



**Kenya Planters Cooperative Union Limited v Kenya Commercial Bank Limited & 3 others;  
Fikah Acres Limited (Interested Party); Chief Land Registrar & another (Proposed Defendant)  
(Environment & Land Case 8 of 2018) [2023] KEELC 228 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 228 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 8 OF 2018  
LN GACHERU, J  
JANUARY 26, 2023**

**BETWEEN**

**KENYA PLANTERS COOPERATIVE UNION LIMITED ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

**AND**

**HARVEN GATHOKE ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL MUTISYA NDONYE ..... 2<sup>ND</sup> DEFENDANT**

**ROBERT KINUTHIA MUNGAI ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**FIKAH ACRES LIMITED ..... INTERESTED PARTY**

**AND**

**CHIEF LAND REGISTRAR ..... PROPOSED DEFENDANT**

**NEW KENYA PLANTERS COOPERATIVE UNION LIMITED .... PROPOSED  
DEFENDANT**

**RULING**

1 Vide a Chamber Summons Application dated 14<sup>th</sup> March 2022, the 4<sup>th</sup> Defendant/Applicant sought for the following orders;

1. That Status quo be maintained in respect of ownership and occupation of all those properties known as L.R. No. 1363/10; L.R. No. 1363/11; L.R. No. 1363/12; L.R. No. 1363/13; L.R.



No. 1363/14; L.R. No. 1363/15; L.R. No. 1363/16; L.R. No. 1363/22; L.R. No. 1363/23; L.R. No. 1363/24; L.R. No. 1363/25; L.R. No. 1363/26; L.R. No. 1363/27; L.R. No. 1363/28 & L.R. No. 1363/33, situated in Makuyu Area of Murang'a County pending the hearing and determination of the Counterclaim filed herein by the Applicant Robert Kinuthia Mungai.

2. That the OCPD Ithanga, Kakuzi Subcounty oversees compliance with the orders of the Court.
  3. That New Kenya Planters Cooperative Union Limited be added as a Defendant to this suit, being the successor of the now defunct Kenya Planters Cooperative Union Limited.
  4. That the Interested Party herein, Fikah Acres Limited, be and is hereby made a Defendant to this suit instead of an Interested Party.
  5. That the Plaintiff be and is hereby permitted to join the Chief Land Registrar as a Defendant to this suit.
  6. That Upon the Joining of the above Defendants, the Plaintiff be and is hereby granted leave to amend his Counterclaim as shown on the Draft Amended Counterclaim filed herewith.
  7. That the Defendants be given a timeline within which to file and serve their responses
  8. The costs of the suit be provided for.
- 2 The Application is based on 18 grounds set out on the face of it and on the Supporting Affidavit of Robert Kinuthia Mwangi, sworn on 16<sup>th</sup> March 2022.
- 3 It is the Applicant's disposition that that the land subject matter of this suit is under risk of being further transferred to 3<sup>rd</sup> Parties in an attempt to defeat the instant proceedings. That in the recent past, the 2<sup>nd</sup> Respondent has been taking possession of the suit land including fencing and felling of trees. That there is likely to be conflict between the current land occupiers and the 2<sup>nd</sup> Respondent, which may lead to breach of peace and violence. That he has a substantial and bonafide claim against Fikah Acres Limited, being a claim for cancellation of title purported to have been transferred by the 1<sup>st</sup> Defendant or in the alternative, market value and mesne profits for the land they purported to have bought from the 1<sup>st</sup> Defendant. That the claim against Fikah Acres Limited qualifies to make it a Defendant, as opposed to an Interested Party. That the Chief Land Registrar, being the office with statutory mandate of registering titles and maintaining a land register is a necessary party for the proper and effectual determination of the instant suit. That Kenya Planters Cooperative Union Limited, is now defunct and its successor is New Kenya Planters Cooperative Union Limited.
- 4 That he has been advised by his advocate that he has a right to amend his Counterclaim with leave of Court, to bring to the attention of the Court all the events that have transpired since the initial Counterclaim was filed. That the proposed amendments will help the Court make a fair determination concerning the suit land.
- 5 With regard to the prayer of status quo, the Applicant deponed and outlined the genesis, and consequent happenings of the instant suit. That he instituted Nairobi HCC 542/1991, Robert Kinuthia Mungai Vs. KPCU to challenge attempts to irregularly sell his land and on 18<sup>th</sup> February 1991, he obtained injunctive orders stopping the sale of the suit land. That on 23<sup>rd</sup> November 1998, he entered an agreement with KPCU in which they agreed to settle the outstanding debt of Kshs. 48,000,000/= by way of transferring the undeveloped land to KPCU, upon the satisfaction of certain terms and conditions. That sometimes in the year 2009, before all the terms and conditions of the aforementioned agreement were met, KPCU was put under receivership. That via a notice dated 23<sup>rd</sup>



- November 1998, he rescinded the first agreement and he proceeded to start new negotiations with the receiver, but the said new negotiations were also never effected. That as far as he is concerned, his suit being Nairobi HCC 542/1991, is still alive and well and has never been determined. That Nairobi HCC 542/1991, was transferred to Nairobi Environment and Court, and it was renamed Nairobi ELC 1469 of 2016, and consolidated with Nairobi HCCC 770 of 2009, to form the instant suit. That in the recent past Fikah Acres Limited had brought and placed a container on the suit land, and have been disturbing peace to the residents thereon by burning it and bringing armed goons.
- 6 The Application is contested by the Plaintiff/1<sup>st</sup> Respondent via a Replying Affidavit sworn by Stephen Kamau Njoroge on 28<sup>th</sup> April 2022. It is the disposition of the 1<sup>st</sup> Respondent that the instant application is an abuse of the Court process and a Nonstarter. That with respect to orders of status quo, he is aware that the properties were transferred from the Plaintiff / 1<sup>st</sup> Respondent as a result of legitimate transaction which the Applicant is well aware of. That he is aware that the 4<sup>th</sup> Defendant previously owned agricultural land in Makuyu area measuring 1,238 acres or thereabouts popularly known as Kahonoki Estate described as LR No; 1363/2. That the Plaintiff /1<sup>st</sup> Respondent took over the 4<sup>th</sup> Defendant's debt from Agricultural Finance Corporation of KES 868,383.45/= and National Bank of Kenya KES 527,069/= and by a mortgage dated 28<sup>th</sup> November 1984, the Applicant herein assigned all that land known as LR No. 1363/2, to the Plaintiff to secure the monies advanced.
- 7 That by an agreement dated 23<sup>rd</sup> November 1998, the Applicant and the 1<sup>st</sup> Respondent agreed that certain parcels of land more specifically being L.R. No. 1363/10; L.R. No. 1363/11; L.R. No. 1363/12; L.R. No. 1363/13; L.R. No. 1363/14; L.R. No. 1363/15; L.R. No. 1363/16; L.R. No. 1363/22; L.R. No. 1363/23; L.R. No. 1363/24; L.R. No. 1363/25; L.R. No. 1363/26; L.R. No. 1363/27; L.R. No. 1363/28 & L.R. No. 1363/33, would be assigned to the 1<sup>st</sup> Respondent in satisfaction of an unpaid debt of Kshs. 48,000,000/=. That the reassignments were executed on 18<sup>th</sup> September 2018, and the portions to be transferred were identified measuring approximately 876.43 acres. That the 1<sup>st</sup> Respondent discharged the identified plots to the Applicant, and before the transaction to transfer of the mutually identified parcels of land was completed, the 1<sup>st</sup> Respondent was put under receivership. That Nairobi HCCC No. 799 of 2009, challenging the receivership sought orders restraining the 1<sup>st</sup> Defendant from selling the selected properties. That the said suit Nairobi HCCC 799 of 2009, was settled between the Plaintiff, 1<sup>st</sup> and 3<sup>rd</sup> Defendants via consent dated 19<sup>th</sup> November 2013, and the Plaintiff further withdrew the suit against the 4<sup>th</sup> Defendant /Applicant herein. That on the strength of the consent dated 19<sup>th</sup> November 2013, the 1<sup>st</sup> Respondent sold and transferred the identified properties to the 2<sup>nd</sup> Respondent herein. That the transfer to the 2<sup>nd</sup> Respondent was legitimate and legal; and the orders of status quo should not be sustained.
- 8 In addition, that the proposed Defendant New Kenya Planters Cooperative Union, is a public company that is a separate and distinct entity from the Plaintiff herein and it was not created to succeed and/or replace the Plaintiff. That the proposed Defendant NKPCU, did not advance a loan to the 4<sup>th</sup> Defendant/Applicant herein and is not privy to any contracts whatsoever.
- 9 The 2<sup>nd</sup> Respondent on the other hand opposed the Application via the Replying Affidavit sworn by Caroline Muthoni Mureithi dated 31<sup>st</sup> May 2022. It is their contention that the 2<sup>nd</sup> Respondent is the registered and beneficial owner of the parcels of land more specifically identified as L.R. No. 1363/10; L.R. No. 1363/11; L.R. No. 1363/12; L.R. No. 1363/13; L.R. No. 1363/14; L.R. No. 1363/15; L.R. No. 1363/16; L.R. No. 1363/22; L.R. No. 1363/23; L.R. No. 1363/24; L.R. No. 1363/25; L.R. No. 1363/26; L.R. No. 1363/27; L.R. No. 1363/28 & L.R. No. 1363/33, located in Murang'a County, having purchased the same for value from the Plaintiff/1<sup>st</sup> Respondent herein. That prior to the said transaction, his advocates Muriu Mungai & Co Advocates, undertook due diligence on the title of the



- suit land. That upon the agreement for sale and the purchase of the suit property, the 2<sup>nd</sup> Respondent paid the entire purchase price to the 1<sup>st</sup> Respondent and Applicant subsequently executed conveyance documents in their favor which were registered on 21<sup>st</sup> August, 2014.
- 10 That via an application dated 18<sup>th</sup> September 2014, the Applicant herein filed an application in this Court contesting the 2<sup>nd</sup> Respondent's title of the suit properties and seeking for cancellation of the same and reinstatement of the suit land to his name. That on 2<sup>nd</sup> February 2016, this Court delivered a ruling in respect of the aforementioned application and the same was dismissed for non-disclosure of material facts. That having read the instant application, they are of the view that the same is res judicata and therefore untenable as the issues raised have already been determined by this Court via its ruling dated 2<sup>nd</sup> February 2016. That the same issues were raised by the Applicant in Nairobi Constitutional Application No. 1377 of 2016, Robert Kinuthia Mungia vs. Fikah Acres Limited and Another (2018) eKLR, where the Court dismissed a similar Application by the Applicant herein seeking the same injunctive orders. In addition, that they strongly believe that the entire suit is incompetent for reasons that the purported Counter claim was never filed in Court and if it was filed, it was filed after the suit was withdrawn
  - 11 Finally, that there is no reason advance for joinder of the Interested Party as a Defendant as opposed to as an Interested Party and the said prayer should be dismissed. That the suit is an abuse of the Court process and should be struck out in limine.
  - 12 In rejoinder to the responses of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Applicant filed a Further Affidavit sworn on 7<sup>th</sup> June 2022, by Robert Kinuthia Mungai. It is the Applicant's disposition that it is premature to canvass the issue of legality and validity of transfer of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents since what was before the Court was an application for the maintenance of status quo. That the issues in the instant application have never been determined by any other Court. That it is only after the amended Counterclaim is admitted that the issue of legality and validity of transfer of the suit property will become ripe for canvassing. That the issue of validity of transfer is a live issue that needs to be heard and determined on its merits, which will only be possible if leave to amend the counterclaim is granted.
  - 13 Further that the ruling of 2<sup>nd</sup> February 2015, by Hon. Justice G.V. Odung'a was delivered by the High Court and not the Environment and Land Court and the High Court lacks jurisdiction to deal with issues of validity of title. That the Application dated 18<sup>th</sup> December 2014, was never heard and determined on merits, but was struck out by the Court on what it termed as material disclosure and not dismissed as deponed by the 2<sup>nd</sup> Respondent. That Nairobi Constitutional Application No. 1377 of 2016, Robert Kinuthia Mungia vs. Fikah Acres Limited and Another (2018) eKLR, only related to the validity of the proceedings that had been instituted by the 2<sup>nd</sup> Respondent in THIKA CMCC No. 41 of 2015; Fikah Acres Limited vs. Robert Kinuthia Mungai and it did not have anything to do with additional parties or amendment of pleadings. That the Counterclaim was filed on 5<sup>th</sup> April 2012, and the Notice of withdrawal of suit was filed on 29<sup>th</sup> October 2014.
  - 14 The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated 17<sup>th</sup> June 2022, through the Law Firm of Gathenji & Company Advocates and raised five issues for determination by this Court.
  - 15 On whether the instant suit is Res Judicata, the Applicant submits that the instant application is not Res judicata. That contrary to the allegations of the 2<sup>nd</sup> Respondent, the instant application seeks an order of status quo pending the hearing of the Applicant's counterclaim, addition of new parties as Defendants and leave to amend the counterclaim and does not seek a determination of whether the suit



properties belonged to the Applicant after execution of the settlement agreement dated 23<sup>rd</sup> November 1998. That the ruling made on 2<sup>nd</sup> February 2016, dealt with an application for orders of injunction restraining any dealings with the suit property; an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to surrender for cancellation of title and an order compelling the Registrar to rectify the Registry Index Map. That Nairobi Constitutional Application No. 1377 of 2016, Robert Kinuthia Mungia vs. Fikah Acres Limited and Another (2018) eKLR, only related to the validity of the proceedings that had been instituted by the 2<sup>nd</sup> Respondent in THIKA CMCC No. 41 of 2015 Fikah Acres Limited vs. Robert Kinuthia Mungai, and whether an injunction could be issued against the 2<sup>nd</sup> Respondent restraining it from dealing with the suit property.

- 16 The Applicant placed reliance on the case of John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Ministry of Transport and Infrastructure & 3 Others (2015) eKLR, where the Court of Appeal in Malindi set out the ingredients for res judicata as follows; firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the Court or tribunal before which the former suit was litigated was competent and determined the suit finally.
- 17 On whether an order of status quo should be granted pending hearing of the Counterclaim, it is the Applicant's submissions that the granting of a status quo order is discretionary upon a Court. That if the Order is not granted, the suit lands risk being alienated by the 2<sup>nd</sup> Respondent to the detriment of the Applicant, and that if the order is granted, the Respondent will not suffer any prejudice whatsoever as they have not demonstrated the same, in their Replying Affidavits.
- 18 On whether New Kenya Planters Cooperative Union Limited, and the Chief Land Registrar should be enjoined as Defendants, the Applicant relied on the case of Peter Irungu Wainaina Vs. Chege Njihia & 2 others (2018) eKLR, and submitted that the said proposed Defendants are necessary and proper parties to enable the Court effectively and completely adjudicate upon and settle all the questions involved in the suit. Further, that if the Court grants a final order in favour of the Applicant, the same cannot be enforced without them.
- 19 On whether Fikah Acres Limited, should be made a Defendant to the suit other than an Interested Party, the Applicant relied on the case of Marigat Group Ranch & 3 others v Wesley Chepkoimot & 19 others [2014] eKLR, where it stated that an interested party is not strictly a Plaintiff or Defendant. The contest in a suit is between Plaintiff and Defendant, and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as Plaintiff or Defendant, and not as Interested Party. It is the Applicant's submissions that in the instant case, Fikah Acres Limited, is the registered owner of the suit land and it is that ownership that the Applicant is contesting. That Fikah Acres Limited, having a registered interest in the suit land should be made a Defendant to enable the Applicant herein effectively prosecute his claim for cancellation of title.
- 20 On whether the Applicant should be allowed to amend his Counter claim, the Applicant submits that pursuant to Order 8 Rule 3 and 5(1) of the Civil Procedure Rules, this Court has discretion to grant an order for amendment of pleadings. That the general rule is that amendments of pleadings can be done at any time with leave of Court before Judgment. That allowing amendments allows the Court to appreciate all the issues in dispute and adjudicate on the real and live issues given that the nature of the proceedings herein has mutated over time. Further that if the amendment is not allowed, the Applicant's right to fair hearing under Article 50 of *the Constitution* will be violated and the applicant will in effect be driven away from the seat of Justice unheard.



- 21 Based on the forgoing, the Applicant urged the Court to allow the instant Application as prayed.
- 22 The 1<sup>st</sup> Respondent similarly filed his written submissions dated 20<sup>th</sup> July 2022, through the Law Firm of Gitonga Muriuki & Co Advocates. On whether the Applicant's application dated 14<sup>th</sup> March 2022, is merited, the 1<sup>st</sup> Respondent relies on a litany of cases and submits that the Application is not merited as it seeks prayers that are prejudicial to 3<sup>rd</sup> Parties who are not party to the suit which in effect violates their right to fair hearing. In the case of Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR, the Supreme Court pronounced itself and stated that the right to be heard is a fundamental right in civil proceedings in our jurisdiction.
- 23 On the threshold for grant of interim orders, the 1<sup>st</sup> Respondent relied on the case of Giella vs. Cassman Brown Co. Ltd. 1973 EA 358, where the Court outlined the elements necessary for grant of a temporary injunction. It was his submissions that the Applicant was neither in occupation of the suit properties nor was he the legal owner and therefore he had failed to establish a prima facie case to warrant grant of the interim relief sought. That the circumstances of the case demonstrate that the balance of convenience is in favor of not granting the temporary relief sought because of the potential prejudice that may arise if the same is granted. That the orders sought affect parties not parties to the instant suit and should therefore be declined.
- 24 Further that the 1<sup>st</sup> Respondent opposes the inclusion of New Kenya Planters Cooperative Union Limited as the said entity is a separate and distinct entity which is not privy to all the agreements mentioned in this suit, and therefore cannot be asked to account, act and/or give evidence in relation to those agreements. In addition, that it should be noted that the Liquidation of the Plaintiff has not been set aside and or vacated.
- 25 The 1<sup>st</sup> Respondent urged this Court based on the above principles that the Applicant's Chamber Summons Application dated 14<sup>th</sup> March 2022, be dismissed with costs.
- 26 The 2<sup>nd</sup> Respondent on the other hand, filed its written submissions dated 3<sup>rd</sup> October 2022, through the Law Firm of Muchoki, Kangata Njenga & Co Advocates. On whether the instant Application is Res Judicata, the 2<sup>nd</sup> Respondent submitted that the instant application is Res Judicata and an abuse of the Court process. That from the ruling delivered on 1<sup>st</sup> February 2016, this Court will note as follows;
- a. That the ruling arose from an application filed by the Applicant herein on 18<sup>th</sup> December 2014, and raised similar issues to the instant application.
  - b. That the prayers sought in the application dated 18<sup>th</sup> December 2014, correspond almost word for word with the prayers sought in the instant application.
  - c. That at paragraph 97 of the ruling, the Court pronounced itself concerning the Defendants claim of title to the suit properties and made definitive findings regarding the Interested Party who it is not disputed purchased the suit land from the Plaintiff for value.
- 27 That the Applicant also filed Nairobi ELC Petition No. 1377 of 2016 Robert Kinuthia vs. KPCU and Fikah Acres LTD, where the Applicant who is before this Court was seeking the same prayers only camouflaged as separate issues. That the Principal prayer is one seeking an injunction, but has been phrased as an order seeking the maintenance of Status quo. That this is the same prayer that was denied for stated reasons by Justice Okongo and Justice Odunga, and this Court should be persuaded by the said decisions to find that the instant application is Res Judicata. In support of its contention the 2<sup>nd</sup>



Respondent relied on the case of *The Independent Electoral and Boundaries Commission vs. Maina Kiai and 5 Others* (2017) eKLR, where the Court explained the application of the doctrine of Res Judicata.

- 28 On whether there is a basis for the grant of a status quo order, the 2<sup>nd</sup> Respondent submitted that there was none because the Applicant had failed to establish the elements established in *Giella vs Cassman Brown*, to warrant grant of a temporary injunction. It is the submissions of the 2<sup>nd</sup> Respondent that the Applicant had failed to establish a prima facie case and substantiate the loss he stood to suffer if the order for status quo is not granted.
- 29 On whether the Applicant had established a case for the Joinder of Fikah Acres Ltd. as a Defendant, the 2<sup>nd</sup> Respondent relied on Order 1 Rule 3 of the Civil Procedure Rules, and on the case of *King'ori vs. Chege & 3 Other* (2002) 2KLR 243, where the Court stated that parties cannot be added so as to introduce a new Cause of Action, or alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to *the Constitution* and determination of the suit. It is the 2<sup>nd</sup> Respondent's contention that the Applicant had not pleaded any cause of action against Fikah Acres Ltd. and he had not set out the orders or reliefs he wanted against the Interested Party. The 2<sup>nd</sup> Respondent urged the Court to dismiss this prayer because the Applicant had failed to establish a basis for the proposed Joinder of the Interested Party as a Defendant.
- 30 In conclusion, the 2<sup>nd</sup> Respondent submitted that the Applicant's application to amend his Counterclaim was marred by inordinate delay and it appeared as an afterthought after he lost previous applications. Reliance was placed on the case of *Kassam vs. Bank of Baroda (Kenya) Ltd* (2002) eKLR, where the Court stated that, an amendment should be applied for immediately it is seen that an amendment is necessary. That there is no basis for amending the Counterclaim where the Court had already found that the 4<sup>th</sup> Defendant had already compromised his claim over the Subject matter by entering a settlement agreement
- 31 Based on the foregoing, the 2<sup>nd</sup> Respondent urged this Court to find that the instant application lacked merit and proceed to dismiss it with costs.
- 32 The Court has considered the pleadings in general, the rival written submissions and the relevant provisions of law and finds the main issues for determination are;
1. Whether the instant application is Res judicata?
  2. Whether an Order for Status quo should be granted?
  3. Whether Fikah Acres Ltd. should be joined as s Defendant as opposed to being an Interested Party and whether the Chief Land Registrar and New Kenya Planters Association should be joined to the suit as Defendants?
  4. Whether leave should be granted to the Applicant to amend the Counterclaim?
- 33 Before delving into the issues above outlined, this Court notes that the instant suit was filed on 22<sup>nd</sup> October 2009, via a Complaint. That the said Complaint has been amended on several occasions with the last amendment being done on 24<sup>th</sup> June 2011. In response to the said Complaint, the 4<sup>th</sup> Respondent who is the Applicant herein filed a Defence and Counterclaim dated 8<sup>th</sup> April 2012. On 6<sup>th</sup> August 2014, the matter was placed before a Judge who gave a further mention date and issued an order for the maintenance of status quo with respect to the 4<sup>th</sup> Defendant's property. Via a letter dated 19<sup>th</sup> November 2013, and filed in Court on 26<sup>th</sup> November 2013, the Plaintiff together with the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants entered a consent that sought to settle the suit and all pending applications on the one



hand and discharge all injunctive orders, status quo orders and any other consequential orders, issued in the matter on the other hand. On 29<sup>th</sup> October 2014, the Plaintiff fully withdrew his suit against the 4<sup>th</sup> Defendant (Applicant herein) pursuant to Order 25 of the Civil Procedure Rules.

- 34 While the Court appreciates the above, it has noted that the Counterclaim as filed by the 4<sup>th</sup> Defendant is still alive for determination by this Court. Secondly, the Court notes that the Plaint as filed by the Plaintiff/1<sup>st</sup> Respondent herein was compromised via a Consent and none of the issues raised were determined on merit. In addition, the Court notes that the 1<sup>st</sup> Respondent herein was placed on liquidation pursuant to Section 65 of the Cooperatives Societies Act, and 4 liquidators appointed for that purpose.
- 35 Having stated the foregoing, this Court will now proceed to determine the issues raised one after another.

### **1. Whether the instant application is Res judicata?**

- 36 The 2<sup>nd</sup> Respondent contends that the instant application is res judicata, and as result, it is bad in law and an abuse of the Court Process. It is their contention that via an application dated 18<sup>th</sup> December 2014, the Applicant herein filed an application in High Court Civil Case 779 of 2007, contesting the 2<sup>nd</sup> Respondent's title of the suit properties and seeking for cancellation of the same and reinstatement of the suit land to his name. That on 1<sup>st</sup> February 2016, the Court delivered a ruling in respect of the aforementioned application and the same was struck out. The Court proceeded to state that if the 4<sup>th</sup> Defendant/Applicant herein was aggrieved, he was entitled to institute a claim for fraud. Further, that the same issues were raised by the Applicant in Nairobi ELC Constitutional Application No. 1377 of 2016, Robert Kinuthia Mungia vs. Fikah Acres Limited and Another (2018) eKLR, where the Court dismissed a similar Application by the Applicant herein seeking the same injunctive orders for lack of merit.
- 37 The 2<sup>nd</sup> Respondent contends that the Applicant is seeking similar injunctive orders in the instant application, but disguised as an order for the maintenance of status quo. That this prayer was refused by Justice Odunga and Justice Okongo and this Court should find that the Application is indeed res judicata. The Black's law Dictionary 10<sup>th</sup> Edition defines "res judicata" as

An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

- 38 The doctrine of res judicata is set out in Section 7 of the Civil Procedure Act. The doctrine ousts the jurisdiction of a Court to try any suit or issue which had been finally determined by a Court of competent jurisdiction in a former suit, involving the same parties or parties litigating under the same title. A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
- i. The suit or issue raised was directly and substantially in issue in the former suit.
  - ii. That the former suit was between the same party or parties under whom they or any of them claim.
  - iii. That those parties were litigating under the same title.
  - iv. That the issue in question was heard and finally determined in the former suit.



- v. That the Court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
- 39 In the case of *John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR, the Court of Appeal set out the ingredients of res judicata as follows:
- From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the Court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83.”
- 40 In *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that:
- Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.
  - b) That former suit was between the same parties or parties under whom they or any of them claim.
  - c) Those parties were litigating under the same title.
  - d) The issue was heard and finally determined in the former suit.
  - e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
- 41 In a nutshell, res judicata is intended to bring litigation to a halt; it is intended to bar a person who has had his day in a Court of competent jurisdiction where his case was concluded from re-litigating his case afresh. In essence, it saves judicial precious time and protects the sanctity of the Court to do just what it should do. In sum, it prevents the abuse of the Court process.
- 42 Having laid out the basis for the principle of res judicata, this Court will proceed to probe whether the instant application is res judicata to the Application dated 18<sup>th</sup> December 2014, and to the application dated 7<sup>th</sup> November 2016. In carrying out the probe, this Court will carefully and methodically analyse the two identified applications to classify the parties, the subject matter, the reliefs sought, the issues for determination therein, and if the same are similar to those raised in the instant application. Further this Court will seek to find out if a decision has been delivered in the two applications by a Court of competent jurisdiction.
- 43 It is not in doubt that both the Application dated 18<sup>th</sup> December 2014, and the one dated 7<sup>th</sup> November 2016, have been heard and determined on merit and rulings by Courts of competent jurisdictions delivered on 1<sup>st</sup> February 2016 and 5<sup>th</sup> April 2018 respectively.
- 44 On whether the parties in all the impugned applications are similar, it is not in doubt that the parties herein were the same parties in the application dated 18<sup>th</sup> December 2014, and that dated 7<sup>th</sup> November



2016. The Application dated 18<sup>th</sup> December 2014, was filed in Nairobi HCCC 779 of 2009, which was consolidated with Nairobi ELC Case 1469 of 2016, and later transferred to this Court as the suit lands fall within the territorial jurisdiction of this Court.

- 45 As regards the Application dated 7<sup>th</sup> November 2016, it was filed in Nairobi ELC Constitutional Application 1377 of 2016. In the said Nairobi ELC Constitutional Application 1377 of 2016, the Applicant, herein was also the Applicant, while the 2<sup>nd</sup> Respondent herein was the sole Respondent and the 1<sup>st</sup> Respondent herein was an Interested Party.
- 46 Based on the foregoing, it is evident that the Parties in the instant application are similar to the parties in the application dated 18<sup>th</sup> December 2014, and the one dated 7<sup>th</sup> November 2016. Further, it is evident and therefore safe to conclude that both applications dated 18<sup>th</sup> December 2014, and 7<sup>th</sup> November 2016, respectively have been determined on merit by Courts of competent jurisdictions and rulings delivered as outlined above.
- 47 Having conclusively delt with two of the elements necessary before the Court can find Res judicata, this Court will now proceed to determine if the issues in question in the instant application are similar to the issues raised and determined in the applications dated 18<sup>th</sup> December 2014, and the one dated 7<sup>th</sup> November 2016.
- 48 The instant application is omnibus in nature as it seeks various orders in one application. It seeks and order for maintenance of status quo, and an Order for joinder of 3 parties and an Order seeking leave to amend a counterclaim.
- 49 This Court has perused the Orders sought in the Application dated 18<sup>th</sup> December 2014, and noted that the said application sought joinder of Fikah Acres Limited, as an Interested Party, sought an injunction against the proposed Interested Party and the Respondents therein among other orders. In its decision delivered on 1<sup>st</sup> February 2016, the High Court sitting in Nairobi struck out this application for material non-disclosure by the Applicant therein who is also the Applicant herein. With regards to the Application dated 7<sup>th</sup> November 2016, it sought a declaration that Subordinate Courts have no jurisdiction to deal with land matter and specifically that Thika Chief Magistrates Court lacked Jurisdiction to entertain THIKA CMCC 41 of 2015. The said application also sought a temporary injunction against Fikah Acres Ltd. who is the 2<sup>nd</sup> Respondent herein.
- 50 It is the contention of the 2<sup>nd</sup> Respondent that an order for maintenance of status quo is similar in nature to an order for temporary injunction and therefore the instant application is res judicata as the issue of injunction has already been previously determined in the application dated 18<sup>th</sup> December 2014, and that dated 7<sup>th</sup> November 2016. The question then that begs the answer is whether an order for maintenance of status quo is similar in nature and form with an order for a temporary injunction. This Court in holding that these two orders are materially different as guided by the case of Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc.Civil Cause no 11 of 2012 cited with approval in Pricillah Wanja Kibui v James Kiongo Kibui & another [2014] eKLR where the Court stated,

In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.



51 Having found that an order for status quo is materially different from an order of temporary injunction, it follows therefore that the prayers sought in the instant application are materially different from the prayers sought in the applications dated 18<sup>th</sup> December 2014, and that dated 7<sup>th</sup> November 2016. It is then follows that the instant application is not res judicata and the Court will proceed to determine the other issues on merit.

## 2. Whether an Order for Status quo should be granted?

52 The Black's Law Dictionary, Butter Worths 9<sup>th</sup> Edition, defines Status Quo as a Latin word which means "the situation as it exists". The purpose of an order of Status quo has been reiterated in a number of decisions:

53 In Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] e KLR, Odunga J. stated,

54 When a Court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."

55 In TSS Spinning & Weaving; Company Ltd Vs Nic Bank Limited & another [2020] e KLR, the purpose of a status quo order as unpacked as follows:

In essence therefore, a status quo order is meant to preserve the subject matter as it is/ existed, as at the day of making the order. Status quo is about a Court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.'

56 In Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another [2020] e KLR, the purpose of a status quo order was explained as follows:

..... By maintaining the status quo, the Court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision."

57 Apart from preserving the substratum of the subject matter, the Court has also found an order of status quo as a case management strategy, where the Court is keen to prevent prejudice as between the parties to a matter pending the hearing and determination of the main suit.

58 The Court of Appeal in the case of Mugah Vs Kunga [1988] KLR 748, upheld the practice of issuing status quo orders in land matters status.

Status quo orders should always be issued for purposes of preserving the subject matter. This Court's practice direction vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the Court the leeway and discretion to make an order for status quo to be maintained until determination of the case."

59 Based on the foregoing, this Court opines that an order for maintenance of status quo is an order to be issued for the purpose of preserving the subject matter of the property, for case management reasons and in a bid to prevent prejudice from being visited against either party to the case. Further status quo orders are different from injunctions, meaning that the considerations to be established for grant of



injunctions are not necessary under status quo orders. Indeed, in the case of Msa Misc Appln. (J.R) No. 26 of 2010. The Chairman Business Premises Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd (UR), the Court agreed that in certain circumstances, a prohibitory injunction may end up having the same effect as an order for status quo. This does not however mean that an injunction and a status quo order are one and the same thing, merely, that in certain circumstances, particularly where the order sought is one of a prohibitory injunction, it may happen that the effects of a that injunction and a status quo order may be similar.

- 60 Having outlined the nature and application of an order maintaining status quo, what begs the answer is whether the Applicant has made a case for grant of the said order.
- 61 It is the Applicant's contention that the suit lands are under a risk of being further transferred to third parties in an attempt to defeat this proceedings. That sometimes in August 2014, when a status quo order was still subsisting, the 1<sup>st</sup> Respondent transferred the suit lands to itself measuring 859.771 acres, and later transferred the suit lands to the 2<sup>nd</sup> Respondent without his consent. That the impugned parcels of land are now registered in the name of the 2<sup>nd</sup> Respondent and he is afraid they may be transferred to other unsuspecting parties. That even though the Plaintiff herein compromised the suit, his Counterclaim is alive and well and it deserves a right to be heard. The 1<sup>st</sup> Respondent on the other hand has opposed the Applicant contention and stated that the properties were transferred to it as a result of a legitimate transaction and accordingly it passed on good title to the 2<sup>nd</sup> Respondent. That the Applicant was at all times aware of the transaction as he sold the land to the 1<sup>st</sup> Respondent in exchange of loan facility, that he had taken with them and was in arrears. Similarly, the 2<sup>nd</sup> Respondent averred that it was a bonafide purchaser for value, and it was the registered and beneficial owner of the suit land. That prior to acquisition of the suit land, it conducted due diligence on the title and established the ownership of the same.
- 62 Based on the foregoing, it is evident that both the Applicant herein and the 2<sup>nd</sup> Respondent claim ownership over the same parcels of land. While the impugned property is registered in the name of the 2<sup>nd</sup> Respondent, the Applicant avers that the said registration was procure by fraud. This Court appreciates the provisions of Sections 24 and 25 of the Land Registration Act, 2012 which guarantees absolute and unlimited rights to a registered owner of land.
- 63 Be that as it may, the Court also appreciates that the Applicant also has a right to be heard and to have his claim determined on merit. With this in mind and noting the nature and the age of this dispute, this Court finds and holds that the Applicant has made out a case for the grant of an order of status quo pending the hearing determination of the Applicant's counter claim.

**3. Whether Fikah Acres Limited should be joined as s Defendant as opposed to being an Interested Party and whether the Chief Land Registrar and New Kenya Planters Association should be joined to the suit as Defendants?**

- 64 An Application for joinder is essentially based upon Order 1 Rule 10(2) of the Rules which stipulates as follows:
- (2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."



65 It is trite that Court has discretion to allow joinder of a party to a suit where it is deemed such party is a necessary party to the suit and whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. See the case of Meme... Vs...Republic (2004) 1EA 124, where the Court held that: -

66 A party could be enjoined in a matter for the reasons that:-

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings.
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law.
- iii. Joinder to prevent a likely course of proliferated litigation.

67 The guiding principles for joinder were also reproduced in the case of Peter Irungu Wainaina vs. Chege Njihia & Others [2018] eKLR, where the Court while quoting Havelock J in the case of Technomatic Limited T/A Promopack Company Vs. Kenta Wine Agencies Limited & Another (2014)eKLR, held that for joining a party thus;- He must be a necessary party, he must be a proper party, in the case of a Defendant there must be a relief flowing from that Defendant to the Plaintiff, the ultimate order or decree cannot be enforced without his presence in the matter and his presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

68 Though the Court has discretion to issue an order for joinder of a necessary party, it may also refuse such joinder where such joinder would lead to difficulties in handling the existing cause of action and the party being sought to be enjoined is unnecessary party. In Pravin Bowry v John Ward and Another [2015] eKLR the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The Court referred to the Ugandan case of Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU) where the Court stated as follows:

A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the Court is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the cause or matter...

69 For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies (on an application of a Defendant) to be joined as a co-Defendant, where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (Emphasis by underline)

70 In Civicon Limited v Kivuwatt Limited and 2 Others [2015] eKLR the Court of Appeal, on the interpretation of Order 1 of the Rules observed as follows:

Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their



presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.

...from the foregoing, it may be concluded that being a discretionary order, the Court may allow the joinder of a party as a Defendant in a suit based on the general principles set out in *Order I rule 10 (2)* bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

- 71 It is trite that power to grant and order for joinder under Rule 1 (10) of the Civil Procedure Rules, is discretionary and in exercising jurisdiction a Courts main objective should be to do justice. In the instant case, the lands in dispute are registered in the name of the 2nd Respondent. The Applicant however lays claim on the same and seeks cancellation of title on the grounds that the same were fraudulently transferred from him to the 1st Respondent and consequently to the 2nd Respondent. It is evident based on the foregoing that the 2nd Respondent and the proposed 3rd Defendant/3rd Respondent are necessary parties for the determination of the Applicant’s Counterclaim. It is it this Court’s finding that both the 2nd and 3rd Defendants will be critical parties in aiding this Court to determine all the issues in question conclusively. In addition, the ultimate Orders if granted cannot be enforced without their presence in the matter as doing so will effectively compromise their right to be heard.
- 72 In relation to New Kenya Planters Cooperative Union Limited (NKPCU), the Applicant contends that it was formed to replace the 1st Respondent herein after the same went into liquidation. The Court notes that the Applicant has not substantiated this allegations. Further, the Court notes that it is the averment of the 1st Respondent that the NKPCU is new entity completely separate from the 1st Defendant and it has a right to sue and to be sued in its name. That it has no relationship whatsoever with the 1st Respondent and that the 1st Respondent is still under liquidation. In the absence of evidence and appreciating the doctrine of privity of contract and the concept of separate legal personality, this Court denies the prayer to join NKPCU as Defendant to this suit.
- 73 The upshot of the foregoing is that this Court finds and holds that Fikah Acres Limited and the Chief Land Registrar are necessary and proper parties and they hereby joined as Defendants to the Applicant’s Counterclaim. However, NKPCU is not a necessary and shall not be joined in the suit.

#### **4. Whether leave should be granted to the Applicant to amend the Counterclaim?**

- 74 The issue for determination is whether the Court should allow the application for amendment of the Defence and Counterclaim. The general power to amend pleadings draws from Section 100 of the *Civil Procedure Act*. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the Court. However, this discretion should be exercised judiciously and in line with criteria set out under the Civil Procedure Rules. The said Order 8, Rule 3 of the Civil Procedure Rules provides as follows:

Amendment of pleadings with leave



- (1) Subject to Order 1, Rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings”

75 Order 8 Rule 5 of the Civil Procedure Rules, provides as follows: -

For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

76 The Court has the power to amend pleadings, which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's Precedents of Pleading, 12<sup>th</sup> Edition, which provides as follows concerning amendment of pleadings:

...power to so amend can be exercised by the Court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

78 Similarly, in Halsbury's Laws of England, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -

...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

79 The principles that should guide the Court in dealing with applications for amendments are elaborated in Mulla, the Code of Civil Procedure, 18<sup>th</sup> Ed, Vol 2 pages 1751-1752 which has been cited in various authorities including the case of Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others (2014) eKLR where it is stated as follows:

- i. Amendments should be allowed which are necessary for determination of the real controversies in the suit;
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;
- iv. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;



- v. Amendments of a claim or relief barred by time should not be allowed;
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time
- vii. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties
- viii. The delay in filing the petitions for amendment should be properly compensated by costs
- ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”

80 In the case of *Institute for Social Accountability & Another v Parliament of Kenya & 3 others* [2014] eKLR, where the Court observed that:

The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the Court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

81 The issue of amendment of pleadings was also considered in *Suleiman v Karasha* [1989]eKLR the Court of Appeal held that:

82 Under the Civil Procedure Rules, the parties can amend their pleading with the leave of the Court at any time before judgment. Such amendment would clearly set the issues in dispute to enable the Court to arrive at a just decision. It does not matter if the hearing has been concluded but the Court has to consider the application for amendment and give effect to it as it may deem just. “

83 What can be gleaned from the above is that the Court has a wide discretion to amend pleadings at any stage of the proceedings so to bring out the real issues in controversy between the parties and on such terms as to costs as may be just.

84 In the instant case, the applicant contends that the amendments as proposed are essential for the determination of the real issues in the suit. That many factors had changed since he filed his first Counterclaim that necessitated the amendment. The Respondents on the other hand are opposed to the amendment on the grounds that the amendment is sought after inordinate delay and that since the Plaintiff as filed has already been compromised, the Defence and Counterclaim has no legs to stand on and it should therefore be struck out.

85 This Court notes that indeed the suit on which the Counterclaim is grounded has been compromised. However, it does not agree with the Respondents that the Counterclaim lacks merit on that ground. It is trite that a Counter claim is an independent claim filed by a Defendant together with a defence and it can stand on its own in the absence of and/or where a Plaintiff has been struck out or compromised as in the instant case. A Counterclaim like a Defence does not collapse the instance a Plaintiff collapses. With regards to the amendments sought, the Court appreciates that the instant suit was filed sometimes in 2009, and initial Counterclaim was filed sometimes in 2012, about a decade ago. While the Court appreciates this, it also notes that the instant suit has never proceeded to substantive hearing as the same was compromised before it could take off. The Court further notes that while the Respondents allege they will suffer prejudice if the instant application is allowed, they have failed to substantiate the said prejudice. Whereas the Court appreciates all the factors above stated, it is of the view that it would



be in the interest of justice to allow the applicant to amend the Defence and Counterclaim so that the Court can determine the real issues in controversy.

86 The upshot of the foregoing is the Applicant's Application dated **14<sup>th</sup> March 2022**, is found merited and the same is allowed in the following terms;

- a. A declaration be and is hereby issued that Status quo be maintained in respect of ownership of all those properties known as L.R. No. 1363/10; L.R. No. 1363/11; L.R. No. 1363/12; L.R. No. 1363/13; L.R. No. 1363/14; L.R. No. 1363/15; L.R. No. 1363/16; L.R. No. 1363/22; L.R. No. 1363/23; L.R. No. 1363/24; L.R. No. 1363/25; L.R. No. 1363/26; L.R. No. 1363/27; L.R. No. 1363/28 & L.R. No. 1363/33 situated in Makuyu Area of Murang'a County pending the hearing and determination of the counter claim filed herein by the Applicant Robert Kinuthia Mungai.
- b. That the Interested Party herein, Fikah Acres Limited be and is hereby made a Defendant to this suit instead of an Interested Party.
- c. That the Chief Land Registrar, be and is hereby joined as a Defendant to this suit.
- d. That the Applicant be and is hereby granted leave to amend his counterclaim and to file and serve the same within 21 days of the date of this ruling
- e. That the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants be and are hereby granted corresponding leave to file their Defenses to Counterclaim within 21 days of service of the amended Counterclaim.
- f. Costs be in the cause

87 It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**L. GACHERU**

**JUDGE**

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Plaintiff/1<sup>st</sup> Respondent - Absent

1<sup>st</sup> Defendant – Absent

2<sup>nd</sup> Defendant – Absent

3<sup>rd</sup> Defendant – Absent

Mr. Muturi for the 4<sup>th</sup> Defendant/Applicant

M/s Swaka H/B Njenga for the Interested Party/2<sup>nd</sup> Respondent

Proposed Defendant/3<sup>rd</sup> Respondent – Absent

Proposed Defendant/4<sup>th</sup> Respondent – Absent

