



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 21 OF 2018**

**FLORENCE MWANIKA OCHIENG.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**NAHASHON OCHIENG ONYANGO.....1<sup>ST</sup> DEFENDANT/ APPLICANT**

**JOHN MARTIN SITUMA WEKESA.....2<sup>ND</sup> DEFENDANT**

**NANCY MUTHONI MUGO.....3<sup>RD</sup> DEFENDANT**

**KENNETH NYABERA.....4<sup>TH</sup> DEFENDANT**

**CHARLES BONYO.....5<sup>TH</sup> DEFENDANT**

**LINUS LIGARE.....6<sup>TH</sup> DEFENDANT**

**RAPHAEL KIOMO GITHINJI.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. The applicant brought an application dated 21/5/2018 seeking the following orders:-

(1) That the Honourable Court be pleased to order that this application be heard in priority to any other pending application hereto.

(2) That Honourable court be pleased to strike out the Plaint and dismiss the suit by the plaintiff as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendant/applicants hereto on ground of Res judicata.

(3) That consequent to the grant of the prayers above the Honourable Court be pleased to issue orders of injunction against the plaintiff, her servants, agents or even sons from interfering with the rightful possession of the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> defendants/applicants for peacefully enjoying use of the portions rightfully belonging to the 1<sup>st</sup> defendant and/or purchased from the 1<sup>st</sup> defendant.

(4) That this Honourable Court be pleased to issue order of injunction against the plaintiff, her servants and/or agents restraining them from trespassing on the properties rightfully belonging to the 1<sup>st</sup> defendant and those purchased by the 2<sup>nd</sup>, 3<sup>rd</sup> 5<sup>th</sup> and 6<sup>th</sup> defendants and the portion leased to the 7<sup>th</sup> defendant.

(5) That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

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

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

2. The grounds upon which the application is made are contained at the foot of the application. Succinctly put, they are that the declaration sought in this suit cannot be granted as the issue of ownership was determined by way of a consent recorded in **Kitale ELC 31 of 2009**, that

the defendant's right to sell was canvassed in **ELC 31 of 2009**; and that the suit is therefore contrary to **Section 7** of the **Civil Procedure Act**; that the court lacks jurisdiction to grant the orders sought; that the court is *functus officio*; that the motion sought the review of the judgment in **Petition 3 Of 2015**;

3. The applicant has brought the application pursuant to **Order 2 Rule 15(1) and Order 51 Rule 1** of the **Civil Procedure Rules (2010), Section 3, 3A, 7, 8 and 63 (e) of the Civil Procedure Act**. The application is supported by the sworn affidavit of Nahashon Ochieng Onyango on behalf of 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants.

4. **Section 7** of the **Civil Procedure Act** which is relied upon by the defendants states as follows:

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

*Explanation.* - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

*Explanation.* - (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

*Explanation.* - (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

*Explanation.* - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. (emphasis mine)

*Explanation.* - (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

*Explanation.* - (6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

5. The provisions above therefore bar any court from trying a suit or an issue:

a. 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;

b. and which has been heard and finally decided a competent court.

6. The issue of ownership of the suit land was directly in issue in **Kitale ELC 31 of 2009**. There was a final consent entered into by the parties in Kitale ELC 31 of 2009 completely settled that matter. The parties in that case were as follows:

NAHASHON OCHIENG ONYANGO.....PLAINTIFF

VERSUS

FLORENCE MWANIKA ONYANGO...1ST DEFENDANT

HENRY OTIENO.....2ND DEFENDANT

BERNARD OSORE.....3RD DEFENDANT

BENJAMIN OSENGO.....4TH DEFENDANT

PHILIP OPIYO.....5TH DEFENDANT

PETER GATIMU.....6TH DEFENDANT

EVERLYNE WANYAMA.....7TH DEFENDANT

JOHN SIMIYU.....8TH DEFENDANT

HALLIN WANYAMA.....9TH DEFENDANT

MARY PETER.....10TH DEFENDANT

ALICE WANYONYI.....11TH DEFENDANT

EVERLYNE SIMIYU.....12TH DEFENDANT

7. The descriptions of the parties in that suit were as follows: the **1<sup>st</sup> defendant** is the plaintiff's 3<sup>rd</sup> wife. The **2<sup>nd</sup> - 4<sup>th</sup>** defendants are the plaintiff's sons. The **5<sup>th</sup> - 12<sup>th</sup>** defendants are described in the plaint as unlawful lessees brought by the 1<sup>st</sup> to 4<sup>th</sup> defendants onto the land comprised in **Grant No. 13623** of which the plaintiff was the absolute proprietor. The plaintiff averred that the 1<sup>st</sup> defendant leased to the 5<sup>th</sup> - 12<sup>th</sup> defendants part of the land he owns without his consent. He also averred that the 1<sup>st</sup> - 4<sup>th</sup> defendants have prevented the plaintiff from subdividing, cultivating and using the property, hence that suit seeking an injunction. It is clear that the 5<sup>th</sup> to 12<sup>th</sup> defendants in that suit could only claim under the 1<sup>st</sup> defendant. Similarly, the 2<sup>nd</sup> to 7<sup>th</sup> defendants in the instant suit are alleged in the plaint to be lessees or purchasers and they can only claim under the 1<sup>st</sup> defendant herein. In the end I find that the real dispute over the land herein is really between the plaintiff and the 1<sup>st</sup> defendant. Indeed the other parties have hardly filed anything in the suit. This suit therefore meets one requirement of a suit challenged under **Section 7** of the **Civil Procedure Act** as parties are the same, or can be deemed to be claiming under one of the main parties who are identified as husband and wife in this suit.

8. The consent of the parties dated **25<sup>th</sup> November, 2013**, in that **Kitale ELC 31 of 2009** was as follows:

"(1) **The plaintiff's suit is marked as withdrawn with no orders as to costs.**

(2) **That the plaintiff do have land known as IR 13623 surveyed and subdivided among his children and wives.**

(3) **That the plaintiff do allocate seven (7) acres forming part of the land to the 1<sup>st</sup> defendant Florence Mwanika Ochieng.**

(4) **The parties to be allocated the land to enjoy it without any interference".**

9. That was the end of that suit. An application by the defendant herein was filed in **Kitale ELC 31 of 2009** seeking the following orders:

1) **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:**

(2) **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.**

(3) **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.30726/2; LR.30726/7; 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")

(4) 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.

(5) 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.

(6) 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.

(7) 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.

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

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

(10) Costs of the application.

10. In a ruling on that Application this court stated as follows:

“21. 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.

22. 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.

23. I therefore find that the plaintiff's application dated 7/4/2017 is for the greater part merited and I grant prayers Nos. 4, 6, 7, 8, 9, 10, 11 and 12.”

11. It is clear from the above passage that this court has already pronounced itself on the issue of ownership of the land with finality in that former suit.

12. The only issue addressed in the instant suit which was not addressed in **Kitale ELC 31 of 2009** was that of matrimonial property. The issue of matrimonial property could not have arisen in this suit unless the plaintiff and the 1<sup>st</sup> defendant were spouses. The resolution in **Kitale ELC 31 of 2009** ought to have taken that into consideration. The parties never addressed it directly. However it is noteworthy that by virtue of the consent in that suit the plaintiff herein was given the seven acres that is comprised in a larger parcel that is **LR. No. 30726/5**. The relevant deed plan number is **404041**. In my view, she could not have been given the 7 acres in any other capacity other than as a wife to the 1<sup>st</sup> defendant. The probable end-result of claiming matrimonial property rights would have possibly been a declaration of entitlement to some land on the part of the plaintiff, the size of which can not be determined now for the reason that the bringing to an end of that suit by way of a consent of the parties shut that issue out. The parties must be deemed to have been conscious of that fact at the time of the execution of the consent.

13. Therefore, in my view the issue of matrimonial property ought to have been raised in **Kitale ELC 31 of 2009** and not in a separate suit, as it arose out of the relationship between the plaintiff and the 1<sup>st</sup> defendant.

14. The consent entered into by the parties on 26<sup>th</sup> November 2013 completely settled **Kitale ELC 31 of 2009**. The court observed as much in **Kitale ELC 59 of 2014** when it stated as follows:

“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.”

15. Having held as above in **Kitale ELC 59 OF 2014**, this court is of the view that it has already expressed itself on the matter of *res judicata* relating to ownership of the suit land, albeit in another related suit. There is no need to belabor the point here: the instant suit is *res judicata*. To reach any finding in this suit different from the consent of the parties in **Kitale ELC 31 of 2009** is to reopen litigation that

should remain closed unless on appeal or review.

**16.** By dint of **explanation (4)** in **Section 7** of the **Civil Procedure Act** the matters that the plaintiff never raised in an already concluded suit can not be raised here.

**17.** However, I am alive to the pendency of **Kitale ELC 59 of 2014** and that the application dated **21/5/2018** seeks more than a declaration of res judicata.

**18.** If I have found that this suit is res judicata, I must down my tools and therefore decline the grant of any other order which if subsequently issued would not be consistent with the finding of *res judicata*. I must therefore reject prayers **3, 4, 5, and 6** of the application dated **21/5/2018**.

**19.** In the end I only grant **prayers (2) and (7)** of the application dated **21/5/2018**. This suit is therefore struck out with costs to the applicants.

It is so ordered.

**Dated, signed and delivered at Kitale on this 25<sup>th</sup> day of October, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**25/10/2018**

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for plaintiff

N/A for defendants

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**25/10/2018**