REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 20 OF 2018

HENRY NJUE NJIRU

PHILIP NJERU NAMAN

STEPHEN NJIRU NAMU AND 107 OTHERS.......................PLAINTIFFS

VERSUS

JENARD JOSIAH NYAGA & 78 OTHERS.........................DEFENDANTS

RULING

A. INTRODUCTION

1. By a notice of motion dated 2nd December 2019 expressed to be brought under the provisions of **Sections 1A, 1B, 3A** and **100** of the **Civil Procedure Act (Cap. 21), Order 40 Rule 10, Order 51, Order 1 Rules 9 & 10, Order 8 Rule** of the **Civil Procedure Rules, Articles 22, 23 (3) (c), 40** and **159** of the **Constitution of Kenya 2010, and all enabling provisions of the law,** the Plaintiffs sought various orders among them prayers for amendment of the plaint; substituted service of summons and amended plaint; and a conservatory order with respect to *Title No. Mbeere/Kirima/2958* (the *suit property*) and all sub-divisions arising therefrom. The prayers for amendment of plaint and service of process through substituted service were granted without any objection by the Defendants. However, the prayer for a conservatory order was contested and it is the subject of the instant ruling.

B. THE PLAINTIFFS' APPLICATION

2. The pertinent prayer for a conservatory order in the notice of motion dated 2nd December 2019 stated as follows:

> *"4. THAT pending the hearing and determination of the suit herein; this honourable court be pleased to issue a conservatory/preservation order maintaining the status quo in respect of parcel No. Mbeere/Kirima/2958 and all sub-divisions arising from parcel No. Mbeere/Kirima/2958 including parcel Title Nos. Mbeere/Kirima 3183/3424/3425/3186/3187/3932-3978/3279/3185/3236/3246/3188 /3190/3243/3296/3298/3302/3241/3288/3310/3239/3240/3309/3286/3245/3283/3289/3238/3287/3295/3292/3304/3291/3184/3270/ 3282/3269/3268/3265/3252/3263/3256/3235/3250/3247/3189/3294/ 3300/3253/3200/3261/3258/3306/3192/3193/3232/3234/3259/ 3257/3262/3249/3281/3290/3277/3279/3273/3271/3264/3210/3237/ 3225/3226/3228/3229/3230/3212/3216/3217/3218/3219/3226/ 3221/3223/3196/3197/3199/3261/3262/3202/3204/3206/3205/3207/ 3209/3299/3208/3198/3303/3215/3194/3211/3231/3308/32933244/ 3301/3227/3260/3305/3248/3280/3278/3272/3251/3222/32423214/ 3195/3266/3267/3275/3276/3307/3191 and any other pieces thereof."*

3. The said prayer was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Plaintiff, Henry Njue Njiru on 2nd December 2019. It was contended that the 1st Defendant had allocated the suit property and its sub-divisions in a fraudulent, illegal, manipulative and ravenous manner and that the process violated both the retired Constitution of Kenya and the current Constitution of Kenya, 2010. The Plaintiffs contended that the amended plaint raised serious triable issues and that it was necessary to preserve the *status quo* since the Defendants were in the process of dealing with the suit property and its sub-divisions which might render the pending suit nugatory. The Plaintiffs further contended that even though their initial application for an interim injunction to prevent further dealings with the suit property was dismissed on 28th February 2019 there was a compelling justification for the court to grant a conservatory order.

C. THE RESPONSE BY THE 1ST, 10TH, 11TH, 12TH, 13TH, 23RD, 30TH & 34TH DEFENDANTS

4. The 1st Defendant filed a replying affidavit sworn on 30th June 2020 on his own behalf and on behalf of the 10th, 11th, 12th, 13th, 23rd, 30th & 34th Defendants in opposition to the Plaintiffs' said application. They contended that the application was frivolous and vexatious. They contended that it was *res judicata* since the Plaintiffs' notice of motion dated 14th June 2018 dismissed their prayer for an interim injunction pending the hearing and determination of the suit. The Defendants also contended that the Plaintiffs had failed to demonstrate that any of their rights had been or were likely to be violated unless the conservatory orders were granted.

5. The rest of the grounds set forth in opposition to the application were similar to the ones raised during the hearing of the Plaintiffs' application for an interim injunction dated 14th June 2018. For instance, it was contended that the Plaintiffs had failed to exhibit copies of the land registers for all the sub-divisions which resulted from the suit property; that the register for the suit property was closed on 13th August 2008 upon sub-division; and that the resultant sub-divisions were subjected to further sub-divisions hence it was not clear if all the affected property owners had been joined in the suit. The 1st Defendant also reiterated his earlier response that the suit property was specifically meant for members of Njeru house of Ikambi clan and not the general membership of the clan. The court was consequently urged to dismiss the said application with costs.

D. THE RESPONSE BY THE 2ND DEFENDANT

6. The 2nd Defendant filed a notice of preliminary objection dated 14th February 2020 in opposition to the said application and suit. Although the 2nd Defendant listed four (4) points of preliminary objection, the same really boiled down into two points. First, that the suit and application were barred by the doctrine of *sub-judice* since similar suits were pending before this court vide *Kerugoya ELC Case No. 67 of 2014 Amos Mwaniki Mbuti & 6 Others V Mununga Tea Factory Co. Ltd* and *Embu ELC Case No. 149 of 2015 – Mununga Tea Factory Co. Ltd V Amos Mwaniki Mbuti & Others.* Second, that the application and suit were barred under the doctrine of *res judicata* on account of the aforesaid two suits.

E. RESPONSE BY THE 7TH, 18TH, 19TH, 20TH & 22ND DEFENDANTS

7. The 7th, 18th, 19th, 20th & 22nd Defendants filed grounds of opposition dated 16th December 2019 in opposition to the said application. They contended that the application was incompetent, bad in law and incurably defective. It was further contended that the application was *res judicata* as the same was canvassed vide the Plaintiffs' earlier notice of motion dated 14th June 2018. Consequently, the Defendants contended that the application was frivolous, vexatious and an abuse of the court process which should be dismissed with costs.

F. THE PLAINTIFFS' REJOINDER

8. The Plaintiffs filed a further affidavit sworn by the 1st Plaintiff on 14th July 2020 by way of rejoinder. The Plaintiffs disputed that the instant application was *res judicata* or *sub judice.* They asserted that the parties in the instant suit were not the same as parties in the two previous suits hence those two legal doctrines were inapplicable to the instant suit and application. They further contended that the conservatory/preservatory order sought was of a different character from the interim injunction sought in their earlier application. They also contended that unless the orders sought were granted the suit properties and the resultant sub-divisions might be alienated thereby rendering the entire suit nugatory.

G. RESPONSE BY THE REST OF THE DEFENDANTS

9. Apart from the 88th Defendant who indicated that he was not opposed to the application, the rest of the Defendants did not file any response to the Plaintiffs' said application.

H. DIRECTIONS ON SUBMISSIONS

10. When the application was listed for hearing on 1st July 2020, it was directed that the same shall be canvassed through written submissions. The Plaintiffs were granted 21 days within which to file their submissions whereas the Defendants were granted 21 days upon the lapse of the Plaintiffs' period to file and serve theirs. It was further directed that the 2nd Defendant's notice of preliminary objection shall be argued in opposition to the application. The record shows that the Plaintiffs filed their written submissions on 24th July 2020. However, the rest of the parties had not filed their submissions by the time of preparation of the ruling.

I. THE ISSUES FOR DETERMINATION

11. The court has considered the Plaintiffs' notice of motion dated 2nd December 2019 together with the supporting affidavit, the replying affidavit in opposition thereto, the Plaintiffs' further affidavit, grounds of opposition on record as well as the notice of preliminary objection. The court is of the opinion that the following issues arise for determination herein:

a) Whether the Plaintiffs' application is res judicata.

b) Whether the application is untenable on account of the doctrine of sub judice.

c) Whether the Plaintiffs have made out a case for the grant of a conservatory/prohibitory order.

d) Whether the Plaintiffs' application is frivolous, vexatious or otherwise an abuse of the court process.

e) Who shall bear costs of the suit.

J. ANALYSIS AND DETERMINATION

a) Whether the Plaintiffs' application is res judicata

12. It was contended by some of the Defendants that the Plaintiffs' application was *res judicata* on account of the Plaintiffs' previous application dated 14th June 2018 which was determined on 28th February 2019. On the other hand, the Plaintiffs disputed that their application was *res judicata.* They submitted that the Defendants are in the process of alienating some of the sub-divisions of the suit property and that unless a conservatory order is granted the suit might be rendered nugatory and practically useless. They submitted that their earlier application was seeking an injunction which was totally different from the conservatory order sought in the instant application. It was pointed out that the two orders were governed by different provisions of law and that different considerations applied to each one of them. The Plaintiffs relied on the case of **Bernard Mugo Ndegwa V James Githae & 2 Others [2010] eKLR** for the submission that the requirements of *res judicata* had not been satisfied in the present circumstances.

13. The court has considered the submissions and material on record on this issue. There is no doubt that vide their notice of motion dated 14th June 2018 the Plaintiffs sought various interim orders including the following:

> "*e. That pending the hearing and determination of the suit herein, this honourable court be pleased to issue an order stopping any dealings/transactions whatsoever relating to the suit property by any persons including the Defendants including but not limited to sale, transfer, lease or any other disposition of interest in the suit property and sub-division, allotment and registration of any portions of the suit property by any persons in favour of whomsoever as well as processing of any land control board consents in respect of the suit property and any portions thereof."* (emphasis added)

14. The purpose of the said prayer was to preserve the suit property pending the hearing and determination of the suit. By its ruling dated and delivered on 28th February 2019, the court declined to grant any of the interim orders sought in the application including the interim injunction to prevent any further dealings with the suit property or any portion thereof.

15. In the instant application the Plaintiffs are seeking a "conservatory/preservation order" to maintain the *status quo* with respect to the suit properties and its various sub-divisions pending the hearing and determination of the suit to prevent the suit from being rendered nugatory. In addition to the provisions of the law relied upon in the earlier application, the Plaintiffs have added **Articles 22, 23, 40 and 159** of the **Constitution of Kenya 2010.** They have amended the plaint to include additional Defendants. They have also included particulars of the various sub-divisions of the original suit property and they have described their cause of action in greater detail and clarity.

16. The court is far from satisfied that the said amendment of the plaint and variation of the interim orders sought has introduced a new cause of action or introduced new circumstances to warrant a fresh adjudication of the their application for interim orders. Although the order of injunction may be different from a conservatory order the two orders were clearly intended to serve the same purpose namely, to preserve the suit properties and its sub-divisions and to prevent any further dealings with them pending the hearing and conclusion of the suit. It has not been demonstrated that the Plaintiffs were prevented by sufficient cause from including the prayer for a conservatory order as an alternative in the earlier application.

17. It has been held that a litigant is obligated to plead his entire claim or defence and it is not permissible to litigate by instalments. In the case of **Uhuru Highway Development Ltd V Central Bank of Kenya & 2 Others [1996] eKLR** it was held *inter alia,* that:

> **"The Court of Appeal went further in Pop-in (Kenya Limited Civil Appeal No. 80 of 1988, unreported) and relying upon the case of Yat Tuns Investment Co. Ltd. Vs Dao Heng Bank & Another [1975] A.C. 581 stated that, (putting it in a summary form) parties must bring before court, exercising reasonable diligence, all points that they could take and that points not taken then cannot be taken again as the same would amount to an abuse of the process of court.**
>
> **The long and short of all this is that once an application for injunction within a suit has been heard and determined under the principles as laid down in Giella Vs Cassman Brown, a similar application cannot be brought unless there are new facts, not brought before the court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the precious ruling. Such cases, of course, must be very few and far in between. In the result, the appeal must fail and is hereby dismissed with costs."**

18. In the same case, the court made the following important pronouncements on the instances when a trial court may entertain a matter or issue already decided by the same court:

> **"Any application for an interim injunction of necessity and prudence makes it obligatory upon the court to inquire into the issue as to whether there is a *prima facie* case with a probability of success. Whilst such observations which lead the court to reach such a decision will not bind the trial court, they are nonetheless binding for the purposes of the interlocutory application. That is to say, no court will re-open the application on supposition that it could have been wrong, save by a review application, provided that application comes within the ambit of Section 80 of the Civil Procedure Act and Order 44 of the Civil Procedure Rules, otherwise, as pointed out earlier, there would be no end to repeated applications by a party who does not succeed in the first instance."**

19. The court finds that no new facts or circumstances have arisen in this suit to warrant consideration of an application for a conservatory or preservation order which is similar in effect to the earlier application for interim injunction dated 14th June 2018. It was not explained why the Plaintiffs did not seek such a conservatory order instead of or in the alternative in the interim injunction. The instant application has not

been brought within the purview of the legal provisions relating to review either.

20. The court is thus of the opinion that the instant application is *res judicata* within the principles enunciated in the case of **Uhuru Highway Development Company Ltd** Case. The question of whether or not the doctrine of *res judicata* applies not only to suits as defined in **Section 2** of the **Civil Procedure Act (Cap. 21)** but also applications in interlocutory proceedings was settled in by the Court of Appeal in that case. It was held that the general principles of *res judicata* applied to interlocutory applications as they do to suits otherwise there would be no end to interlocutory applications on matters or issues which have already been determined.

21. The court is further of the opinion that the instant application is precluded on account of the doctrine of *functus officio* as expounded by the Supreme Court of Kenya in the case of **Raila Odinga & 5 Others V The IEBC and 3 Others [2013] eKLR.** It was held, *inter alia,* that:

> **"We therefore have to consider the concept of "functus officio", as understood in law. Daniel Malan Pretorius, in "The Origins of the Functus Officio Doctrine, with specific reference to its application in Administrative Law" (2005) 122 SALJ 832, has thus explicated this concept; "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicating or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter…….The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker." This principle has been aptly summarized further in Jersey Evening Post Limited V. AI Tharil [2002] JLR 542 at 550;**
>
> **"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a Judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully conducted, and the court functus, when its judgement or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."**

b) Whether the application is untenable on account of the doctrine of sub-judice

22. In view of the court's finding and holding that the Plaintiffs' application is barred by virtue of the doctrine of *res judicata* it shall not be necessary to consider this issue or indeed any of the remaining issues save for the question of costs.

c) Who shall bear costs of the application

23. Although costs of a suit or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful Defendants should not be awarded costs of the application. Accordingly, the 1st, 2nd, 10th, 11th, 12th, 13th, 18th, 19th, 20th, 22nd, 23rd, 30th & 34th Defendants shall be awarded costs of the application to be borne by the Plaintiffs.

K. CONCLUSION AND DISPOSAL ORDER

24. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 2nd December 2019 on account of the doctrine of *res judicata.* Accordingly, the said application is hereby struck out with costs to the 1st, 2nd, 10th, 11th, 12th, 13th, 18th, 19th, 20th, 22nd, 23rd, 30th & 34th Defendants. It is so ordered.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **1ST DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Mr. Morara Omoke for the Plaintiffs, Ms. Nzekele holding brief for Mr. Okwaro for 1st, 10th, 11th, 12th, 13th, 23rd, 30th & 34th Defendants, Mr. Ochieng for the 2nd Defendant, Ms. Rose Migwi for the 88th Defendant, Mr. Siro for the Attorney General for the 78th & 79th Defendants and in the absence of the rest of the parties.

Y.M. ANGIMA

JUDGE

1.10.2020