT WAFULA OPUSI.....17<sup>TH</sup> DEFENDANT/RESPONDENT**

**FRANCIS MUTHOKA MWANZIA.....18<sup>TH</sup> DEFENDANT//RESPONDENT**

**JOSHUA LOKITESO OKATETE.....19<sup>TH</sup> DEFENDANT/RESPONDENT**

HOSEA IBRAHIM OBUFU.....20<sup>TH</sup> DEFENDANT/RESPONDENT

JAIRUS OMWOYO OTETE.....21<sup>ST</sup> DEFENDANT/RESPONDENT

JOSEAH KIPCHIRCHIR LANGAT.....22<sup>ND</sup> DEFENDANT/RESPONDENT

AND

PRAVIN GALOT.....1<sup>ST</sup> INTERESTED PARTY

RAJESH GALOT.....2<sup>ND</sup> INTERESTED PARTY

GANESHLAL GALOT.....3<sup>RD</sup> INTERESTED PARTY

#### RULING

There are two matters for determination. The 1<sup>st</sup> is the **Notice of Motion Application** dated 17<sup>th</sup> April 2020, by the Plaintiff/ Applicant and the 2<sup>nd</sup> matter is the **Notice of Preliminary Objection**, dated 4<sup>th</sup> May 2020, by the Defendants/Respondents. In its Application the Plaintiff/ Applicant is seeking for orders that;

1. **THAT the Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants/ Respondents either by themselves, agents, servants, employees or otherwise howsoever from accessing, entering into, being in occupation of the staff quarters and any part of the property situate in L.R No. 7022/7 in Kiambu County along Njathaini Road also known as Mohan Galot Estate pending the hearing and determination of this suit.**

2. **The Honourable Court be pleased to grant an order of mandatory injunction directing the Defendants to immediately deliver vacant possession of the staff quarters and any part of the property situate at L.R No. 7022/7 in Kiambu County along Njathaini road and also known as Mohan Galot Estate, pending the hearing an determination of this suit.**

3. **An order directed to the OCS Kiambu Police station to provide place officers to enforce these orders in order to avoid breach or disturbance when serving and implementing these orders**

#### 4. **Costs.**

The Application is premised on the grounds that the Plaintiff/ Applicant is the registered owner of the suit property and resides therein with his wife and children. That he has made developments on the suit property, including maisonettes for use by his guests and from time to time, he has allowed his relatives and guest to stay there at his pleasure as his guests. Further that he had employed some of his relatives as his employees, but they have illegally taken control of some of his other employees, whom they have converted to a parallel outfit to take care of their own interest. That the said relatives illegally employed the Defendants/ Respondents as their employees in various capacities and have thus forcefully taken up the servants quarters, which he had constructed for his employees. That their allowances are being unlawfully paid from the Plaintiff's/ Applicant's business. He contended that the actions of the Defendants/ Respondents deployment as workers is a plot to dispossess him off his property and to intimidate and frustrate him from enjoying his fundamental freedoms to privacy and property associated with the Plaintiff's/ Applicant's ownership and to weaken and compromise his security and safety.

Further that the Plaintiff/ Applicant has taken precipitate steps and put in place measures to mitigate the spread of **COVID -19 Pandemic**, but that the Defendants/ Respondents, their families and friends have refused to adhere to the Plaintiff's/ Applicant's directive and measures put in place, which actions are adverse to the Plaintiff's/ Applicant's ownership, care and control as the sole proprietor of **Mohan Galot Estate**, being his right to control who resides and allowed entry into the Estate, who works for gain, his privacy, quiet enjoyment and user of the Estate. That the Defendants/ Respondents are engaged in a series of criminal acts and the criminal acts were particularized under paragraph 16.

That the Defendants/Respondents continued stay in the suit property is detrimental to his rights and it is only just and fair that they be barred from accessing the suit property. That the Plaintiff/ Applicant has not consented to the Defendants/Respondents occupation and all efforts to have them vacate the premises have been unsuccessful and as a result of their occupation, the Plaintiff/ Applicant has suffered damages and continues to incur loss of user.

In his Supporting affidavit, **Mohan Galot**, the Plaintiff/ Applicant herein averred that he has recruited new employees who need to be accommodated within his property and is being forced to incur unnecessary expenses. That unless the Court intervenes, the Defendants/Respondents will continue to illegally occupy the suit property without any lawful justification and contrary to his rights.

The Application is opposed and **Walter Omosa Nyakundi**, swore a Replying Affidavit on 4<sup>th</sup> May 2020, and averred that he had the authority of the 2<sup>nd</sup> to 22<sup>nd</sup> Defendants/Respondents to swear the Affidavit on their behalf. That the Defendants/Respondents have been advised by their Advocate that the Application as drafted and filed discloses an employment dispute. He confirmed that the Defendants/Respondents reside on the suit property within **Galot Estate** and not **Mohan Galot Estate**. It was his contention that they are employees of **Rajesh Galot** and **Pravin Galot**, who are co-owners of the suit property. That the Defendants/Respondents are aware that the Plaintiff/ Applicant and their employers are members of the wider **Galot Family**, and that there are several pending Court cases on the ownership and control of the suit property. Further that in an attempt to dismiss them from employment, the Plaintiff/ Applicant has filed

several Court cases against their employers and this suit is an attempt to illegally terminate their employment.

That on **25<sup>th</sup> November 2009**, the Plaintiff/ Applicant instituted **CMCC No. 339 of 2009**, against one of their employers, seeking the Court to restrain their employers, against allowing them into the suit property and it was allowed and the Plaintiff/ Applicant sought the assistance of the OCPD to evict the Defendants/Respondents from the suit property. That the Application for eviction was heard inter parties and allowed on **17<sup>th</sup> December 2009**, and the Defendants/Respondents were thus forced to temporarily stay out of their work place and residence.

However, the said orders for their eviction were stayed on **4<sup>th</sup> January 2010**, and Defendants/Respondent returned to their work place. That the Plaintiff/ Applicant filed an Application seeking to set aside the **stay orders** and whilst the said proceeding was still pending before the High Court, the Plaintiff/ Applicant filed another application in **HCCC No. 2247 of 2007**, seeking a mandatory injunction against their employers to remove them from the suit property. However, the Court declined to grant the said orders of eviction. That the High Court ultimately delivered its ruling in **Civil Appeal 1 of 2010**, seeking to set aside the orders staying their eviction and dismissed the said Application noting that the Applicants' ownership of the suit property is already challenged in another suits, that **Hon. Justice P. Kariuki Kihara (as he then was)** had already declined the Applicant's Application to have the employees of **Rajesh and Pravin Galot** removed from the suit property. That **Lady Justice Nambuye JA.** expressed concerns that the Applicant had obtain injunction orders in the Subordinate Court while there were pending proceedings in **ELC 2247 OF 2017** and **HCCC 49 of 2009**, and further stayed all proceedings in **CMCCC No. 339 of 2009**.

He contended that on **11<sup>th</sup> November 2014**, in **ELC 2247 OF 2007**, the Court issued orders restraining the Applicant from removing the Defendants/Respondents from the suit property as the servants and employees of **Rajesh Galot, Pravin Galot and Ganeshlal Pusharam**. Further that the said orders are still in force and that this Court sitting in Nairobi on **17<sup>th</sup> February 2013**, stayed the proceedings in **ELC No. 2247 of 2007**, pending the determination of **HCCC No. 55 of 2012**. That the Plaintiff's/Applicant's attempts to evict the Respondents from the suit property was made and stayed and the instant suit is therefore mischievous and an abuse of the Court process. He further averred that the fact that Defendants/Respondents are employees of some members of the **Galot Family**, has always been within the knowledge of the Plaintiff/Applicant. That by way of Memorandum dated **10<sup>th</sup> November 2004**, the then **farm manager** wrote to their employers informing him of staff changes in which employees were allocated a particular employer and therefore could not take instructions from anyone else. That the Plaintiff/ Applicant prepared a map in which he indicated the portion of the property that was to be managed by each of the **Galot family** members and their employees, and the Respondents fall within their employers' property allocated to them.

That all their bills are paid for by their employers and that the Plaintiff/ Applicant has insisted on various occasions to have them report to him and ignore instructions from their employers. It was his contention that the Respondents have complied with all the Ministry of Health **regulations** on preventing and managing the **Covid 19 pandemic** and the Plaintiff/ Applicant is using the pandemic to settle his feud. He averred that the issue of whether the Plaintiff/ Applicant can remove them from the suit property and bring in new employees can only be settled by the Employment and Labour relations Court.

The 2<sup>nd</sup> Interested Party **Rajesh Galot**, swore a Replying Affidavit on **8<sup>th</sup> May 2020** and averred that all the Defendants/ Respondents in the suit are his employees and that the Plaintiff/ Applicant has in numerous suit attempted to have their workers evicted from the suit property. That the Plaintiff/Applicant filed **HCC 2247 of 2007**, against the interested parties seeking to evict them and their employees. That on **30<sup>th</sup> January 2009**, the Plaintiff/Applicant filed an Application and sought specific orders of eviction of their employees and that the matter is still pending in Court. That while **HCCC 2247 of 2007**, was still pending, the Plaintiff/Applicant filed **HCCC No.49 of 2009**, seeking to restrain the Defendants, and/or their Servants from entering into the suit property and having got no orders, approached the Subordinate Court for the same orders in **CMCC 339 of 2009**, to which he got the said orders. That then **Pravin Galot**, the 1<sup>st</sup> Interested Party went to the High Court, and the said orders were stayed. That the instant suit as presented is fatally defective and in violation of **Section 6 of the Civil Procedures Act** as the same issues are still pending in **ELC 2247 of 2007**, as consolidated with **ELC 49 of 2009**, between the parties. It was his contention that the High Court in **ELC 2247 of 2007**, gave a clear order which is still in force,

The Plaintiff/ Applicant swore a Supplementary Affidavit on **15<sup>th</sup> July 2020**, and denied alluding to any employment dispute. He averred that the 1<sup>st</sup> Defendant/ Respondent has relied on false and erroneous advise from his employers that the said employers are co-owners of the suit property as no proof of ownership has been exhibited. That the Defendants/ Respondents are not his employees and thus cannot rely on the non-existent contract He further averred that **Walter Nyakundi**, has not shown that he is a party to any alleged dispute regarding the subject suits pending in Court.

It was his contention that since the Defendants/Respondents have admitted that they are not his employees and since their occupation of the suit property is a threat to his life, then their own employers should arrange for their own accommodation. That though some of the Defendants/Respondents were his employees in the past, they have since left his employment and he denied subdividing his property. He also denied that the Defendants/ Respondents were adhering to the **MOH guidelines**. Further that the 1<sup>st</sup> Defendant/Respondent cannot depone to facts which he has knowledge of and that he had committed various criminal activities and the 1<sup>st</sup> Interested Party prevented his arrest and that he is a fugitive as warrants a of arrest against him have been issued.

Further that the facts that the said deponent has relied on are evidence of destruction to his property and threats to his security, and that he has never sued the Defendants/Respondents regarding any subject matter. He contended that the Interested Parties have totally misconceived and mischaracterized the cause of action precipitating the institution of the instant suit. That the facts and issues subject matter of the instant dispute are **novel** and have never been subject of the facts and issues subject of the disputes in **ELC 2247 of 2007** and **HCCC No. 49 of 2009** and the **Preliminary Objection** should therefore be rejected. He reiterated that he is the registered and sole owner of the suit property, there being no evidence to the contrary and he **therefore** ought to be allowed to enjoy his proprietary interests.

The 1<sup>st</sup> Defendant/ Respondent filed a Supplementary Affidavit sworn on **10<sup>th</sup> August 2020**, and averred that the Defendants/ Respondents are the Interested Parties' employees. That there are express orders issues by the Court in **ELC 2247 of 2007**, barring the Applicant herein from removing or interfering with the Interested parties, including their servants and/or employees it is thus clear that as servants of the

Interested parties, the orders bars the Applicant from interfering with their occupation. That the Applicant's attempts to draw a distinction between the Defendants/ Respondents herein is an attempt to create a distinction, without a difference. Further that the orders bars the Plaintiff/Applicant from interfering with their servants and that the Defendants/Respondents are servants, a fact confirmed by the Plaintiff/Applicant herein. That the charges facing the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/ Respondents will be determined on merit and that the law presumes they are innocent until proven guilty. He denied being a fugitive from justice.

The Preliminary Objection by the Defendants/Respondents dated 4<sup>th</sup> May 2020 is based on the grounds that;

1. That pursuant to paragraph 9-22 of the Plaint and paragraphs 1-23 of the Grounds of the Application, the issues raised in the entire suit revolve around the alleged employment of the Defendants by the Applicants employee and is therefore an employment dispute that this Court lacks the requisite jurisdiction to hear and determine.
2. That under Article 162 (2) (a) of the constitution as read together with section 12 of the Employment and Labour relations Court, Act, all employment disputes are reserved for the employment and Labour Relations Court.
3. That the dispute on all that parcel of land known as Land reference Number 7022/7 is already the subject of ELC No. 2247 of 2007 and HCCC No. 49 of 2009 both of which are pending before the ELC Court at Nairobi and the unnecessary inclusion of the same in what is essentially an employment dispute between the Applicant and his alleged former employees is in violation of Section 6 of the Civil Procedure Act
4. That the Plaintiff is engaged in forum shopping in violation of the principle of forum non convenien
5. That this Suit as drafted and filed is therefore before the wrong Court and should be struck out in limine
6. That the suit is therefore frivolous, vexatious, irresponsible and an abuse of the Court process.

The Notice of Motion Application and the Notice of Preliminary Objection were canvassed by way of written submissions, which this Court has carefully read and considered. The issues for determination are;

1. Whether the Notice of Preliminary Objection is merited
2. Whether the suit is sub judice
3. Whether the Notice of Motion Application dated 17<sup>th</sup> April 2020

#### **1. Whether the Notice of Preliminary Objection is merited**

There are two limbs to the Defendants/Respondents Preliminary Objection. In their first limb the Defendants/ Respondents have contended that the Court does not have jurisdiction to hear and determine the suit, as the same is an employment dispute that falls within the jurisdiction of the **Employment & Labour Relations Court**. Further on the 2<sup>nd</sup> Limb the Defendants/ Respondents have contended that the suit is **sub judice** to ELC 2247 of 2007 consolidated with HCCC 49 of 2009.

A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean:-

**“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

Further Sir *Charles Nabbold, JA* stated that:-

**“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”**

It is evident that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any fact has to be ascertained from elsewhere or when the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999*, the Court held that:-

**“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”**

It is evident that a *Preliminary Objection*, must stem from the pleadings and should raise pure point of law. See the case of *Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, where the court held that:-

**“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

Does the *Notice of Preliminary Objection*, herein satisfy the ingredients of a *Preliminary Objection*? This Court will be persuaded by the findings in the case of *Oraro...Vs...Mbaja (2005) 1KLR 141*, where the Court held that:-

**“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.**

In the instant *Preliminary Objection*, the Defendants/Objectors have averred that the Court lacks Jurisdiction to deal with the instant suit as it is an employment dispute, and falls within the purview of the **Employment & Labour Relations Court**. It is not in doubt that jurisdiction is everything and without it, the Court will have no option but to down its tools. See the case of *Owners of Motor Vessel ‘Lillian S ‘...vs... Caltex Oil (Kenya) Ltd (1989) KLR 1*. the court held that:-

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

It therefore follows that the issue of jurisdiction does not require the ascertaining of facts or probing of evidence. The Court finds and holds that the issue of jurisdiction herein is a Preliminary Objection properly raised and it meets the test of what amounts to a **Preliminary Objection**.

The 2<sup>nd</sup> point raised by the Defendants/Respondents is that the suit is **Sub judice** . In the case of *Henry Wanyama Khaemba... Vs... Standard Chartered Bank Ltd & Another (2014) EKLK*, the Court held that:-

**“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”**

Further in the case of *George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR*, the Court held that:-

**“I have considered the points raised by the 1<sup>st</sup> Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”**

For the Court to determine whether the issues herein were directly and substantially in issue with the others suit, the Court will have to ascertain facts and probe evidence. Further the issue on whether or not the same is **Subjudice**, facts have to be ascertained and a Preliminary Objection cannot be raised on disputed facts. Therefore, this Court holds and finds that the issue of **subjudice** as raised by the Defendants/ Respondents does not amount to a **Preliminary Objection**, and does not qualify to be determined as Preliminary Objection.

Having held that the issue on whether or not the Court has jurisdiction is a properly raised Preliminary Objection, the Court will then seek to determine whether the same is merited. It is not in doubt that jurisdiction is everything and without jurisdiction, the Court has no option but to down its tools.

It is the Defendants/ Respondents contention that the instant suit is an employment dispute that has been disguised as a land matter and therefore the Court does not have jurisdiction to hear and determine the same. The **Environment & Land Court** has its root in **Article 162(2) (b) of the Constitution** which provides as follows:-

(2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -*

a. ....

b. *The environment and the use and occupation of, and title to, land.*

(3) *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*

To give effect to **Article 162 (2) (b) of the Constitution**, Parliament enacted the **Environment & Land Court Act**. **Section 13** of the said Act provides as follows:-

1. **The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article**

162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland; and
- (e) any other dispute relating to environment and land.

3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

5. Deleted by Act No. 12 of 2012, Sch.

6. Deleted by Act No. 12 of 2012, Sch.

7. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

- (a) interim or permanent preservation orders including injunctions;
- (b) prerogative orders;
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (f) restitution;
- (g) declaration; or
- (h) costs.

The Court has carefully gone through the Notice of Motion Application together with the Plaint dated **17<sup>th</sup> April 2020**, and notes that while some of the facts that have been pleaded revolve around the issue of employment of the Defendants/ Respondents, there is no doubt as acknowledged by the parties that the Defendants/ Respondents are employees of the Interested parties. The Court has seen the prayers that have been sought by the Plaintiff / Applicant and the same are prayers of **mandatory injunction** and **delivery of vacant possession**, an order of **mesne profits** and **general and exemplary damages**. There is no doubt that it is only the **Environment & Land Court** that has the jurisdictions to grant the said orders.

While the dispute may be between employers and employees, it is the Courts considered view that in determining whether a Court has jurisdiction, what the Court must determine then is whether it has the jurisdiction to grant the orders sought. The Court will not look at the relationship of the parties, but will consider if it can grant the said orders in the event the suit is found to be merited. Therefore, the Court finds that if the instant suit as framed and the prayers as sought were to be placed before the **Employment & Labour Relations Court**, that Court would never be in a position to determine the matter because it would not have the requisite jurisdiction to either grant or deny the orders as sought especially the order of **vacant possession**.

For the above reasons, this Court finds and holds that it has jurisdiction to adjudicate over the instant dispute and grant the orders sought, in the event the suit is found to be merited. Consequently, the Court finds and holds that the **Preliminary Objection** on jurisdiction is **not** merited and the same is hereby dismissed.

## **2. Whether the suit is subjudice**

While the Court has held above that the issue of **subjudice** cannot be raised as a Preliminary Objection, the Court notes that both the Defendants/Respondents and the Interested Parties have raised the said issues in their respective Replying Affidavits and the Court must therefore determine the same.

While it is the Plaintiff's/ Applicant's contention that the suit is not **subjudice** as there is no suit pending before any Court between him and the Defendants/ Respondents, it is the Defendants/Respondents contention that the issues raised in the instant suit are the same issues that have been raised and are subject of **ELC 2247 of 2007** and **High Court Civil Appeal No. 1 of 2010** and there are orders in existence expressly barring the Plaintiff/ Applicant from interfering with interested parties occupation of the suit property and the said orders are extended to the Defendants servants and/or employees and the Defendants/Respondents herein are employees of the beneficiaries of the above orders.

The Interested Parties have also averred that the suit is **subjudice** as the substratum and gist of the suit is to evict the Defendants/ Respondents who are their employees and therefore the Plaintiff/Applicant is seeking the same orders as the two suits that have since been consolidated. **Section 6** of the **Civil Procedure Act** provides:

**“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.”**

In **Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** the court held that:

**“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”**

In the case of **Thiba Min. Hydro Co. Ltd ...Vs... Josphat Karu Ndwiga [2013] eKLR** the Court held that:

**“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 looking at the pleadings in both cases, .....and there can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which requires under Section 1B that there be an “efficient use of the available judicial and administrative resources”.**

**Having considered all the above, I am satisfied that the plea of sub-judice as properly been invoked in this case.”**

With above in mind, the Court then proceeds to determine whether the suit is **subjudice**. It is not in doubt that Defendants/ Respondents are employees of the Interested Parties. This has been confirmed by production of salary remittance by the Interested Parties. Indeed, even the Plaintiff/ Applicant has in his pleadings acknowledged that the Defendants /Respondents are employees of some of his relatives. Therefore, this Court finds and holds that it is irrelevant how the said employees ended up as the Interested Parties employees. Further it is not in doubt that there are suits that are pending before other Courts of **competent jurisdiction**, between the Plaintiff/Applicant and the Interested Parties over the suit property. The Court has carefully gone through the pleadings annexed to the Defendants/Respondent's Replying Affidavit and notes that in **ELC 2247 of 2007**, in his Plaint the Plaintiff/ Applicant had sought for amongst other orders that;

**“An order of injunction to compel the Respondent both..... to remove all the security guards, agents , servants and other strangers from the suit property.”**

Further in his Plaint in **HCCC 49 of 2009**, the Plaintiff/ Applicant had sought for orders that;

**“ A declaration that Defendants are not entitled whether by themselves, family servants to enter into Galot Estate”**

The two suits having been consolidated **Hon. Justice Mutungi** in his order dated **11<sup>th</sup> November 2014** made an order that;

**“The Plaintiff by himself, his servants or agents or any of them or otherwise be and is hereby restrained by a temporary order of injunction from wasting, damaging , removing, disposing, seizing or otherwise interfering with the ownership, occupation, enjoyment and access of the Defendants , their families , agents and servants from the suit property.”**

It is not in doubt that the subject matter in both this suit and the consolidated suits before the **Environment & Land Court in Nairobi (Milimani)** is the same. Though the Plaintiff/ Applicant has averred that there is no suit between him and the Defendants/ Respondents that is pending, the Court has already established that the Defendants/ Respondents are servants and/or employees of the Interested Parties herein and are thus affected by the orders issued earlier by a Court of competent jurisdiction.

In his claims the Plaintiff/ Applicant roped in the Interested Parties servants, and all the orders sought by the Plaintiff/ Applicant against the Interested Parties were also to be extended to their servants/ and all the orders that were granted affected and or protected the Interested

Parties together with their servants. It is therefore evident that though the Defendants/Respondents are not named parties in the said suits, any orders made in the other pending suits affected them.

It is also not in doubt that all the suits involve the same suit property and the Plaintiff/ Applicant is claiming sole ownership over the said property. Further that in all the suits, the Plaintiff/Applicant is also claiming **vacant possession** of the suit property. He is also seeking for the same **vacant possession** in this case from the Defendants/ Respondents; and also in the consolidated suits by the Interested Parties and the Defendants/Respondents who are their servants. As was held by the Court in Thiba Min. Hydro Co. Ltd ...Vs... Josphat Karu Ndwiga (supra), **it is not the form in which the suit is framed that determines whether the suit is sub-judice, rather it is the substance of the suit, and looking at the pleadings in both cases.**

**Looking at the instant suit and ELC 2247 of 2007 and 49 of 2009 as consolidated, it is very clear that the Defendants/Respondents and the Interested Parties have properly invoked the doctrine of subjudice.**

In the case of Barclays Bank Of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012]eKLR the court held that:

**“...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 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties...”**

Having gone through the lamentations of the Plaintiff/ Applicant, in the instant suit, this Court finds that the same could have been raised in the consolidated suit. Having analysed the available evidence, the Court arrives at a finding that the instant suit is **sub judice** and consequently, the Court proceeds to **stay** the instant suit entirely as provided for under **Section 6** of the **Civil Procedure Act**.

### **3. Whether the Notice of Motion Application dated 17<sup>th</sup> April 2020 is merited**

The Court having found that the instant suit is **subjudice**, and having **stayed** the entire suit it then finds and holds that there is no merit in making a determination on the instant Notice of Motion Application.

This Court noted that it will be making a decision **per incuriam**, if it were to make an order granting **vacant possession** to the Plaintiff/ Applicant as against the Defendants/Respondents being well aware that there is an Order by a Court of **equal** and **competent** jurisdiction barring the Defendants'/Respondents' eviction from the said suit property.

The Upshot of the foregoing is that the Court finds and holds that the suit herein is **subjudice** and the same is **stayed** pending the hearing and determination of **ELC 2247 of 2007**, as consolidated with **HCCC 49 of 2009**. Further the Notice of Motion Application dated **17<sup>th</sup> April 2020** is found **not** merited and the same is dismissed entirely with costs to the Defendants/ Respondents.

It is so ordered.

**Dated, signed and Delivered at Thika this 22<sup>nd</sup> day of October, 2020**

**L. GACHERU**

**JUDGE**

**22/10/2020**

**Court Assistant – Lucy**

### **ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Tiego for the Plaintiff/Applicant**

**Mr. Kenyatta for all the Defendants/Respondents**

**Mr. Kamau Kaka for all the Interested Parties**

**L. GACHERU**

**JUDGE**

**22/10/2020**