



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 878 OF 2013

HON. GIDION MIKE MBUVI.....PLAINTIFF

VERSUS

REGISTERED TRUSTEES OF NATIONAL

CHRISTIAN COUNCIL OF KENYA.....1ST DEFENDANT

TRANQUILITY DEVELOPMENT LIMITED.....2ND DEFENDANT

NATIONAL LAND COMMISSION OF KENYA.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

Introduction

The Plaintiff filed the suit herein by way of a Plaint dated 22nd July 2013, and on the same date also filed a Notice of Motion of even date seeking injunction orders against the 1st Defendant to restrain it from removing or erecting structures, developing, charging, transferring, alienating, selling, gifting or dealing in any manner whatsoever with the Land Reference Number L.R. No. 209/9324 (hereinafter referred to as the suit property), pending the hearing and determination of the suit filed herein. He also sought an order that the Officer Commanding Police Division Buruburu do ensure compliance and enforcement of this Court's Order.

The grounds for his Notice of Motion are that on 1st July, 1993, the President of the Republic of Kenya, through the Commissioner of Lands made a Grant to the 1st Defendant of the suit property pursuant to the provisions of the repealed Registration of Titles Act, and that a Certificate of Title was issued to the 1st Defendant. Further, that the grant had special conditions attached to it which the 1st Defendant did not comply with, and that in further breach without consent from the 3rd Defendant and/or an illegal consent if at all one was obtained, the 1st Defendant has transferred the suit property to the 2nd Defendant.

The Plaintiff further avers that the 2nd Defendant using the title obtained from the 1st Defendant has evicted more than 20,000 Kenyans who were lawfully eking a living on the said land, it being a public land after the 1st Defendant failed to comply with the conditions of the grant. The Plaintiff attached a

copy of certificate of the grant issued to the 1st Defendant with respect to the suit property to his supporting affidavit sworn on 10th July 2013.

The Plaintiff further stated that he tried to fight the Defendants' action by challenging the evictions of the members of the public in CMCC No. 7708 of 2012 (Nairobi) where he sought to be enjoined as an interested party. He annexed copies of the pleadings and order given in the said suit. However, that his efforts have been met with resistance from the Defendants who have sued him in Nairobi ELC No. 708 of 2003 for trespass to the suit property. The Plaintiff also attached copy of the pleadings and orders given in Nairobi ELC No. 708 of 2003. The Plaintiff contended that the 2nd Defendant is not the legal owner of the suit property as the previous proprietor, the 1st Defendant, did not pass a clean title to them, and that the said property is and remains public land.

The Preliminary Objections and Responses

The 1st and 2nd Defendants subsequently filed Notices of Preliminary Objection. The 1st Defendant grounds of objection in its Notice of Preliminary Objection dated 2nd August 2013 were as follows:

1. The matters impleaded by the Plaintiff are *res judicata* and this Court has no jurisdiction to try them the same having been directly and substantially in issue in High Court Civil Case No. 932 of 1996 - **Classic Jua Kali Co-operative Society Ltd –vs- The National Council of Churches of Kenya** and in Civil Application No. Nai 190 of 2000 in the Court of Appeal, being **Classic Jua Kali Co-operative Society Ltd –vs- the National Council of Churches of Kenya**, and the Plaintiff herein is agitating this suit in disguise of and/or under and on behalf of the same members of Classic Jua Kali Co-operative Society Ltd who were parties in the previous suit and is litigating under the same title. That persons who have litigated a dispute should not be permitted to mutate themselves, disguise themselves or use proxies to litigate matters already conclusively determined by a court of the same jurisdiction.
2. The suit is an abuse of the process of Court as the Plaintiff is already party to High Court ELC No. 708 of 2013 – **Tranquility Development Limited –vrs- Hon. Gedion Mike Mbuvi and Hon. Rachael Shebesh** which case touches the same suit property in this case, and which prior filed ELC 708 of 2013 is pending for hearing and determination. This Court consequently has no jurisdiction to proceed any further with this present suit while the first filed suit is pending in Court.
3. The Plaintiff has no legal standing to maintain the claim as to the sanctity, integrity and transferability of the Title L.R. No. 209/9324, as the High Court in HCCC No. 932 of 1996 – **Classic Jua Kali Co-operative Society Ltd –vs- The National Council of Churches of Kenya and Others** conclusively determined that there was no trust extant in relation to the Title as held by the 1st Defendant, and which the 1st Defendant on 15/02/2013 lawfully transferred to the 2nd Defendant. Further, that the Plaintiff's posturing that L.R. No. 209/9324 is public land is arrant impudence in the light of the judgment of the High Court in HCCC No. 932 of 1996.
4. That in furtherance of the overriding objectives of the Civil Procedure Act and the Rules made thereto and for the timely disposal of proceedings that this Court looks at the decisions made by this same High Court in HCCC No. 932 of 1996 and the Court of Appeal in Civil Application No. 190 of 2000, and peremptorily dismiss this suit as an abuse of the process of the Court and the matters pleaded in this suit being *res judicata* as the same are panel beaten, recast issues that were previously determined.

The 2nd Defendant's grounds of objection in its Notice of Preliminary Objection dated 1st August 2013 were as follows:

1. The Plaintiff does not have *standi* to bring this suit.
2. The entire suit and application herein is *res judicata* and ought to be struck out.
3. The suit is an abuse of Court process as it does not raise any triable issues

All the Defendants also filed replying affidavits to the Plaintiff's Notice of Motion. The 1st Defendant in

a replying affidavit and further affidavit sworn by its Deputy Secretary General, Oliver Kisaka Simiyu, on 2nd August 2013 and 10th September 2013 respectively, stated that the 1st Defendant was the registered proprietor of the suit property until 15th February 2013 when it transferred the same to the 2nd Defendant for valuable consideration. Further, that the suit property has always, at all material times been private land.

The 1st Defendant contended that the attempt to impeach the 1st Defendant's absolute and indefeasible title to the suit property through HCCC No. 932 of 1996 was rejected by the High Court in the judgment of Mbaluto J. (as he then was) dated 24th September 1999. Further, that the 1st Defendant in 2012 issued a Notice of Termination of tenancy to Classic Jua Kali Co-operative Society Ltd under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301 of the Laws of Kenya) which was not challenged, and subsequently obtained an eviction order in the Chief Magistrates Court in Nairobi Civil Case No. 7708 of 2012. The 1st Defendant averred that the Plaintiff herein applied to court and was enjoined into Chief Magistrate Court Civil case No. 7708 of 2012 as an Interested Party.

The 1st Defendant further averred that the persons the Plaintiff contemplates to represent in this suit and in **The National Christian Council of Churches of Kenya vs. Classic Jua Kali Co-operative Society Ltd**, CMCC No. 7708 of 2013 and in **Tranquility Development Limited vs. Hon. Gideon Mbuvi and Hon. Rachael Shebesh**, HCCC 708 of 203 are members of the Classic Jua Kali Co-operative Society Ltd, and the same were the plaintiffs in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others**, HCCC No. 932 of 1996 and in **Classic Jua Kali Co-operative Society Ltd vs. The National Council of Christian Churches of Kenya and Others** C.A Civil Application No. Nai 190 of 2000. The 1st Defendant annexed copies of the title deed to the suit property, and of the judgment and orders given in the above-cited cases.

The 2nd Defendant in a replying affidavit sworn on 16th August 2013 by Zoher Pirbhai, its Managing Director, stated that it purchased the suit property from the 1st Defendant in 2013, and followed all the legal requirements in obtaining title to the land which included obtaining consent to transfer from the Commissioner of Lands. Further, that it ascertained that the 1st Defendant was the registered proprietor of the said property, and that the issue of the suit property being public land is misleading and inaccurate. The 2nd Defendant stated that it has obtained change of user approval from the concerned authorities, and has already carried out substantial developments on the suit property including erection of a perimeter wall and extension excavation.

The 3rd and 4th Defendants also filed a replying affidavit sworn on 2nd October 2013 by Gordon O. Ochieng, a Principal Land Administration Officer at the Ministry of Lands. The Deponent stated that according to records held by the Ministry of Lands, Housing and urban Development the 1st Defendant was allocated the suit parcel herein by way of a letter of allotment dated 2nd March 1978. Further, that the said allocation was given to the 1st Defendant free by the Government to build sheds for Small Scale Industries in the name of "Pilot Project for Light Industries", and was planned by the Department of Physical Planning for purposes of development of light industrial development vide Part Development Plan No. 42//1B/75/2A dated 15th July 1975 which was approved by the Commissioner of Lands on 16th November 1976.

The Deponent further averred that the 1st Defendant wrote to the then Commissioner of Lands in letters dated 23rd November 1977, and 28th March 1978 confirming that they were carrying out an initial survey to determine the types of industries to be included in the project and the specific people were intended to benefit from the project. Further, that they were proceeding with development work to assist the less fortunate members of society who wished to engage in certain artisan trades.

Lastly, the Deponent contended that although the Commissioner of Lands granted his consent to transfer the suit property to the 2nd Defendant, this consent did not exempt the 2nd Defendant from performance of the conditions of the grant requiring them to submit building plans for approval, and to obtain approval

for a change of user from light industrial purposes, which it had not done. The deponent annexed copies of the allotment letter, part-development plan and the letters referred to in the foregoing.

The Submissions

The parties were directed to file written submissions on the 1st and 2nd Defendants' preliminary objections. The 1st Defendant's counsel in submissions dated 10th September 2013 argued that the Classic Jua Kali Co-operative Society are using the Plaintiff to relitigate matters that were heard and determined in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996**, where the Court dismissed their efforts to impeach the 1st Defendant's then title to the suit property its right to alienate and transfer the property, and that by so doing hope to obtain a different outcome. The counsel relied on the decisions in **Benjoh Amalgamated Ltd & Another vs Kenya Commercial Bank Ltd (2006) e KLR** and **Pop-In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich (1990) KLR 609**, as well as on section 7 of the Civil Procedure Act for the argument that the doctrine of *res judicata* applies. He also relied in various decisions of the Supreme Court of Kenya including **In the Matter of the Interim Independent Electoral Commission (2011) e KLR** to submit that this court thereby had no jurisdiction to entertain the Plaintiff's Notice of Motion and entire suit.

The counsel for the 1st Defendant further submitted that the suit and Notice of Motion herein are an abuse of the process of court as the Plaintiff is already a party to **Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another, ELC No. 708 of 2013**, and is the raising the same issues in this suit as those he raised in ELC 708 OF 2013. Further, that this court is therefore obliged by section 6 of the Civil Procedure Act to stay this suit. The counsel also relied on the decision in **Ngongah vs Khan and Associates (1996) LLR 5603 (HCK)** in this respect.

The 2nd Defendant's Counsel filed submissions dated 10th October 2013, wherein he contended that the Plaintiff in paragraph 2 of his Complaint claims to bring this suit in a representative capacity, on behalf of persons evicted from the suit property or affected by the cause of action therein. It was submitted that the Plaintiff has no *locus standi* to bring the suit as he has not complied with the provisions of Order 1 Rule 8 of the Civil Procedure Rules as to the filing of representative suits, and because in his individual capacity he does not have a cause of action against the 2nd Defendant, neither has he suffered any loss as a result of the 2nd Defendant's ownership of the suit property.

The counsel further submitted that the suit herein is *res judicata* as the Plaintiff in his Complaint states that he has brought the suit herein on behalf of persons who were evicted from the suit property. Further, that the persons so evicted were an entity known as Classic Jua Kali Co-Operative Society Ltd which had previously litigated with the 1st Defendant over the suit property in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996**. Further, that the suit herein is premised on the ground that the suit property is public land, and that in the said suit the Court ruled that the suit property was private land belonging to the 1st Defendant.

The counsel also submitted that the suit herein is *res judicata* on account of the decision in Chief Magistrate's Court Case No. 7708 of 2012, where the Plaintiff's and the Classic Jua Kali Co-operative Society's applications to set aside eviction orders issued to the 1st Defendant with respect to the suit property set aside, principally on the ground that the said property was public land were dismissed.

Lastly, the 2nd Defendant's counsel argued that the suit herein was an abuse of the process of court as it failed to raise triable issues against the 2nd Defendant. He argued in this respect that section 26(1) of the Land Registration Act protects the sanctity of title, and Order 2 Rule 10 of the Civil Procedure Rules makes it mandatory for pleadings to contain particulars of any misrepresentation, fraud and breach of trust that would impeach the 2nd Defendant title, which the Plaintiff has not pleaded.

The 3rd and 4th Defendant's counsel filed submissions dated 22nd October 2013 and argued therein that

this suit is not *res judicata* as the 3rd and 4th Defendants were not parties to **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996, Classic Jua Kali Co-operative Society Ltd vs. The National Council of Christian Churches of Kenya and Others C.A Civil Application No. Nai 190 of 2000 or Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another, ELC No. 708 of 2013.** The counsel submitted that the parties herein cannot therefore be said to have been litigating under the same title nor are the issues in the present suit the ones determined in the previous proceedings.

The Plaintiff's submissions are dated 31st October 2013 and were filed in court on the same date. The Plaintiff's counsel submitted therein relying on the Court of Appeal decision in **The Director Kenya Medical Research Institute vs Agnes Muthoni & 35 Others, Nairobi Civil Appeal No. 15 of 201,** that the issues being raised in the preliminary objections are issues of fact and not of law. Further, that the parties and issues in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996** are different from the present suit.

The counsel argued that no issues of trust having been raised in the present suit, and that the Plaintiff's application in **The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief Magistrate's Court Case No. 7708 of 2012** which involved eviction of the members of Classic Jua Kali Co-operative Society Ltd was dismissed for non-attendance. Lastly, the counsel for the Plaintiff relying on the Court of Appeal decision in **Kenya Hotel Properties Limited vs Willisden Investments Limited & 4 Others (2013) e KLR** argued that the suit herein raised a matter of public interest and should be heard on merit.

The Issues and Determination

I have read and carefully considered the pleadings, evidence and submissions made herein. The main issues to be decided are whether the 1st and 2nd Defendants' preliminary objections raise pure points of law, and if so, whether the said preliminary objections have merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696,** as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The first set of the objections by the 1st and 2nd Defendants arise from previous cases that have been filed in the courts, namely **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996, The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief Magistrate's Court Case No. 7708 of 2012 and Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another, ELC No. 708 of 2013.** The fact of these previous cases having been filed, and some of them having been heard and determined is not in dispute. What is being disputed is whether the said previous suits make the present suit *res judicata*, *sub judice*, and an abuse of the process of court.

These in my view are pure questions of law that properly belong in the province of a preliminary objection, as they have the potential of determining or affecting the further hearing of the present suit. The 1st and 2nd Defendants' preliminary objections on this suit being *res judicata*, *subjudice* and an abuse of the process of court are therefore competently before the court.

The second objection raised is with regard to the Plaintiff's *locus standi* to file the suit herein, and the 2nd Defendant argued in this respect that the Plaintiff has filed a representative suit without complying with Order 1 Rule 8 of the Civil Procedure Rules, and that he had no individual cause of action. However to the extent that the court has discretion to allow the Plaintiff to comply with the provisions of the said rule,

and a determination as to whether he has an individual cause of action raises matters of fact that will need to be ascertained, I find that the said objection does not raise a pure point of law and is therefore dismissed.

I will therefore proceed to consider the pure points of law raised in objection by the 1st and 2nd Defendants. On the issue raised of whether the application herein is *res judicata*, section 7 of the Civil Procedure Act 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.”

The requirements for *res judicata* to arise as stated in the said section are that :

- a. There must have been a previous suit between the same parties
- b. The issue before the court must have been finally determined in that previous suit
- c. The issue must have been determined by a court having competent jurisdiction.

Section 7 has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality.

In the present case, it is not disputed that the courts that have heard the previous suits are courts of competent jurisdiction. The two previous suits which have been finally decided are Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996, and The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief Magistrate’s Court Case No. 7708 of 2012 .

It is argued in this respect by the Plaintiff that the parties to Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996, were not the same as those in this suit, and principally that the Plaintiff herein was not a party in the previous suit. The 3rd and 4th Defendants also argue that they were not a party to the said suits. The 1st and 2nd Defendants on the other hand argue that the Plaintiff herein is a representative of Classic Jua Kali Co-operative Society Ltd, which was a party in the previous suits.

Explanation. (6) to section 7 of the Civil Procedure Act provides as follows in this regard:

“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”

The Plaintiff herein in the Plaint he filed dated 22nd July 2013 states that he has brought this suit on his own behalf and on behalf of the other persons who were the victims of an eviction from the suit property.

It is not in dispute that the parties evicted from the suit property was Classic Jua Kali Co-operative Society Ltd, the Defendants in The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief Magistrate’s Court Case No. 7708 of 2012, as a result of the orders of eviction given therein, and who were also the Plaintiffs in Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996. The orders of eviction were given in favour of the 1st Defendant herein, who was also the Defendant in Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996.

It is my view that the Plaintiff is therefore in privity with Classic Jua Kali Co-operative Society Ltd which was a party and the Plaintiff in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996**, for the reasons that he is litigating the same interests as those of Classic Jua Kali Co-operative Society Ltd over the same suit property. Therefore to this extent, the Plaintiff herein is litigating in the same title and capacity as Classic Jua Kali Co-operative Society Ltd in his suit as against the 1st Defendant herein. In addition the Plaintiff herein was joined as an Interested Party in **The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief Magistrate's Court Case No. 7708 of 2012** and was clearly a party in that suit.

It is therefore the finding of this court that the Plaintiff and 1st Defendant herein have been parties in previous suits determined by competent courts, namely **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996**, and **The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief Magistrate's Court Case No. 7708 of 2012**. It is also my view in this regard that it is not only possible but necessary when an objection of *res judicata* is raised in suits with multiple parties, to separate and isolate those parties in the suit that have litigated in previous suits, so as to prevent parties from adding new parties to a new suit for the sole purpose of relitigating issues that have already been heard and determined between some of the parties.

On the question of whether the issues in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996**, and **The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief Magistrate's Court Case No. 7708 of 2012**. were the same as those in the present suit, I note that Explanation (4) to section 7 of the Civil Procedure Act provides that 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.

In **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996** the issue was whether there were any representation and or understanding that the 1st Defendant herein held the suit in trust for the Plaintiffs therein, and if they were thus entitled to be such a declaration. The Plaintiff therein also sought to be registered as owner of the suit property. The Court therein found no such trust to exist and dismissed the Plaintiff's suit.

The Plaintiff in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996** ought to have raised all the issues attacking the 1st Defendant's title to the suit property that are now being raised by the Plaintiff herein, whom is this court has found is litigating under the same title and capacity as the said Plaintiff in that suit. It is thus the finding of this court that the Plaintiff herein cannot raise any issue in the suit or Notice of Motion filed herein as to the legality or validity of the 1st Defendant's title to the suit property, as that issue is deemed to have been a matter in issue in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996** and is *res judicata*.

The issue raised in **The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief Magistrate's Court Case No. 7708 of 2012** in which the Plaintiff herein was also an Interested Party was that of eviction of Classic Jua Kali Co-operative Society Ltd from the suit property, which eviction orders were granted to the 1st Defendant herein by the court. As the Plaintiff herein was litigating the same interests and title as those of Classic Jua Kali Co-operative Society Ltd, it is the finding of this court that the issue of eviction of the said Plaintiffs from the suit property is *res judicata*.

Lastly still on the issue of *res judicata*, it is the finding of this court that as the 2nd, 3rd and 4th Defendants in this suit were not parties in **Classic Jua Kali Co-operative Society Ltd vs. The National Christian Council of Churches of Kenya and Others, HCCC No 932 of 1996**, and **The National Christian Council of Churches of Kenya vs Classic Jua Kali Co-operative Society Ltd, Chief**

Magistrate's Court Case No. 7708 of 2012 , the suit herein cannot be *res judicata* as against the said Defendants. This is also for the reason as argued by the Plaintiff, that there are issues raised in this suit arising from the sale of the suit property to the 2nd Defendant herein that were not decided in the cited previous suits.

I will proceed to consider the objection raised that the suit herein is *sub judice* and an abuse of the process of court, in that the same issues have raised in a previous suit namely **Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another**, ELC No. 708 of 2013. Section 6 provides for the doctrine of *sub judice* as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

On the other hand, interventions by the courts to prevent abuse of the process of court are sanctioned by section 3A of the Civil Procedure Act which provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

I note in this regard that the 1st, 3rd and 4th Defendants herein are not parties in **Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another**, ELC No. 708 of 2013, and that the 2nd Defendant therein is not a party in this suit. It is thus my finding that to this extent section 6 of the Civil Procedure Act is inapplicable and the suit herein is not *sub judice*. However, this finding notwithstanding, it is my view that the suit herein is an abuse of the process of court as the Plaintiff could have raised the issues herein by way of a counterclaim to the suit in **Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another**, ELC No. 708 of 2013, as both suits arise from the sale of the suit property to the 2nd Defendant by the 1st Defendant herein.

Arising from the foregoing reasons I uphold the 1st and 2nd Defendants preliminary objections only to the extent that the Plaintiff's Suit and Notice of Motion filed herein both dated 22nd July 2013 are *res judicata* as between the Plaintiff and 1st Defendant herein on the issues of the validity 1st Defendant's title to the suit property herein, namely Land Reference Number L.R. No. 209/9324, and the eviction of the Plaintiff from the said suit property. The costs of the said preliminary objections shall be in the cause.

As regards the other outstanding issues in the suit filed herein and said Notice of Motion, I hereby order as follows pursuant to the provisions of section 3A of the Civil Procedure Act and Order 11 of the Civil Procedure Rules:

1. That the suit herein be consolidated with that in **Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another**, ELC No. 708 of 2013 for purposes of being heard and determined together, and that the file for **Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another**, ELC No. 708 of 2013 shall be the lead file for purposes of filing of pleadings and recording of proceedings.
2. That the Plaintiff's Counterclaim in **Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another**, ELC No. 708 of 2013 shall be deemed to be the said Plaintiff's Counterclaim in **Tranquility Development Ltd vs Hon. Gidion Mike Mbuvi & Another**, ELC No. 708 of 2013.
3. The 1st and 2nd Defendants Defences filed herein shall be deemed to be the said Defendants' Defences to the said Plaintiff's Counterclaim.
4. The Notice of Motion by the Plaintiff herein dated 22nd July 2013 shall be heard and determined together with the Notice of Motion by the Original Plaintiff in **Tranquility Development Ltd vs**

Hon. Gidion Mike Mbuvi & Another, ELC No. 708 of 2013 dated 17th June 2013.

5. The parties in the two suits consolidated by order 1 hereinabove are at liberty to apply.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___15th___ day of ___January___, 2014.

P. NYAMWEYA

JUDGE