



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L NO. 786 OF 2012**

**(Formerly Hcc No. 212 of 2011)**

**SAMUEL KIPLANGAT NAMINI .....1ST**  
**PLAINTIFF**

**MARK KIMUTAI YAGAN ..... 2ND**  
**PLAINTIFF**

**ISAAC KIPRUTO BETT..... 3RD**  
**PLAINTIFF**

**VERSUS**

**THE TOWN COUNCIL OF ELDAMA RAVINE .....1ST**  
**DEFENDANT**

**MARY KEMBO ..... 2ND**  
**DEFENDANT**

**SMITH KIPLECH TANUI ..... 3RD**  
**DEFENDANT**

**JOSPHAT KIYENG.....4TH**  
**DEFENDANT**

**ERIC MALAL .....5TH**  
**DEFENDANT**

**UCHUZI SUPERMARKET LTD .....6TH**  
**DEFENDANT**

**CYRUS THUKU.....7TH**  
**DEFENDANT**

**MAMA KIUMBA .....8TH**  
**DEFENDANT**

**MAINA .....9TH**  
**DEFENDANT**

## RULING

On the 11.11.2014, the applicants filed the application herein by way of notice of motion for leave to be enjoined to this suit as co-defendants and that in the alternative E & L Case NO. 518 of 2013 be consolidated with this matter and that the proposed co-defendants be granted leave to file their pleadings in this case within 14 days. The applicants' application is based on grounds that he is a businessman at Eldama Ravine Township operating from a container in the disputed parcel which in his view is a public utility as it is a bus stage.

That he is informed by his counsel on record that issues raised in ELC No. 518 of 2013 are substantially the same with issues in this matter. On the 9th October 2014, this Honourable Court ordered the defence to re-open its case and stayed E & L Case No. 518 of 2013 wherein they are the plaintiffs and the respondents are the defendants. Upon issuance of the order re-opening the defence case, their counsel on record immediately made an application for them to be enjoined in these proceedings. However, the plaintiffs and the defendants herein for ulterior motives riddled with corruption and impunity entered into a consent dated 24th November, 2014 vacating the above order and restoring judgment dated 17th July, 2013 without consulting them despite the fact they are proper parties to the suit being in actual occupation of the suit land with genuine interest in the outcome of this suit. The plaintiffs have now threatened to forcefully evict them from the suit land on basis of the impugned consent order. They have been condemned unheard and now stand to suffer irreparably unless this application is heard urgently as they have been occupying the disputed parcel for many years doing their various businesses with permits from the 1st defendant whom they expected to protect their interests. They claim to have various businesses on the disputed parcel and unless the reliefs sought are granted they stand to suffer severe blows to the only means of earning a living.

They believe that the defendants herein shall not suffer any prejudice should the orders sought be granted. Conversely, any eviction orders given by this honourable court shall greatly prejudice and threaten their fundamental rights and freedoms including the inherent right to be heard.

In the supporting affidavit of **Reuben Cherutich Chelagat**, the applicants state that he is a businessman at Eldama Ravine Township operating from a container in the disputed parcel which in his view is a public utility as it is a bus stage.

That he represents a group of traders as their chairman and the group number is over 70 members who have formed a Sacco known as Ravine Stage Business Sacco Society Ltd.

That they were urged by the government to form a Sacco to streamline the operations at the market and the bus stage which is normally a beehive of activity during the day but used to operate prior to formation of the Sacco as individual traders and were paying for licences and permits to the then Eldama Ravine Town Council. He is informed by his counsel on record, which information he believes to be true and correct, that issues raised in ELC No. 518 of 2013 are substantially the same issues raised in these proceedings and it is only fair that the two matters are consolidated to save on precious judicial time and strongly believes that they have a good defence to the suit.

He alleges that the plaintiffs herein for ulterior motives did not name them as the defendants and failed to notify them completely of any pending suit despite the fact that they are proper and necessary parties in this proceedings being in occupation of the suit land. They claim that the disputed land is a public property and the same is not available for private use. He does not see any prejudice that the respondents will suffer if they are accorded a chance to in the very least make their representations to this honourable court and allow the court to determine the merit of their concerns. That it is therefore just and fair that they are enjoined in this suit since they have a genuine interest in the outcome of this case.

That any eviction orders given by this honourable court shall greatly prejudice and threaten their fundamental rights and freedoms including the inherent right to be heard.

The second Notice of Motion before court is dated 16.12.2014 in which the applicants seek an order that

pending the hearing of E & L Case No. 518 of 2013, there be a stay of execution of consent order dated 24.11.2014 and judgment dated 17.7.2013 and all consequential orders and that the judgment entered in this case, consent dated 24.11.2014 and all consequential orders that directly affect the applicants herein be varied and or set aside.

The application is based on grounds in the Notice of Motion and supported by the affidavit of **Rueben Cherutich Chelagat** who states that issues raised in ELC No. 518 of 2013 are substantially in issue in this matter and that the applicants have been occupying the disputed parcel for many years doing their business with permits from local authority and derive their livelihoods from the same the addition of the applicants as parties to this suit is necessary for the purpose of determining the real matter in dispute. The presence of the applicants before this honourable court is necessary to enable the court to effectively and completely adjudicate upon and settle all questions raised in this suit. That the plaintiff failed to disclose the fact that the applicants are proper parties to the suit as they are in actual occupation of the suit land and any decision made by the honourable court directly touch and affect them. The applicants were neither named in the suit nor served despite the fact that the prayers sought in the suit directly affect them as they are in actual occupation of the suit land.

The 1st, 2nd and 3rd plaintiffs/respondents filed a replying affidavit through **Mark Kimutai Yagan** of P. O. Box 101, Eldama Ravine stating that the applications herein are incompetent and unmeritorious. That the applicants are not parties to the suit but continue to file documents in this suit. The respondent states that the applicant has not been punished unheard as they are not parties to suit. The land is not public land as the respondents have title. They claim that the applicants have been occupying the land illegally. The eviction evident on the applicants is as a result of a suit that was heard and concluded therefore the matter was closed and re-opening it will prejudice the respondents. That through the consent dated 24.11.2014, judgment of 17.7.2013 was restored and the order setting aside the judgment was vacated.

**Lilian J. Sadalla**, the County Executive for Lands, Housing and Urban Development, Baringo County depones that she is informed by her advocate on record, which information she believes to be true that the Applicants herein who are the Plaintiffs in High Court E&L No. 518 of 2013 agreed to stay their case aforesaid and await the outcome of this case as their case had no basis as they literally pinned their hopes on the 1st defendant shouldering them since the 1st defendant was agitating the public interests. Furthermore, that since the Applicants had no proprietary interest in the property they have no locus standi to agitate this application. That she is further informed by her advocate that since this matter is finalized by consent of the parties, no useful purpose will be served by an order for consolidation of the suits.

She concedes that the Honourable court ordered that the defendant case be re-opened in a ruling delivered on 9th October, 2014 pursuant to their application dated 15th November, 2013. That they thereafter filed their list of documents, list of witnesses and witnesses' statements but upon careful scrutiny of their defence case and counterclaim, they realized that their defence case was built on weak evidence and they therefore instructed their advocate to record the consent dated 24th November, 2014 restoring, the judgment delivered herein on 17th July, 2013 and withdrawing their counterclaim with no orders as to costs. The withdrawal of the counterclaim was made in good faith to save on costs as they had no strong evidence to challenge the Plaintiff's titles to the land parcels in question. She is informed by her advocate that they did not need the consent of the Applicants to enter into the said consent as they were not parties to the suit and that the Applicants are not prejudiced by the consent aforesaid since they have an opportunity to proceed with their case No. 518 of 2013 which sit is independent of the proceedings in this case and therefore in the circumstances, she believes that the Applicants' application have no basis both in law and in fact, reason wherefore she prays that the said application be dismissed with costs.

The applicants filed a supplementary affidavit stating that on 19th November, 2013 they sought to be enjoined in these proceedings upon learning of eminent eviction however, the matter was already pending for judgment when it came to their notice and the trial court advised them to file a separate suit which advice they immediately heeded and complied as evidenced in plaint on record. That the 1st defendant subsequently moved the honourable court seeking to set aside the judgment and decree and have the defence re-opened.

That the 1st defendant's application dated 15th November, 2013 was heard and allowed by the honourable court purely on grounds of public interest in the suit lands vide a ruling dated 9th October, 2014. That their counsel on record immediately filed their application to be enjoined in these proceedings on 11th November, 2014 which application was due for hearing land determination.

That however, to their shock the plaintiffs and the 1st defendant entered into consent to their exclusion while clearly knowing that they were a necessary party in these proceedings being in occupation of suit lands and whose terms of consent adversely effected them.

That the effect of the said consent is to evict them from the suit land and condemn them without hearing wherein they operate their businesses having been licensed by the 1st defendant upon paying for the permits as the suit lands herein constitute the only bus stage in Eldama Ravine township being a public utility. That E & L Case No. 518 of 2013 was stayed on the premise that this matter had been re-opened to be determined on merits and the actions of the respondents can only be described as aimed at defeating their interests in these proceedings.

For this court to determine this dispute in view of the two applications, it has waded into the history of the matter. This suit was commenced on the 13th of March, 2008 in the High Court of Kenya at Nakuru as Hccc No. 81 of 2008 when the plaintiffs sought a declaration that the 1st and 2nd plaintiffs were the lawful owners of L. R. 498/654 whilst the 3rd plaintiff was the lawful owner of L. R. 498/655 and that the defendants have trespassed thereon hence prayed for their eviction and mesne profits. The plaintiff finally prayed for a permanent injunction against the defendants from trespassing on the suit lands. The 7th defendant entered appearance and filed defence on the 6.6.2008 whilst the 1st defendant filed a detailed defence and counterclaim on 24.6.2008. The 1st defendant alleged that the plaintiffs obtained title to the suit property fraudulently and through misrepresentation and also alleged that the allotment letters obtained by the defendants was done fraudulently the land being public utility land.

The plaintiffs replied to the defences and counterclaim denying that the suit lands were public utility and that the procedures prior to ***Government Lands Act Cap. 280 (repealed)*** were followed. All the allegations in the defence and counterclaim were denied.

In the year 2011, the suit was transferred to Eldoret and given a new number thus Eldoret Hccc No. 212 of 2011 and thereafter was heard in Eldoret and judgment delivered on the 17.7.2013.

**On the 18th November, 2013**, the applicants herein thus Charles Chebet, Reuben Chelagat and Michael Kimani brought an application for stay of execution pending the hearing of the application and praying that the judgment and all consequential orders to be set aside and the applicant be granted leave to defend the suit and the draft defence be deemed as duly filed upon payment of fees. The application was based on grounds that they were faced with an eviction despite the fact that they were not parties to the suit and that they were in occupation of the suit property constructing business thereon. This application was never canvassed and was overtaken by events.

The 1st defendant also filed an application **on the 19.11.2013**, seeking for review of the judgment decree and all consequential orders of the court on grounds that the 1st defendant was not heard and yet the suit properties were public property having been reserved for a bus park but were irregularly acquired by the plaintiffs.

The honourable court heard the application for review and was swayed by the public element that the property in contention were public land and therefore there was need to review his judgment. The judgment entered on 17.7.2013 was therefore reviewed and set aside. The court re-opened the case for the hearing of the defence of the 1st defendant only and set for hearing on 15.12.2014.

On the 1.12.2014, the registry received a written consent of both parties which was placed before the Deputy Registrar whose import was that:

1. ***The order setting aside the judgment delivered on 17.7.2013 is hereby vacated.***

2. ***The judgment delivered on 17.7.2013 is hereby restored.***
3. ***Each party to bear own costs.***
4. ***The 1st defendant's counterclaim is hereby withdrawn with no order as to costs.***

The aforesaid consent prompted the applicants to file the application dated 16.12.2014 as the applications dated 11.11.2014 had been filed.

The applicants through ***Kibii, learned counsel*** submit that they filed case No. 518 of 2013 wherein they are 72 members having sued the respondents herein and Baringo county, however, the suit was stayed to await the outcome of Eldoret E & L No. 786 of 2012. The Judge when making directions in case no 518 of 2013 observed;

***“I have ordered the re-opening of the defence case. In my opinion, the issues in the suit are the same as the issues in E & L No. 786 of 2012. I therefore, stay this suit pending hearing and determination of the case No. E & L NO. 786 of 2012”.***

The applicants filed an application to be enjoined in this suit herein, however before it could be heard, the respondents entered into a consent therefore, defeating the application. The applicants suspect that the consent was entered with the sole purpose of subverting justice and circumventing Judicial process and to deny the applicants a hearing. The 1st, 2nd, 3rd plaintiffs on their part submit that the plaintiffs are protected under Article 40(1) of the Constitution. They submit that the applicants and defendants intend to arbitrarily deprive the plaintiffs of their right to property and to deny them of their enjoyment thereof. The respondents argue that they have legitimate titles to the suit land parcels. Moreover, they argue that the suit herein is *res judicata*. The respondents further argue that the consent was legitimate and that the applicants are strangers to this suit.

***On locus standi***, the respondents argue that the applicants have no *locus standi* assuming that the property was public land as the 1st defendant is the only person mandated to protect public property.

The 1st defendant/respondent on his part argues that the consent was entered in good faith and in any event, the applicants will not suffer any prejudice as they still have an opportunity ventilate their case No. 518 of 2013 where they are plaintiffs in the said case and which is independent of this suit. The 1st defendant further argues that the applicants have no *locus standi* and have no basis for setting aside the consent dated 24.11.2014 and entered in the court record on 1.12.2014.

I have considered the two applications and do find the following issues ripe for determination:

1. ***Whether the applicants have shown sufficient interest in the matter.***
2. ***Whether the issues in 786 of 2012 are similar to the issues in 518 of 2013.***
3. ***Whether the consent entered into on 24.11.2014 was proper.***
4. ***Whether the suit is res-judicata.***
5. ***Whether the plaintiffs' titles are indefeasible.***

### **1. WHETHER THE APPLICANTS HAVE SHOWN SUFFICIENT INTEREST IN THE MATTER**

This court finds that the applicants are the persons who are in occupation of the suit lands and have been in occupation for many years doing business with permits from the local authority and have been sustaining themselves and families from the suit land. They have formed the Ravine stage business savings and credit co-operative society Ltd and earning a living from the disputed parcels of land by doing businesses of ***tailoring shop, Mali Mali shop, retail shop, she doctor, Electric shop, cereals shop, clothing shop, school, Dairy, health clinic***, the list is endless. It is obvious that the applicants have actual interest in the land case of the suit being the real occupants. They have filed a suit thus E&L No. 518 of 2014 which went before Honourable Justice Munyao on the 9th day of October 2014 who stayed suit pending the outcome of this suit, the honourable Judge having been informed by the 1st defendant that the land in dispute was public land. I do hold that the applicants have *locus standi* to agitate this

matter as the suit land is alleged to be public land and that the same is being occupied by the applicants.

## **2. WHETHER THE ISSUES IN 786 OF 2012 ARE SIMILAR TO ISSUES IN 518 OF 2013**

The issue in Eldoret E&L 786 of 2012 is whether the suit lands were private property and that if the same were private properties, did they belong to the plaintiffs or the 2nd – 9th defendants? If they were public properties, then did they belong to the 1st defendant. Whilst the issues in Eldoret E&L 518 OF 2013 are whether the applicants have a stake or rights as residents of Eldama Ravine Townships and its environs over the bus stage grounds at Edama Ravine, an alleged public utility but illegally converted into private property. This court finds that in the suit are similar as the main issues in both suits being whether the property in dispute is public land or private land.

## **3. WHETHER THE CONSENT ENTERED INTO ON 24.11.2014 WAS PROPER**

The respondents argue that the consent entered on 24.11.2014 was entered into in good faith. The applicants think otherwise. This court finds that the consent was entered into despite a pending application by the applicants to be enjoined as parties. Why were the applicants ignored in the consent and yet there was an application on record for the applicants to be enjoined as defendants. The court finds that had the Deputy Registrar been informed that the consent was filed after the applicants sought to be enjoined as co-defendants, the consent order could not have been granted. Moreover, there is no evidence that the Deputy Registrar was made aware of the existence of another suit similar to the suit herein which had been stayed pending the hearing and determination of the the suit herein. When the court made the order, it believed that the 1st defendant would protect the interest of the applicants having argued that it was interested in protecting public interest as the suit land was public land. The consent entered into by the parties was against public interest and appears to have been entered into to circumvent the due process of the law.

## **4. IS THE SUIT RES-JUDICATA?**

The law pertaining to the doctrine of res judicata is captured under the provision of Section 7 of the Civil Procedure Act which provides 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.”*

For a preliminary objection of *res judicata* to succeed one must demonstrate that the matter in issue is identical in both suits and that the parties in the suit are the same. Sameness of title, concurrence of jurisdiction, finality of the previous decision are clear principles to be considered for the court to declare a suit res-judicata. This court finds that the parties are not the same though the issues are the same as the applicants are not yet parties in the suit herein.

## **5. WHETHER THE PLAINTIFF'S TITLES ARE INDEAFISBLE**

The court finds that the issue of indefeasibility of title cannot be determined by consent. The 1st defendant having been allowed to pursue the defence on public interest in view of the land in contention being public land failed to protect the said public interest by abducting in duties and entering into a consent. The 1st defendant through its officer swore an affidavit that the land in dispute was public land and was granted orders reviewing the judgment entered on 17th July 2013. To come back to court with a consent setting aside the order for review was suspect. Without going into the merit of the two suits I do find that Article 40 of the Constitution of Kenya protects interest in land with a rider that property acquired unlawfully cannot be protected by the constitution.

The upshot of the foregoing is that the judgment entered into by consent of the parties on the 24th of

January 2014 is set aside due to public interest. Ultimately, Eldoret E & L 786 of 2012 and Eldoret E& L 518 of 2013 are hereby consolidated. Proceedings to be undertaken in Eldoret E& L 518 of 2013.

**DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF NOVEMBER, 2015.**

**ANTONY OMBWAYO**

**JUDGE**