



Kiambu Dandora Farmers Co. Ltd v Waindi & 12 others (Environment & Land Case E234 of 2023) [2024] KEELC 1348 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E234 OF 2023**

**LN MBUGUA, J
MARCH 12, 2024**

BETWEEN

KIAMBU DANDORA FARMERS CO. LTD PLAINTIFF

AND

**LAVENDER LUCKY WAINDI 1ST DEFENDANT
MICHAEL KINYANJUI 2ND DEFENDANT
D.K GATIMU 3RD DEFENDANT
JOHN PETER WAMBUGU GICHIMO 4TH DEFENDANT
ROBERT KUNGU NGATA 5TH DEFENDANT
SEVENTH DAY ADVENTIST CHURCH 6TH DEFENDANT
RICHARD SEILS 7TH DEFENDANT
SAL YUT SERVICES LIMITED 8TH DEFENDANT
VISION STARS ACADEMY 9TH DEFENDANT
DIRECTOR OF SURVEYS 10TH DEFENDANT
CHIEF LAND REGISTRAR 11TH DEFENDANT
HON. ATTORNEY GENERAL 12TH DEFENDANT
INSPECTOR GENERAL OF POLICE 13TH DEFENDANT**

RULING

1. The Plaintiff's Notice of Motion dated 23.6.2023 is for determination alongside 4 preliminary Objections filed herein. They are; the 2nd, 4th and 9th Defendant's Preliminary Objections dated



14.7.2023 and 1.2.2024, Preliminary Objection of the 1st Defendant dated 28.7.2023 and that of the 3rd and 8th Defendants dated 12.10.2023.

Case for the Plaintiff; The Notice of Motion dated 23.6.2023

2. In the above application, the Plaintiff seeks interim injunctive and conservatory orders restraining the 1st to 9th and 11th Defendants from continuing with any dealings on land parcel No. LR 11379/3 and also prays for an order maintaining status quo on the suit property. They also seek orders directing whoever is conducting any business on the suit parcels without its authority to be depositing rent in court or in an escrow account opened by its advocates and the respondent's advocates, and that the 13th defendant, (the Inspector General) be ordered to enforce the court orders.
3. The application is premised on grounds on its face and on the supporting affidavit sworn on 23.6.2023 by the Plaintiff's director, one Abdulahi Muigai. He avers that the Plaintiffs acquired the suit land on 7.4.1970 for the benefit of its members. That in a 1972 High Court suit case no. 1348 / 1972, *Robert Mcabaria & others v Kibiro Karanja & others*, the court had declared that the land parcel LR No. 11379/3 was bought by the current plaintiffs and is vested to them.
4. He avers that the suit parcel was subdivided into 4 blocks being Nairobi Block /163, 215, 241 and 173 vide a Gazette Notice dated 10.9.2021, yet the Plaintiff still holds the title and the same has been produced and accepted by the court in ELC E161 of 2019 Group 27 Investment Limited v Kiambu Dandora Farmers Company Limited & others.
5. He avers that one of the blocks being Nairobi Block/163 has been invaded by the Defendants who are constructing thereon without permission and Umoja II Block 107/1 and Block 107/2 have been fraudulently created out of the said parcel.
6. In another affidavit sworn on 17.1.2024 by its director Joseph Mwangi Karanja, the plaintiffs contend that other matters in various suits are different, since different LR numbers are mentioned but in this matter, the Plaintiff is specific about LR 11379/3. They contend that there is a new development since the suit land has been subdivided into various blocks, a fact that did not exist when the other alleged matters were filed.

Case for the 1st Defendant;

Preliminary Objection dated 28.7.2023

7. The 1st Defendant filed the Preliminary Objection averring that the Plaintiff's application and suit are re judicata since there exists Milimani Chief Magistrate's Land and environment Case No. E418 OF 2022 between her as the Plaintiff, while the Plaintiff herein is the 1st Defendant, wherein injunctive orders were issued against the current Plaintiff herein and are still in force. She reiterates these averments in her replying affidavit of even date.

Case for the 2nd, 4th and 9th Defendants Preliminary Objections dated 14.7.2023 & 1.2.2024

8. The 2nd, 4th and 9th Defendants contend that the Plaintiff's suit and application are sub-judice to the case; Nairobi ELC Petition No. 9 of 2019 and is res judicata as the issues sought were canvassed in the case of *Republic v National Land Commission & another; Samuel Wachira Wanja & 2 others (Ex Parte); Kiambu Dandora Farmers Co Ltd & another (Interested Parties)* [2021] eKLR.
9. They further contend that the suit is time barred under Section 7 of the *Limitation of Actions Act* and that this court lacks jurisdiction to hear it.



10. In the replying affidavit of 1.2.2024, the 2nd Defendant avers that he is one of the members of Zone 9 plot owners association and that they are the registered owners of parcels Nairobi Umoja Block 107/1118-1134.
11. That as an association, they filed Nairobi ELC Petition No. 9 of 2019, in which the Plaintiff herein is the 8th Respondent and the matter is coming up for directions on 4.3.2024 before Hon Judge Omollo.
12. That in the said matter, officials of the Plaintiff were adjudged contemnors for disobedience of court orders issued therein whereupon they were sentenced to pay ksh.200,000/=.

Case for the 3rd and 8th Defendants Preliminary Objection dated 12.10.2023

13. The 3rd and 8th Defendants Preliminary Objection raises similar grounds as those raised by the 1st Defendant. In his replying affidavit of 12.10.2023, the 3rd Defendant avers that the true position concerning the parcel known as LR 11379/3 is that it was compulsorily acquired by the Government of Kenya under the Land Acquisition Act, 1968 vide Kenya Gazette Notices No. 840 and 841 issued on 15.3.1974 and the Plaintiff was paid compensation, thus it has no locus to file this suit.
14. That on 1.4.1978, the Government of Kenya allocated a portion hived from the said parcel known as Nairobi Block 107/1 to Nairobi City Council and a title to that effect was issued on 12.5.1997.
15. That in 1992, the Nairobi City Commission subdivided the parcel to 16 plots and he was allotted plot 13 together with Newton Njiiri Wachunga vide a letter of allotment dated 11.8.1992.
16. That a survey was conducted by the 10th Defendant and a survey map was prepared on 21.9.1994 and authenticated on 29.5.1997 and plot 13 given Reference number 1129. They were then issued with a lease on 15.11.1998 and on 26.2.2007, they transferred the parcel to the 8th Defendant.
17. He avers that from 2007 to date, the 8th Defendant has applied for and received written approvals by various government entities to develop the parcel, has persistently paid rates and has successfully sued a trespasser vide ELC 104 OF 2015 Sal Yut Services Limited v Ramuka Agencies Limited & others.

Case of the 6th Defendant; Replying Affidavit Dated 15.10.2022

18. The 6th Defendant has also opposed the suit vide the above mentioned pleading, where he describes himself as a Church Elder at the Seventh Day Adventist Umoja II Church. He avers that in the year 2000, the 6th Defendant purchased Land Parcel Nairobi/Block 107/1/1127 from the registered proprietor, Francis Lekolol (now deceased) for ksh.3 million, and on 14.2.2008, a transfer was registered in their favour.
19. He avers that the 6th Defendant herein sued the Plaintiff herein in ELC Case 249 of 2007 Francis Lekolol and 5 others v Kiambu Dandora Housing Scheme Limited seeking to restrain it from interfering with the parcel as it has been in open occupation since the year 2000 and has developed it by constructing a house of worship among other permanent structures.

Submissions

20. The issues raised in the various pleadings were canvassed by way of written submissions. The Plaintiff and the 6th Defendant did not file written submissions.
21. The 1st Defendant's submissions are dated 25.1.2024, where she reiterates that the suit offends the provisions of Section 6 and 7 of the Civil Procedure Act, as the same is sub judice to Milimani Chief Magistrate Land and Environmental Case E418 of 2022. It is argued that the suit is also res judicata to



- the extent that in the above stated matter, injunctive orders were issued against the Plaintiff herein on 14.12.2022 restraining it from interfering with the 1st Defendant's possession of NRB/Umoja/Block 107/1/1296 which the Plaintiff claims to be part of LR No. 11379/3.
22. The 1st Defendant relies on the case of *Diocese of Eldoret Trustee (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & Anor* [2020] eKLR as well as the case of *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others* [2022] eKLR.
 23. Submissions of the 2nd, 4th and 9th Defendants are dated 2.2.2024, where it argued that the suit is res judicata as the issues sought to be canvassed were settled in the case of *Republic v National Land Commission & another; Samuel Wachira Wanja & 2 others (Ex-parte); Kiambu Dandora Farmers Co Ltd & another (Interested Parties)* [2021] eKLR where all documents by the National Land Commission being relied on by the Plaintiff herein were quashed.
 24. It is also submitted that the suit and the application are sub judice to the case Nairobi ELC Petition No. 9 of 2019. That in these proceedings, the Plaintiff seeks to evict the 2nd, 4th and 9th Defendants from the suit property whereas in the Petition, the Defendants seek to bar the Plaintiff from entering the suit property.
 25. It is argued that the suit is time barred under Section 7 of *Limitation of Actions Act*, Cap 22 as happenings hereof date back to 1970's and the Plaintiff did not seek extension before bringing this action.
 26. It is also argued that the application lacks probative value as no exhibits have been annexed to the supporting affidavit to the application, thus it offends Rule 9 of the Oaths and Statutory Declarations Rules and that Article 159 (2) (d) of the *Constitution* cannot be used to circumvent mandatory rules of procedure laid down in the statutes.
 27. It is also submitted that the Plaintiff has not established the principles in *Giella v Cassman Brown* [1973] EA to warrant the orders sought. Additionally, it is submitted that there is no basis for grant of conservatory orders and that the prayer on deposit for rent is speculative as there is no evidence by the Plaintiff as to who is conducting what type of business in the suit property.
 28. Other cases cited by the 2nd, 4th and 9th Defendants include; *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* [2017] eKLR, *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, *Wilis Onditi Odhiambo v Gateway Insurance Co. Ltd* [2014] eKLR, *Mary Osundwa v Sugar Company Limited* [2002] eKLR as well as the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral & Boundaries Commission and 6 others* [2013] eKLR.
 29. The 3rd and 8th Defendants filed submissions dated 4.12.2023 where they argue that the court has no jurisdiction to hear the case as the suit is sub judice, that a similar application against the 8th Defendant is pending before court in ELC 347 OF 2012 and is res judicata to the court's rulings in MCELC 418 of 2022 and Nairobi ELC petition 9 of 2019.
 30. It is also argued that the Plaintiff has not established grounds for grant of injunctive orders and as such, the suit should be struck out. The case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Mrao Limited v First American Bank of Kenya Ltd & 2 Others* [2003] KLR as well as Petition No. 8 (E010) of 2021, *Dina Management Limited v County Government of Mombasa & others* are relied upon.



Determination

31. Having regard to all the issues raised herein, I find that the questions falling for determination are; Whether the 4 Preliminary Objections raised are merited, if not Whether the Plaintiff has met the threshold for grant of the orders sought in their application.
32. All the Preliminary Objections are properly grounded on matters of law and this court need not rehash the grounds which were enumerated earlier in this ruling.
33. It has come out clearly that the suit parcel 11379/3 was subdivided giving rise to numerous litigation. To this end, more than 6 cases were pointed out to the court in the pleadings herein as having been determined/actively in court.
34. The principle of res judicata is anchored under 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.”
35. While the provisions of Section 6 of the *Civil Procedure Act* provides that;

“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”.
36. There is a contention that injunctive orders were issued in Milimani Chief Magistrate’s Land and environment Case No. E418 of 2022 on 14.12.2022 whereby the Plaintiff herein was restrained from interfering with the 1st Defendant’s possession of NRB/Umoja/Block 107/1/1296 which the Plaintiff claims to be part of LR No. 11379/3. The plaintiff has not rebutted the existence of the said orders.
37. Then there is the case Nairobi ELC Petition 9 of 2019, where there are orders against the current plaintiffs in respect of the same property. That in the said suit, the current plaintiffs had even been ordered to return a container which they had taken away. The matter is pending in court. Again the plaintiff has no rebuttal on the aforesaid averments.
38. Further, the 6th Defendant’s averment that it is also in contention with the Plaintiff herein in ELC Case 249 of 2007 Francis Lekolol and 5 others v Kiambu Dandora Housing Scheme Limited was not rebutted.
39. I have also keenly perused the Judgment of Judge Okongo in Judicial Review case of *Republic v National Land Commission & Another; Samuel Wachira Wanja & 2 Others (Ex parte): Kiambu Dandora Farmers Co. Ltd & Another (Interested Party)* [2021] eKLR where the court gave a detailed history of the dispute relating to the suit parcel LR No. 11397/3. Apparently the current plaintiff had purportedly entered into a settlement agreement with the National Land Commission in another case Nairobi ELC Petition 47 of 2011 *Abdulabi Muiruri & Others v Attorney General & Others* whereby National Land Commission was to review “all Grants and Dispositions” relating to the suit parcel LR 11379/3.



40. In the above mentioned Judicial Review Case, Judge Okongo considered the decision of the National Land Commission to be subjudice and an abuse of the powers bestowed on it. The court went on to state as follows:

“I have restrained myself from considering other issues raised by the parties such as the validity of the applicants’ titles and whether or not the original parcel is still owned by the 1st interested party because these are live issues in the many suits that are pending in court and a determination of the same in this judicial review may embarrass the courts handling the said matters.”

41. Thus as far back as June 2021, the dispute relating to parcel 11379/3 was active in other suits!

42. In the case of *Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 Others* [2019] eKLR the court held as follows:-

“Section 6 of the *Civil Procedure Act* is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”

43. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the court stated that;

“in determining whether or not sub judice applied, it was the substance of the claim that ought to be looked at rather than the prayers sought”.

44. The substance of the plaintiffs claim is anchored on acquisition of the land LR 11379/3 decades ago in 1970. The subsequent subdivisions and the alleged compulsory acquisition of the said land has been a subject of the myriad cases. The filing of the instant suit therefore amounts to duplication of issues which have been tabled before other courts.

45. Still in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* (*supra*), the court had this to say in regard to multiplicity of suits;

“Litigation was not a game of chess where players outsmarted themselves by dexterity of purpose and traps. On the contrary, litigation was a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks. Pursuing two processes at the same time constituted and amounted to abuse of court and/or legal process. The multiplicity of actions on the same matter between the same parties even where there existed a right to bring the action was regarded as an abuse”.

46. Clearly, the suit before this court is sub judice to ELC E418 of 2022, Nairobi ELC Petition No. 9 of 2019 as well as ELC Case 249 of 2007 *Francis Lekolol and 5 others v Kiambu Dandora Housing Scheme Limited* and other matters out there.

47. It falls that this suit violates the sub-judice rule and is therefore incompetent. The net effect is that the all the Preliminary Objections are found to have merits. The application and the entire suit are hereby dismissed with costs to the 1st defendant, 2nd, 4th and 9th defendants, 3rd and 8th defendants as well as the 6th defendant.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH, 2024
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Odera Were for Plaintiff

Kulecho for 1st Defendant

Okumu holding brief for Mr. Njenga for 3rd and 8th Defendants

Onyango for 6th Defendant

Court assistant: Judith

