



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 130 OF 2019**

**ESTHER NGONDU NDETI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ALEX KIILU NDETI (*Legal representatives of the Estate of***

**IDAH NDETI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**CECILIA SITUMAI NDETI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**MICHAEL KYENDE NDETI (*Legal representatives of the Estate of***

**KIVUTO NDETI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**KIVUSIT HOLDINGS LIMITED.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

**Introduction:**

1. In his Notice of Motion dated 25<sup>th</sup> February, 2020, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (*the Defendants*) have prayed for the following orders:

***a. That the Plaintiffs' Complaint dated 27<sup>th</sup> November, 2019 and or suit as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively be struck out for being res judicata.***

***b. That the costs of this suit and the Application be borne by the Plaintiffs.***

**The Defendants'/Applicants' case:**

2. The Application is supported by the Affidavit of the 2<sup>nd</sup> Defendant who has deponed that he is the 2<sup>nd</sup> Defendant and also a Director of the 3<sup>rd</sup> Defendant and that he has the authority of his Co-Directors to swear the Affidavit.

3. The 2<sup>nd</sup> Defendant deponed that as admitted by the Plaintiffs, the subject matter of the suit herein is Land Reference Number 7149/9 which they further admit has been sub-divided into portions known as Land Reference Numbers 7149/9/55, 7149/133, 7149/157, 7149/158 and 7149/160.

4. The 2<sup>nd</sup> Defendant deponed that it is also an admitted fact by the Plaintiffs at Paragraph 7, 8, 10 and 19 of the Complaint that the suit property was the subject of a dispute and final determination in Nairobi ELC 55 of 2015 (*formerly High Court Civil Case No. 430 of 1981*) between the Plaintiffs and the 1<sup>st</sup> Defendant and himself and that indeed, the Plaintiffs have tendered in their list and bundle of documents documentary evidence confirming that position.

5. It was deponed that the Plaintiffs have indeed acknowledged that the subject matter of dispute herein has already been heard and

determined in ELC No. 55 of 2015 and in recognition of that fact, they have filed an Application dated 27<sup>th</sup> November, 2019 contesting the sub-division process and are seeking to commit him and the 1<sup>st</sup> Defendant to civil jail on allegation that they are in contempt of the Court Ruling and or the Decree issued in the said suit.

6. According to the 2<sup>nd</sup> Defendant, the suit herein amounts to a grave abuse of the court process and is an attempt by the Plaintiffs to have a second bite at the cherry and that the Honourable Court should bring to a stop the Plaintiffs' conduct.

#### **The Plaintiffs'/Respondents' case:**

7. In response to the Application, the 1<sup>st</sup> Plaintiff deponed that in order for a party to succeed in his reliance on Section 7 of the Civil Procedure Act, he must demonstrate that all the elements of *res judicata* have been satisfied and that one of such elements of the principle of *res judicata* is that the parties to the latter suit ought to be the same as the parties in the former suit or that they litigated on behalf of the parties in the latter suit.

8. The 1<sup>st</sup> Plaintiff deponed that in respect of the matter herein, the former suit, being ELC No. 55 of 2015 (*formerly HCCC 430 of 1981 Nairobi*), the parties to the dispute were Patrick Mutheke Ndeti (*as Plaintiff and who is their late father*) and Dr. Kivuto Ndeti (*as Defendant and who is the late husband and father to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein respectively*).

9. The 1<sup>st</sup> Plaintiff deponed that upon the death of the original Plaintiff and the original Defendant in the former suit, they are now the Decree holders while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are Judgment debtors in the former suit.

10. It was deponed by the 1<sup>st</sup> Plaintiff that as proceedings in the former suit and Appeal by the Defendants were ongoing, on or about 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants instructed a Surveyor to sub-divide the suit property into several sub-divisions and or portions and that on 28<sup>th</sup> January 2019, the Director of Surveys approved some of the sub-division and or Deed Plans.

11. It is the Plaintiffs' case that the original property was sub-divided into various portions which, *inter alia*, include L.R. No.7149/9/55, 7149/9/55, 7149/132, 7149/133, 7149/157, 7149/158 and 7149/160; that the sub-division of the original property is fraudulent, illegal, null and void *ab initio* and that by virtue of the existence of the former suit, the doctrine of *pedente lite* is applicable to the present case.

12. According to the 1<sup>st</sup> Plaintiff, by a letter dated 25<sup>th</sup> January 2018, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' advocates wrote to their advocates notifying them that they would carry out a sub-division exercise of the property and that by a response letter dated 30<sup>th</sup> January 2018, their Advocates informed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' advocates that "*any attempt to deal with the property is contemptuous of the court decision*" as issued in the first primary suit.

13. It was deponed by the 1<sup>st</sup> Plaintiff that in a fraudulent bid to scuttle the Judgment in the former suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and other persons incorporated a limited liability company, the 3<sup>rd</sup> Defendant, in which they are Directors and shareholders, for purposes of transferring and did transfer the sub-divisions in its favour; that after withdrawing the Application which sought for stay of execution and orders for interpretation of the Decree in the former suit, and during the pendency of their Appeal, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants notified them through their advocates that they had already sub-divided the suit property by purporting to comply with the court Decree.

14. The 1<sup>st</sup> Plaintiff deponed that on 28<sup>th</sup> November, 2019, they filed, in the former suit, an Application for contempt of court, which Application has not been determined; that on or about 5<sup>th</sup> July, 2020, some people, in the company of Chinese nationals, visited the suit property and made representations that they intended to start construction works thereon and that although the Plaintiff in the former suit litigated on their behalf and the Defendant therein litigated on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were not parties to the said suit.

15. It was deponed that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants became necessary parties to the current suit because the 3<sup>rd</sup> Defendant is now the duly registered owner and or proprietor of the suit property following a sub-division of the property.

16. The 1<sup>st</sup> Plaintiff deponed that the issue that was determined in the former suit was ownership of all that parcel of land known as L.R. No. 7149/9 and whether or not an order of injunction was to issue; that parcel of land L.R. No. 7149/9 is no longer in existence following a sub-division and that the sub-divisions are no longer registered in favour of the Plaintiff in the former suit but have been sold and registered in favour of a third party, to wit, the 3<sup>rd</sup> Defendant herein.

17. It was deponed that the suit herein seeks a determination that in view of the Judgment in the former suit and in particular the order of a permanent injunction, and pendency of an Appeal, the action of sub-division be declared as null and void; that the suit also raises an issue of fraudulent and illegal sale and sub-division of the original property and that the suit seeks an order that the doctrine of *pedente lite* is applicable in respect of any sale, transfer or purchase of the suit premises by either the 3<sup>rd</sup> Defendant or any other third party.

#### **Submissions:**

18. The Defendants'/Applicants' advocate submitted that from the Plaintiffs' own pleadings, the subject matter in dispute is whether or not the sub-division of L.R. No. 7149/9 is fraudulent and unlawful and consequently whether the orders sought should be granted and that the Plaintiffs in Prayer 1 of the Plaint are seeking an order to the effect that the sub-division of L.R. No. 7149/9 was and is unlawful, null and void.

19. Counsel submitted that as set out in the Decree dated 20<sup>th</sup> September, 2017, the subject matter in dispute in ELC No. 55 of 2015 (formerly HCCC No. 430 of 1981) was the parcel of land known as L.R. No. 7149/9; that the court decreed various orders including an order, “...restraining the Defendant from selling, whole or part or otherwise parting with property L.R. No. 7149/9 registered as IR 1872/2 or evicting the Plaintiff for it until such time P. N. Ndeti & Brothers, a Limited Liability Company, is dissolved and each afforded appropriate shares of the assets forming the family Company some of which though registered under individual members of the family have been jointly sold.”

20. It was submitted that the Plaintiffs are seeking to re-litigate on the same subject matter being ownership of L.R. No. 7149/9 thus caught up by the rule of *res judicata*; that in acknowledging that position, the Plaintiffs filed an Application dated 27<sup>th</sup> November, 2019 in ELC No. 55 of 2015 and sought to commit the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to civil jail for alleged disobedience of the Decree issued on 20<sup>th</sup> September, 2020 and that in paragraph 6 and 7 of the Affidavit sworn by the 1<sup>st</sup> Plaintiff, she challenges the legality of the resultant sub-divisions now the subject of this subsequent suit.

21. The net result, it was submitted, is a real possibility of two (2) courts of equal jurisdiction giving conflicting orders on one subject matter namely, the sub-division of the suit property and that this Honourable Court is sitting as an Appellate Court in the decision made in ELC No. 55 of 2015.

22. Counsel submitted that the sub-division of the suit property was and is the consequential process that was necessary for the Decree issued in ELC No. 55 of 2015 to be effected or enforced and that in purporting to now re-litigate on the sub-division of the property which a court of competent jurisdiction has adjudicated on the parties’ rights, the Plaintiffs are clutching on a straw.

23. The Plaintiffs’/Respondents’ advocate submitted that the issues in the current suit are different from the issues in the former suit in the following manner: the subject matter properties are different from the property which was the subject matter in the former suit, the original property having been sub-divided and sold to the 3<sup>rd</sup> Defendant herein, the Plaintiff herein raises the issue of fraud and collusion by the Defendants in order to alienate the suit properties; the Plaintiff seeks cancellation of the sub-division of titles on account of fraud and illegality and that the cause of action herein arose in January, 2019 (34 years from the date when the award was filed in court) and therefore could not have been made an issue in the former suit.

24. Counsel submitted that where a cause of action was not foreseeable or had not arisen when a former suit was heard and determined, then *res judicata* cannot be a defence to a latter suit. Counsel relied on the case of *Isaak Ben Mulwa vs. Jonathan Mutunga Mweke [2016] eKLR* where the Court of Appeal stated as follows:

“Clearly from these averments the appellant was raising the same matters that had been the subject of the former litigation, namely the ownership of the property and trespass. While we entertain no doubt at all that the issue of ownership was conclusively determined we, however, think that the present claims of encroachment are different from those litigated before the panel of elders. The present acts of trespass could not have been foreseen in 1985 to have been made part of the claim by the appellant’s mother. The present trespass, in our view was a fresh claim. We reiterate the words of this Court in *Nguruman Limited v Shompole Group Ranch & 3 others, Civil Appeal NO. 73 of 2004*:-

“Whatever happened in the year 2000 appears from the pleadings to have been a different trespass from the one in 1991. We have perused the work of Clerk & Lindsell on Torts, 16<sup>th</sup> Edition Paragraph 23-01. IV states:-

‘Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues.’

*It is in our mind not a frivolous issue as to whether the trespass pleaded to having taken place in the year 2000 was covered by the trespass in 1991.*”

*Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res judicata simply because the same parties or their parents litigated over the same matter in 1985. It is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts...The learned Judge was therefore in error in holding that the present suit was res judicata that of 1985. Accordingly, this appeal succeeds and is allowed with costs.*”

25. It was submitted that the parties in the two suits are not the same and are not litigating under same title; that the 3<sup>rd</sup> Defendant is a limited liability company and hence a different legal entity from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that the 3<sup>rd</sup> Defendant has been made a necessary party in this suit because it is now the registered owner of the suit properties.

26. It was further submitted that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were not parties in the former suit and that the 4<sup>th</sup> Defendant is accused of colluding with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to transfer the property despite its knowledge of the existence of the former suit. Counsel relied on the case of *Kenya Hotel Properties Limited vs. Willesden Investments Limited & 6 others [2013] eKLR*.

27. The Plaintiff’s counsel submitted that it is not legally tenable for the court in ELC No. 55 of 2015 to reopen the suit in order to interrogate and issues and the prayers sought in this suit; that the court in the former suit became *functus officio* and that save in exceptional and limited circumstances, the law does not allow a court to reopen a suit after it has made a determination thereof. Counsel relied on numerous authorities which I have considered.

#### **Analysis and findings:**

28. The only issue for determination in this matter is whether this suit is *res judicata* ELC No. 55 of 2015 (formerly HCCC No. 430 of 1981 Nairobi). The 2<sup>nd</sup> Defendant deponed that it is an admitted fact by the Plaintiffs at Paragraph 7, 8, 10 and 19 of the Plaint that the suit property was the subject of a dispute and final determination in Nairobi ELC No. 55 of 2015 (formerly High Court Civil Case No. 430 of 1981) between the Plaintiffs and the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant.

29. It was deponed that the Plaintiffs have indeed acknowledged that the subject matter of dispute herein has already been heard and determined in ELC No. 55 of 2015 and in recognition of that fact, they have filed an Application dated 27<sup>th</sup> November, 2019 contesting the sub-division process and are seeking to commit the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to civil jail on allegation that they are in contempt of the Court Ruling and or the Decree issued in the said suit.

30. According to the Defendants, the suit herein amounts to a grave abuse of the court process and is an attempt by the Plaintiffs to have a second bite at the cherry and that this court should bring to a stop the Plaintiffs' conduct.

31. Section 7 of the Civil Procedure Act states that:

*"...No court shall try any 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 issues has been subsequently raised and has been heard and finally decided by such Court."*

32. In the case of *Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another*, (2017) eKLR, the Court of Appeal extensively considered the principle of *res judicata* and held as follows:

*"...The elements of res judicata have been held to be conjunctive rather than disjunctive. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2007) eKLR*

*'The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and forces to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.'*

33. In the case of *Mburu Kinyua vs. Gachini Tutu* (1978) KLR 69 Madan, J. quoting with approval *William Koross vs. Hezekiah Kiptoo Komen & 4 others* (2015) eKLR, stated:

*"Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same person to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation and which parties exercising reasonable diligence might have brought forward at the time."*

34. The doctrine of *res judicata* is grounded on public interest and thus transcends the parties' interest in a suit. In the *Maina Kiai* case (*supra*), the court quoted with approval the Indian Supreme Court in the case of *Lal Chand vs. Radha Kisham*, AIR 1977 SC 789 where it was stated:

*"The principles of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.*

*The practical effect of res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunction, from entertaining such suit."*

35. Again in *Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited* (2014) eKLR, the Court of Appeal in determining another application by *Benjoh* stated thus:

*"The general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle") and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal."*

36. In the case of *John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport & Infrastructure & Others*, Civil Appeal No. 42 of 2014 (2015) eKLR, the Court likewise extensively considered the principle of *res judicata* and cited with approval the cases of *Handerson vs. Handerson* (1843) 67 ER 313 and the case of *Kamunye & Others vs. Pioneer General Assurance Society Limited* (1971) EA 263 and stated thus:

*“Res judicata is a subject which is not all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Handerson vs. Handerson (1843) ER 313:*

*“... where a given matter becomes the subject of litigation in and adjudication in a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea or res judicata applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...”*

37. In the case of *James Njuguna Chui vs. John Njogu Kimani*, Court of Appeal Nairobi Civil Appeal No. 322 of 2014 (2017) eKLR, the Court in expounding a doctrine of *res judicata* cited with approval the decisions in *William Koross vs. Hezekia Kiptoo Komen & Others*, Civil Appeal No. 223 of 2013 and also the case of *Lal Chand vs. Radha Kishan* Air 1997 SC 789 and stated thus:

*“The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the Courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reargue the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the Court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated Courts but, worse, by having contradictory decisions emanating from the Court or Courts over the same issue, courtesy of the repeat litigation.*

*The philosophy behind the principle of re judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too-human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”*

38. This suit was commenced by the Plaintiffs by way of a Plaint dated 27<sup>th</sup> November, 2019. In the Plaint, the Plaintiffs averred that the subject matter of this suit is all that parcel of land known as LR. No. 7149/9 measuring approximately 100 acres and its sub-divisions.

39. The Plaintiffs averred in the Plaint that in the former suit, being ELC No. 55 of 2015 (*formerly HCCC 430 of 1981 Nairobi*), the parties to the dispute were Patrick Mutheke Ndeti (*as Plaintiff and who is their late father*) and Dr. Kivuto Ndeti (*as Defendant and who is the late husband and father to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein respectively*).

40. According to the Plaintiffs, upon the death of the original Plaintiff and the original Defendant in the former suit, they are now the Decree holders while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are Judgment debtors in the former suit; that as proceedings in the former suit and Appeal by the Defendants were ongoing, in the year 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants instructed a surveyor to sub-divide the suit property into several sub-divisions and or portions and that on 28<sup>th</sup> January, 2019, the Director of Surveys approved some of the sub-division and or Deed Plans.

41. It is the Plaintiffs' case that the original property was sub-divided into various portions which *inter alia* include L.R. No.7149/9/55, 7149/9/55, 7149/132, 7149/133, 7149/157, 7149/158 and 7149/160; that the sub-division of the original property is fraudulent, illegal, null and void *ab initio* and that by virtue of the existence of the former suit, the doctrine of *pedente lite* is applicable to the present case.

42. It is the Plaintiffs' case that in a fraudulent bid to scuttle the Judgment in the former suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and other persons incorporated a limited liability company, the 3<sup>rd</sup> Defendant, in which they are Directors and shareholders, for purposes of transferring and did transfer the sub-divisions in its favour.

43. According to the Plaintiffs, after withdrawing the Application which sought for a stay of execution and orders for interpretation of the Decree in the former suit, and during the pendency of their Appeal, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants notified them through their advocates that they had already sub-divided the suit property in compliance with the court Decree.

44. The Plaintiffs averred that on 28<sup>th</sup> November, 2019, the Plaintiffs filed, in the former suit, an Application for contempt of court, which Application has not been determined; and that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants became necessary parties to the current suit because the 3<sup>rd</sup> Defendant is now the duly registered owner and or proprietor of the suit property following a sub-division of the property.

45. The ultimate prayers that the Plaintiffs are seeking are as follows:

**a. A declaration that the sub-division of LR No. 7149/9 was/is unlawful, illegal, null and void.**

**b. A mandatory order of injunction directed at the Chief Land Registrar to cancel any Title document issued following the sub-**

division of LR No.7149/9 and in particular LR No. 7149/9/55, 7149/132, 7149/133, 7149/157, 7149/158 and 7149/160.

**c. A permanent injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from alienating, selling or in any other way interfering with subdivisions of parcel of land LR No. 7149/9 and in particular LR No. 7149/9/55, 7149/132, 7149/133, 7149/157, 7149/158 and 7149/160 or any other sub-division thereof.**

**d. Costs of the suit.**

46. The Plaintiffs have extensively referred to ELC No. 55 of 2015 in their Complaint, and have specifically pleaded as follows:

*“As proceedings were ongoing in respect of the first and second primary suits on or about 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants instructed a Surveyor to sub-divide the suit property into several sub-divisions and or portions on or about 28<sup>th</sup> January, 2019 the Director of Surveys approved some of the sub-divisions and or Deed Plans.”*

47. In the Decree dated 20<sup>th</sup> September, 2017 in ELC No. 55 of 2015 (formerly HCCC No. 430 of 1981) the issue of ownership of parcel of land known as L.R. No. 7149/9 was determined by the court. In the said suit, the court decreed various orders including an order,

*“...restraining the Defendant from selling, whole or part or otherwise parting with property LR No. 7149/9 registered as IR 1872/2 or evicting the Plaintiff for it until such time P. N. Ndeti & Brothers, a Limited Liability Company, is dissolved and each afforded appropriate shares of the assets forming the family Company some of which though registered under individual members of the family have been jointly sold.”*

48. The subject matter in ELC No. 55 of 2015 is the same subject matter in the suit herein, being a claim of ownership of L.R. No. 7149/9 IR No. 1872/2 or portions thereof. In the present suit, the Plaintiffs are seeking orders to restore the original Title for L.R. No. 7149/9 which has been sub-divided, and which sub-division occurred after the Judgment of the court, with a portion thereof being sold to the 3<sup>rd</sup> Defendant.

49. The Plaintiffs have admitted that they filed an Application dated 27<sup>th</sup> November, 2019 in ELC No. 55 of 2015 in which they sought to commit the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to civil jail for alleged disobedience of the Decree issued on 20<sup>th</sup> September, 2020. In Paragraph 6 and 7 of the Affidavit sworn by the 1<sup>st</sup> Plaintiff, she challenges the legality of the resultant sub-divisions, now the subject of this subsequent suit.

50. The Plaintiffs have admitted in their pleadings that the sub-division of the suit property after the decision of the court in ELC No. 55 of 2015 offends the doctrine of *lis pendens* and that the original suit property having been sub-divided and sold to the 3<sup>rd</sup> Defendant, the subject matter of the dispute is now different from the subject matter in the former suit.

51. Just because the suit property was sub-divided during the pendency of the former suit does not render the resultant sub-divisions to be different subject matters. Indeed, the Plaintiffs themselves have admitted in the Complaint that the subject property in this matter is the same as the subject matter in the former suit, and have filed an Application seeking to cite the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the former suit for contempt.

52. This court has had an occasion to discuss in detail the consequences of a party selling land during the pendency of a suit. In the case of *Carol Silcock vs. Kassim Shariff Mohamed [2013] eKLR*, this court quoted with approval the decision in *Baber A. Mawji vs. United States International University and Another [1976-80] KLR* which quoted *Turner L. J in Bellamy vs. Sabine [1857] I De G & J 566, 584*, who defined the principles of *lis pendens* as follows:

*“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant’s alienating before the Judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings.”*

53. In the same case of *Bellamy vs. Sabine [1857] De G & J 566*, (Vanwarth L J) stated as follows:

*“Where a litigation is pending between a Plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only to the litigating parties, but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the proceedings would ever end...”*

54. The rationale of the doctrine of *lis pendens* has been given by “*Mulla on the Indian Transfer of Property Act, 1882, 5<sup>th</sup> Edition, page 245* as follows:

*“Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendente lite, for a valuable consideration, and without any express or implied notice on point of fact affects the purchase in the same manner as if he had such notice; and he will be accordingly be bound, by the Judgment or decree in the suit.”*

55. In *Mawji*, (*supra*), Madan J went further to state as follows:

*“It would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the suit or by a fresh suit if the property in dispute is transferred to a third party. The court therefore must protect the status quo...”*

56. The Plaintiffs have accused the Defendants of having sub-divided and sold the suit property during the pendency of the suit. Indeed, the Plaintiffs have pleaded that the sale of the suit property to the 3<sup>rd</sup> Defendant during the pendency of the suit offends the *lis pendens* doctrine.

57. Having pleaded so, and having filed an Application in ELC No. 55 of 2015 as against the Defendants for contempt, the Plaintiffs should not have filed the present suit. I say so because, firstly, the issue of ownership of the parent suit property between the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has since been determined, which issue cannot be re-litigated by a court of similar jurisdiction.

58. Secondly, the 3<sup>rd</sup> Defendant having purported to purchase or acquire the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants after the Judgment of the court in the former suit, it is litigating in this matter under the same title as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, a scenario contemplated under Section 7 of the Civil Procedure Act.

59. Thirdly, having admitted in its Pleint that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants disobeyed the Decree of the court in ELC No. 55 of 2015 by sub-dividing and selling the suit property, and having filed an Application for contempt of the Decree of the court, the Plaintiffs should pray for the court in the former suit to order the Defendants to purge the alleged contempt, and for all the parties to comply with the said Decree.

60. Fourthly, the mere fact that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were not parties to the former suit, cannot be a basis for the filing of a fresh suit because the said Defendants, under the *lis pendens* doctrine, are presumed to have been aware of the existence of ELC No. 55 of 2015, and are litigating under the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title.

61. As was held in *Mawji (supra)*, it would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff or Defendant, is forced to litigate again and again to restore the *status quo* either, by further proceedings in the suit or by a fresh suit if the property in dispute is transferred to a third party. That is the scenario the Plaintiffs have put themselves in by filing the present suit.

62. Indeed, the rationale for the doctrines of *lis pendens* and *res judicata* are joined at the hip, that is, there has to be an end to litigation. A person who has approached the courts and had his dispute decided must learn to live with it. It is not open for him to re litigate or re agitate the issue before the same or another forum, against the same parties, or parties litigating under the same title, in the hope of getting an improved or a better result.

63. The Plaintiffs having challenged the legality of the resultant sub-divisions, now the subject of this subsequent suit, in ELC No. 55 of 2015, the net result is a real possibility of two courts of equal jurisdiction giving conflicting orders on one subject matter, namely the sub-division of the suit property. The legality or otherwise of the sub-division of the suit property should be pursued in ELC No. 55 of 2015.

64. Indeed, considering that courts do not issue orders in vain, the issue of the court in ELC No. 55 of 2015 becoming *functus officio* when dealing with the issue of compliance with its own orders does not arise. The court should be able to interpret the Decree in ELC No. 55 of 2015, and where appropriate, cancel any titles that were issued contrary to its orders. That is what the doctrine of *lis pendens* is all about.

65. The Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (*including their late parents*) have been litigating over the subject matter from 1981, a period of 39 years, which litigation must come to an end. That being so, and for the reasons I have given above, I find and hold that this suit is *res judicata* ELC No. 55 of 2015 (*formerly Nairobi HCCC No. 430 of 1981*).

66. The Plaintiffs' suit is therefore struck out with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2020.**

**O.A. ANGOTE**

**JUDGE**