



**REPUBLIC OF KENYA**

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

**ELC NO. 59 OF 2014**

**NAHASHON OCHIENG ONYANGO.....PLAINTIFF**

**VERSUS**

**FLORENCE M. ONYANGO.....1<sup>ST</sup> DEFENDANT**

**BENARD OSORE.....2<sup>ND</sup> DEFENDANT**

**BENJAMIN OSENGO.....3<sup>RD</sup> DEFENDANT**

**PHILIP OPIYO.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated 7<sup>th</sup> November, 2018 which has been filed by the plaintiff seeks the following orders:

(1) That the honourable court be pleased to order that this application be heard in priority to the substantive hearing of this matter.

(2) That the honourable court be pleased to strike out the counterclaim and dismiss the suit by the defendants as against the plaintiff hereto on grounds as *res judicata*.

(3) That consequent to the grant of the prayers above the honourable court be pleased to declare that the plaintiff's suit as against the defendant is so far compromised in terms of the consent orders made on 26<sup>th</sup> November, 2013 and the further orders of this honourable court made on 25<sup>th</sup> August, 2017 in High Court Civil Suit No. 31 of 2009

(4) That consequent to the grant of the prayers above the honourable court be pleased to issue such further direction and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

(5) That there be made such other orders as the interests of justice may demand and the upholding of the dignity of the court.

(6) That costs of the suit hereto and this application be awarded to the applicant herein.

2. The Notice of Motion is brought pursuant to Order 2 Rule 15(1) (d) and Order 51 Rule 1 of the Civil Procedure Rules (2010) Section 3, 3A, 7, 8 and 63 (e) of the Civil Procedure Act and it is founded on the grounds set out at the foot of the application and in the supporting affidavit of the applicant, who is the plaintiff, dated 7/11/2018.

3. The grounds for the application are that the claim that the suit properly equally belongs to the plaintiff and the 1<sup>st</sup> defendant cannot be granted as the issue of ownership was determined by way of a consent in **Kitale ELC No. 31 of 2009** between the same parties; that the counterclaim goes against the provisions of **Section 7 of The Civil Procedure Act 2010** and this court has no jurisdiction to grant the prayers thereof as the matters therein are *res judicata* and the court is *functus officio*; that the 1<sup>st</sup> defendant's right to sell was canvassed in **ELC No. 31 of 2009** where a final consent was recorded on 26/11/2013 which determined the issue of ownership; that the matters raised in the plaint were sufficiently raised and dealt with in **Kitale Civil Suit No. 31 of 2009** and cannot be revisited in this suit either through the plaint or the counterclaim; that the counterclaim is meant to circumvent the consent in **Kitale ELC No. 31 of 2009**; that the counterclaim being identical to the one in **Kitale EL No. 31 of 2009** where the parties are substantially the same as the parties herein, is an attempt at set aside the consent order in **Kitale ELC No. 31 of 2009** and it is an abuse of the court process.

4. The application is opposed by the respondents who filed their replying affidavit sworn by the 1<sup>st</sup> respondent on 25/1/2019 and filed on 28/1/2019. The gist of their response is that the instant application is an abuse of the court process as the instant suit was filed by the plaintiff while he was aware of the consent in **Kitale ELC No. 31 of 2009**; that the issue in the counterclaim has never been directly or substantially in issue in **Kitale ELC No. 31 of 2009** or any other court of competent jurisdiction and in any event it was not raised in **Kitale ELC No. 31 of 2009** or any decision made thereon; that the ownership of the property subject matter was never in issue in **Kitale ELC No. 31 of 2009** and the consent therein did not determine that issue; that the consent has never been complied with as the 1<sup>st</sup> defendant has never been shown the **7 acre** portion allocated to her vide **Order No. 3** of the consent order; that the authenticity of the annexures marked **"NOO4A"** is doubtful as a search at the Lands Registry as at 23/2/2018 revealed that the mother title is still intact and no subdivision has been carried out; that the court erred in granting the order made on 24/8 2017 in **Kitale ELC No. 31 of 2009** as the said order cannot be granted on an application but only upon hearing on a substantive suit; that an appeal has been preferred against those orders and the pendency of the appeal does not allow the orders made on 24/8/2017 to be the basis or grounds of the instant application as the said orders cannot be said to be conclusive. She deposes that being a spouse to the plaintiff the plaintiff cannot purport to have an unfettered right to the property or any resultant to subdivision thereof or to be sole beneficial owner and disregard clear provisions of the law when dealing with the said subdivisions. She further states that upon advice from her advocate she believes that allowing the instant application amounts to this court affirming its own orders that are the subject of an appeal to the Court of Appeal and prays that the application be dismissed with costs.

5. The plaintiff filed a further affidavit wrongly entitled "replying affidavit" sworn on 29/1/2019 reiterating the contents of his affidavit sworn on 7/11/2018. He avers that the prayers in this suit were aimed at confirming the consent in **Kitale ELC No. 31 of 2009** is complied with but does not seek any orders contrary to the consent as the counterclaim does. He draws the attention to the fact that the counterclaim seeks an order that the property is owned by the 1<sup>st</sup> defendant and the plaintiff only which is different from the consent order; that the application dated 10/4/2017 which was not opposed by the defendants save by filing of an appeal annexed the deed plans that the 1<sup>st</sup> defendant objects to; that the respondents have been invited on two occasions vide letters to be shown the portions allocated to the respondents but have failed to respond to those letters; that no evidence of lack of authenticity of the deed plans has been produced by the defendants; that the existence of an undetermined appeal cannot be a bar to the determination of this application; that the appeal is against the order made on 24/8/2017 and not against the consent order of 23/11/2013 and that the appeal even if successful would not affect the consent order or the rights in the property in question in the respective subdivision as agreed in the consent which granted the 1<sup>st</sup> defendant only **7 acres**. It is further averred the appeal will not affect the import of the consent in determining the ownership of the property subject matter hereto. The applicant emphasized that the instant application is wholly based on the consent order that determined the issue of ownership but not any other order subsequent thereto.

6. The following orders were sought in **Kitale ELC No. 31 of 2009**:-

**(a) A permanent injunction restraining the defendants, their servants/agents and those claiming under them from trespassing unto and/or doing any act on Title Number IR 13623 (including) ploughing, planting, cultivating and preventing the plaintiff from using the suit property.**

**(b) Costs of this suit.**

**(c) Any other relief that the court may deem fit to grant.**

7. The background to the instant application is that **Kitale ELC No. 31 of 2009** was finalised by way of a consent of the parties recorded on 25/11/2013 which provided as follows:-

**"By consent the plaintiff's suit be marked as withdrawn with no order as to costs. The plaintiff do have land known as IR.13623 surveyed and subdivided amongst his children and wives. The plaintiff do allocate 7 acres forming part of the land to the 1<sup>st</sup> defendant Florence Mwanika Ochieng. The parties to be allocated the land to enjoy it without any interference".**

8. That suit had been commenced by the plaintiff 5 years prior to the instant suit against the defendants herein and **8** others. The **8** were mere lessees on the suit land and despite the gravity of the orders sought herein, I find that their non-participation in this matter is of little consequence.

9. The following prayers are sought in this suit: -

**(a) A permanent injunction restraining the defendants into their respective portions given to them by the plaintiff on title deed IR No. 13623 that is to say the 1<sup>st</sup> defendant to be confined within 7 acres shown to her by the plaintiff while the 2<sup>nd</sup> to 4<sup>th</sup> defendant be confined to 2 acres each shown to them by the plaintiff.**

**(b) Costs of this suit.**

**(c) Any other relief that the court may deem fit to grant in the best interest of justice.**

10. The following prayers are sought in the counterclaim dated 29/5/2014 in this suit:-

**(a) A declaration that the parcel of land Title No. I.R. 13623 is equally retained and owned by the 1<sup>st</sup> defendant and the plaintiff only;**

**(b) Any such further relief as this Honourable Court shall deem fit to grant.**

11. In reply to the counterclaim in this suit the plaintiff joins issues with the defendant's defence and counterclaim.

12. It would appear whereas **Kitale HCCC No. 31 of 2009** was aimed at keeping the defendants out of the whole of the suit premises that is title No. **IR 13623** the instant suit sought to restrain the defendants from interfering with any other part of IR No. **13623** save the **7 acres** allegedly shown to the 1<sup>st</sup> defendant by the plaintiff and the aggregate of **6 acres** shown and allocated to the 2<sup>nd</sup> – 4<sup>th</sup> defendants in portions of **2 acres** each. At the time of filing of the instant suit it appears that there was no formal subdivision of the land. However on the **15/12/2014** the present applicant filed a notice of motion seeking to bar the respondents from interfering with any portions under occupation and use by other family members than the portions shown to them by the applicant.

13. The court was not convinced subdivision of the suit land had been carried in a manner that could enable the parties settle on definite demarcated portions on the ground. While dismissing the said application the court stated in paragraph 7 in the Ruling dated **25<sup>th</sup> February 2015** as follows:-

**“As said hereinabove, Kitale HCCC No. 31 of 2009 was compromised in terms of the consent therein. The applicant was to subdivide his land amongst his wives and children. There is no evidence that the applicant's land has been subdivided and completed in terms of the consent. The applicant did not demonstrate that he has allocated the respondents their portions. What the applicant has annexed is a proposed subdivision plan. The applicant has not indicated where the respondents are and where they are supposed to move to. The applicant has made generalized allegations that the respondents are threatening to plough portions of other family members. Those portions of other family members are not shown. It is therefore not possible to restrain someone from land which is not specified”.**

14. This did not deter the present applicant. On the 7/4/2017 he filed an application in **Kitale ELC No. 31 of 2009** seeking orders as follows:

**(4) THAT the Honourable Court be pleased to make a declaration that the plaintiff has since complied with the consent order made on the 25<sup>th</sup> November, 2013:**

**(6) THAT an injunction compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants either by themselves their servants or agents or otherwise howsoever, to remain, occupy and use the land more particularly referred to as LR. No. 30726/5 measuring 7.723 (Ha) or 19.099 acres represented by deed plan No. 404041 and not any other part of the land.**

**(7) THAT the Honourable Court be pleased to declare that the plaintiff is entitled to exclusive and unimpeded right of possession, use and occupation to properties more particularly known as**

**LR.30726/8;LR.30726/9;LR.30726/10;**

**LR.30726/12;LR.30726/13;LR.30726/14;**

**LR.30726/15;LR.30726/16;LR.30726/17;**

**LR.30726/18;LR.30726/19;LR.30726/20**

**LR.30726/21;LR.30726/22;LR.30726/23;**

**LR.30726/24;LR.30726/25;LR.30726/26;**

**LR.30726/27;LR.30726/28;LR.30726/29;**

**LR.30726/30;LR.30726/31;LR.30726/32;**

**LR.30726/33;LR.30726/34;LR.30726/35;**

**LR.30726/36;LR.30726/37;LR.30726/38;**

**LR.30726/39;LR.30726/40;LR.30726/41**

**LR.30726/42;LR.30726/43;LR.30726/44;**

**LR.30726/45;LR.30726/46;LR.30726/47;**

**LR.30726/48 (Hereinafter referred to as “the Suit Properties)”**

**(8) A declaration the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants, whether by themselves or their servants or agents or otherwise howsoever, are wrongly in occupation of the suit properties and are accordingly trespassers on the same.**

**(9) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, whether by themselves or their servants or agents or otherwise**

howsoever, are not entitled to remain on the suit properties and the Honourable Court be pleased to grant an order of injunction compelling the defendants, their servants or agents or otherwise howsoever who have already entered the suit properties to vacate the suit properties forthwith and in case of resistance be forcefully evicted by the OCS Kitale Police Station.

(10) The Honorable Court be pleased to grant an order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants, whether by themselves or their servants or agents or otherwise howsoever from re-entering the suit properties.

(11) The Honorable Court be pleased to grant an order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants, whether by themselves or their servants or agents or otherwise howsoever from interfering with the process of replacing beacons and further from interfering with the replaced beacons and the boundaries created thereto in whatsoever manner.

(12) THAT the court be pleased to grant an order of vacant possession of the suit properties.

(13) Any such other or further relief as this Court may deem appropriate.

(14) Costs of the application.

15. On 10/2/2017 the respondents were granted leave to file a response to the application within 14 days. That application was fixed for hearing for 3/7/2017, 3 months later. It was not heard on that date but on 14/7/2017 the plaintiff took a hearing date that is 26/7/2017 on which again the application was not heard. Vide a notice by the Deputy Registrar the parties were notified that the matters that had been scheduled for 26/7/2017 would be heard on 28/7/2017. On the 28/7/2017 when the matter came up for hearing the respondents had not yet filed a response. The court declined the respondents for adjournment and heard the application and set the matter down for a ruling on 24/8/2017. In a ruling dated 24/8/2017 on the application the court granted prayers No. 4,6,7,8,9,10, 11 and 12. The rest of the prayers (save prayers no. 1, 2 and 3 which had been dealt with at the ex-parte stage) were denied. After that the respondents filed an application dated 20/11/2017 seeking an injunction or stay of the execution of the orders of 24/8/2017 pending hearing and determination of an intended appeal against the said orders. That application was dismissed by this court vide a ruling dated 20/3/2018. Paragraph 4 in the Ruling dated 20<sup>th</sup> March 2018 stated as follows:-

**“No draft Memorandum of Appeal is annexed to the application and this court is unable to gauge the intended appeal in order to assess the probability of its success for the purpose of considering the injunction or stay orders sought.**

**Bearing in mind that even now the consent still subsists and no challenge has been mounted against the same, I find no good grounds to grant the current application. Consequently I dismiss the application dated 20/11/2017 with costs to the respondent”.**

16. It is therefore clear from what has been stated hereinabove that **Kitale ELC No. 31 of 2009** has been completely finalised. However although there is a notice of appeal dated 30/8/2017 filed in the matter on 4/9/2017 there is no indication that a substantive appeal has been filed in the matter against the orders of 24/8/2017.

17. After these events the defendants moved to the instant suit and lodged an application dated 11/12/2017 seeking orders of injunction to restrain the plaintiff from disposing of land title No. **IR 13623/6** being **LR No. 9071** or any resultant subdivision therefrom pending the hearing and determination of this suit. The court heard that application which was opposed by the plaintiff and dismissed the application in a ruling dated 26/4/2018. Paragraph 18 - 19 of the Ruling dated 26/4/2018 in the instant case stated as follows:-

**“18. Evidently, the torrential floods from the final consent of the parties in the case Kitale HCCC No. 31 of 2009 scoured bare every hillside, valley and plain of this litigation, the entire terrain, and the defendants are now bereft of any cogent argument that they could prop up to support their application dated 11/12/2017.**

**19. As long as the subject matter of the suit herein and Kitale HCCC No. 31 of 2009 are the same, and the prayers sought are similar in nature, and that consent in the earlier suit still stands, the orders sought by the defendants herein cannot be granted”.**

18. I now return to the instant application which seeks that this court be pleased to strike out the counterclaim and dismiss the suit by the defendants against the plaintiff on grounds of *res judicata* and for orders declaration that the plaintiff's instant suit against the defendant is already compromised in terms of consent orders made on 25/11/2013 and further orders made on 24/8/2017 in **Kitale ELC No 31 of 2009**.

19. The application is opposed by the respondents who filed their replying affidavit sworn by the 1<sup>st</sup> respondent on 25/1/2019 and filed on 28/1/2019. The gist of their response is that the instant application is an abuse of the court process as the instant was filed by the plaintiff while he was aware of the consent in **Kitale ELC No. 31 of 2009**; that the issue in the counterclaim has never been directly or substantially in issue in **Kitale ELC No. 31 of 2009** or in any other court of competent jurisdiction and in any event it was not raised in **Kitale ELC No. 31 of 2009** or decision made thereon; that the ownership of the property subject matter was never in issue in **Kitale ELC No. 31 of 2009** and the consent therein did not determine that issue; that the consent has never been complied with as the 1<sup>st</sup> defendant has never been shown the 7 acre portion allocated to her vide **Order No. 3** of the consent order; that the authenticity of the annexures marked **“NOO4A”** is doubtful as a search at the Lands Registry as at 23/2/2018 revealed that the mother title is still intact while no subdivision has been carried out; that the court erred in granting the order made on 24/8 2017 in **Kitale ELC No. 31 of 2009** as the said order cannot be granted on an application but only upon hearing on a substantive suit; that an appeal has been preferred against those orders and the pendency of the appeal does not allow the orders made on 24/8/2017 to be the basis or grounds of the instant application as the said orders cannot be said to be conclusive. She

depones that being a spouse to the plaintiff the plaintiff cannot purport to have an unfettered right to the property or any resultant to subdivision thereof or to be sole beneficial owner and disregard clear provision of the law when dealing with the said subdivisions. She further states that upon advice from her advocate she believes that allowing the instant application amounts to this court affirming its own orders that are the subject of an appeal to the Court of Appeal and prays that the application be dismissed with costs.

20. The defendants submissions filed on **11/3/2019** aver that the consent order in **Kitale ELC No. 31 of 2009** has never been implemented or complied with up to date. They aver that by the term of the consent the 1<sup>st</sup> defendant was entitled to be allocated **7 acres** and she was to get another share as a wife of the plaintiff. The further submission is made that annexure No. **“NOO4A”** annexed to the affidavit of the plaintiff does not show the 1<sup>st</sup> defendant 7 acres or her portion as a spouse of the plaintiff. However this is an issue the court dealt in the Ruling dated **24/8/2017** when it stated as follows:-

**“I have looked at the supporting affidavit carefully and found that the land that the plaintiff has reserved for the 1st defendant and her 3 children is more than 7 acres. It amounts to 19.09 acres. According to the plaintiff the 1st defendant's share out of that is 7 acres while the rest is for her children who are the 2nd, 3rd, 4th and 5th defendants.**

**I find this is a good arrangement which, though it has not carved out a specific parcel of 7 acres for the 1<sup>st</sup> defendant, has catered for the needs of the 1st defendant and secured the bonds of her family by including her children in the same portion. This is not a new practice. The court takes judicial notice that it is the norm in succession proceedings to group a widow and her children under the same share when distributing a deceased's estate. It should not appear strange when a husband who is alive groups his wife together with her children while sharing out property while he is alive.**

**In any event, there is no good reason that has been presented to this court why the 1<sup>st</sup> defendant and her children should not be given a consolidated land parcel.**

**Besides, if the 1<sup>st</sup> defendant and her children desire to have the land subdivided so that she may have a share of seven acres to herself that is a decision they have to make as a family henceforth without the input of the plaintiff as the power to deal with the land has already been placed in their hands.**

**It is in the public interest that all litigation must come to an end in some way. The consent signed between the parties on 27/11/2009 was geared towards bringing this litigation to an end and it has been substantially respected by the plaintiff. It is the proper position that the letter and spirit of Article 159(2) (b) of the Constitution of Kenya requires that justice shall not be delayed. Article 159(2) (c) requires that in exercising judicial authority, this court shall be guided by the principle that alternative dispute resolution, including reconciliation, mediation and arbitration shall be promoted. It appears that attempts to have the defendants participate in an expeditious resolution of this dispute have been thwarted by recalcitrance on the part of the defendants. The court should not condone this conduct.**

**Given the history of this matter and in particular the consent order which was not ever set aside, and the readiness of the plaintiff to have the matter concluded, it would be contrary to the interests of justice if this court allowed any party herein to engage in conduct that is plainly aimed at stymying the march of these proceedings towards their denouement; I classify failure by the respondents to attend meetings with the Chief despite invitation, failure to file any response to the instant application as well as the application for an adjournment made by Ms. Mwemeke in the category of such conduct”.**

21. That passage disposes of the argument raised by the defendants in the instant application to the effect that the 1<sup>st</sup> defendant's entitlement was not defined.

22. The second argument raised by the defendants is that they have preferred an appeal in Court of Appeal in respect of the orders made on **24/8/2017** and therefore the orders made on **24/8/2017** cannot form the basis of the plaintiff's instant application. They pray that it be dismissed for this reason. However this court must inquire as to whether there is indeed an appeal. Curiously, annexed to the replying affidavit of the defendants filed on **28/1/2019** is the same old notice of appeal dated **30/8/2017**; no other document is annexed to the affidavit to show that a substantive appeal has been filed. Nothing would have been easier for the deponent than to attach evidence of such a substantive appeal or any order of stay of proceedings from a higher court. Consequently the contents of **paragraph 9** of that replying affidavit are not sufficient to convince this court there is a pending appeal against the orders made on **24/8/2017** in **Kitale ELC No. 31 of 2009**. Besides, those orders of **24/8/2017** are not the orders that finalised that case; that case was finalised earlier by way of consent order of **25/11/2013**. A cursory glance of the handwritten proceedings reflects part of the consent which was dictated to the court by Mr. Ingosi for the defendants on that date read as follows:

**“By consent the plaintiff's suit be marked as withdrawn with no orders as to costs.”**

23. **Kitale ELC No. 31 of 2009** was a suit about the same land subject matter herein. The defendant's defence in that matter never raised the issue that the suit was matrimonial property as does the counterclaim dated **28/5/2014** herein. I have already stated that the consent in **Kitale ELC No. 31 of 2009** was recorded on **25/11/2013** before the counterclaim herein was filed. I must consider the counterclaim to be a separate suit, independent of the plaintiff's suit.

24. Whereas the instant case was filed in order to seek orders restricting the defendants to the plot that had been carved out of **IR No. 12623** and subsequently apportioned to them, the counterclaim herein raised the issue of “matrimonial property” based on the same facts as those in the plaint and defence in **Kitale ELC No. 31 of 2009** in which there was no counterclaim.

25. Having been filed after the consent in **Kitale ELC No. 31 of 2009** was recorded, that counterclaim appears to rehash the same matters that were resolved by the consent.

26. The basis for the application of the doctrine of *res judicata* in Kenya is **Section 7 of the Civil Procedure Act (Cap 21)** and, of course, ***the Judicature Act***. The material parts of **Section 7** provide that;

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any one of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”**

27. Going by the contents of **explanation No. 4** of the **Section 7** of the Civil Procedure Act the substantive issue of whether the suit land was matrimonial property or not fell under the category “*any matter which might and ought to have been made a ground of defence or attack in such former suit*” and which according to that Section “*shall be deemed to have been a matter directly and substantially in issue in such suit*”.

28. In view of the above the defendants’ prayer in the counterclaim dated 28/5/2014 which seeks a declaration that the parcel of land title No. **IR 13623** should be equally retained and owned by the 1<sup>st</sup> defendant and plaintiff only goes against the terms of the consent in **Kitale ELC No. 31 of 2009** for two reasons: first it seeks to exclude all the other wives who were encompassed by the consent and secondly it seeks to exclude the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants from any entitlement under that consent. It is quite clear that this court did not envisage that any such order can ever be granted in the future in the absence of a prior order setting aside the consent as that would lead to having two conflicting decisions on the record and embarrass the justice process.

29. The applicant has cited the cases of **Independent Electoral and Boundaries Commission -vs- Maina Kiai and 5 Others [2017] eKLR**, **William Koross (legal representative of Elijah C. A. Koross) -vs- Hezekiah Kiptoo Komen & 5 Other [2015] eKLR**, **Henderson -vs- Henderson [1843] 67 ER 313**, **Mburu Kinyua-vs- Gachini Tuti [1978] KLR 69** and other cases.

30. I will refer to the case of **Independent Electoral and Boundaries Commission -vs- Maina Kiai and 5 Others [2017] eKLR** in which the court stated as follows:-

**“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 suit. It is designated as a pragmatic and common-sensical protection against wastage of the time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, 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.”**

31. In the case of **Mburu Kinyua -vs- Gachini Tuti [1978] KLR 69** the court stated as follows:

**“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 parties to open the same subject of litigation in respect of a 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 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”.**

32. In my view whether the suit land was matrimonial property or not should have been fully litigated in **Kitale ELC No. 31 of 2009**. By conceding to the terms of the consent on behalf of his clients the plaintiff’s counsel waived the 1<sup>st</sup> defendant’s right to a claim of a matrimonial property within that suit and she cannot now be heard state that she has a new cause of action based on the same old facts that supported the plaint and the defence in that suit.

33. Though this court has been urged by the plaintiff to address the issue of *res judicata* with regard to the counterclaim, fairness must be exercised with dealing with the entire suit. The plaintiff’s perspective with regard to his suit herein is that it was compromised by the way of consent recorded on **25/11/2013**. However his suit herein was filed on **2/4/2014** after the consent had been filed. By this act of filing he exposed himself to the counterclaim raised by the defendants which I have observed to be *res judicata* as hereinabove. The question arises as to whether the plaintiff needed to file a new suit at all. In regard to this question this court will consider that the consent in **Kitale ELC No. 31 of 2009** had the effect of withdrawing that suit while allowing for the distribution of the land amongst the parties. The plaintiff may therefore be excused for having filed this suit thereafter. In any even this suit was calculated at obtaining orders restricting the defendants to the land apportioned to them under the terms of the consent record in **Kitale ELC No. 31 of 2009**. It appears that the recalcitrance of the defendants led to this suit and the plaintiff cannot therefore be blamed.

34. In the final analysis I find that whereas there was justification for the filing of this suit by the plaintiff, the pleadings herein should have been confined to the issue of whether the land had been properly distributed as per the consent that finalised **Kitale ELC No. 31 of 2009** and no new issues should have been raised that could render a mockery of the terms of the consent while it still stood valid. No appeal has been demonstrated to be pending with respect to the orders made on **24/8/2017** which orders in my view merely furthered the intent, spirit and purpose of that consent.

35. In my view therefore the plaintiff’s suit herein must be deemed to have been compromised by the terms of the consent and of the orders of **24/8/2017**. On the other hand the defendants’ counterclaim is *res judicata* on the basis of that same fact. It cannot be left standing alone

after the plaintiffs' suit has been marked as settled.

36. I therefore allow the application dated 7/11/2018 and issue the following orders:

(a) That the defendants' counterclaim dated 28/5/2014 is hereby struck out for being *res judicata*.

(b) A declaration that the plaintiff's suit as against the defendants stands compromised in terms of the consent orders made on 26<sup>th</sup> November, 2013 and the further orders of this honourable court made on 24<sup>th</sup> August, 2017 in High Court Civil Suit No. 31 of 2009.

(c) That each party shall bear the costs of the suit and counterclaim.

Dated, signed and delivered at Kitale on this 28<sup>th</sup> day of March, 2019.

**MWANGI NJOROGE**

**JUDGE**

**28/03/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for defendant

N/A for the applicants

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**28/03/2019**