Jumba & another v Metto & 2 others (Environment & Land Case 30 of 2020) [2023] KEELC 15957 (KLR) (27 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15957 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 30 OF 2020

FO NYAGAKA, J

FEBRUARY 27, 2023

BETWEEN

ZIPPY KHAVERE JUMBA ..... 1ST PLAINTIFF

GEORGE JUMBA ..... 2ND PLAINTIFF

AND

JOSPEH KIPKURGAT METTO ..... 1ST DEFENDANT

TIMOTHY CHERUIYOT ..... 2ND DEFENDANT

PAULINE CHEBET SEREMI ..... 3RD DEFENDANT

RULING

1. This is an application dated 30/05/2022 filed on 12/07/2022. It was brought under Section 1A, 1B, 3A of the *Civil Procedure Act*, 2010 and Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of law. In it, the Defendants/Applicants prayed for the following orders:-

    1. ...spent

    2. That the respondents herein be cited for contempt of court for disobeying court order dated 22nd of January, 1996 in Kitale SPMCC No. 150 of 1995.

    3. That the Honourable Court be pleased to order cancellation of the survey of title number Waitaluk/Mambonde Block 7/Koiyo/9 and the resultant subdivisions of Waitaluk/Mambonde Block 7/Koiyo/283, Waitaluk/Mambonde Block 7/Koiyo/284, Waitaluk/Mambonde Block 7/Koiyo/285, Waitaluk/Mambonde Block 7/Koiyo/286, and Waitaluk/Mambonde Block 7/Koiyo/287 and restore Waitaluk/Mambonde Block 7/Koiyo/9 onto one whole.

4. That do issue an order for the subdivision of the restored title number Waitaluk/Mabonde Block 7/Koiyo/9 to give the estate of Joseph Metto 0.8 acres in terms of the decree in Kitale Senior Principal Magistrate' Court Land Case No. 150 of 1995.

5. That the costs of this Application be provided for.

2. In support of the Application, the Applicant listed seven (7) grounds. Of which the first one was that there is a valid court decree issued on 22/01/1996 in Kitale SPMCC No. 150 of 1995 directing that 0.8 acres be excised from plot No. Waitaluk/Mabonde Block 7/Koiyo/9 and the same be made part of Waitaluk/Mabonde Block 7/Koiyo/8 and be occupied by the estate of Joseph Metto (deceased); that the Respondents herein filed this suit to defeat and obstruct the decree issued in Kitale SPMCC No. 150 of 1995; contrary to the express directions of the Court in the Kitale SPMCC matter that the 0.8 acres be excised from Waitaluk/Mabonde Block 7/Koiyo/9 in favour of the decree holder therein, the Respondents excised 0.8 acres from a different parcel of land far away from the original plot Waitaluk/Mabonde Block 7/Koiyo/8 and made it part of the aforesaid plot; during the pendency of this suit, and in flagrant disregard of the decree in Kitale SPMCC No. 150 of 1995, the Respondents subdivided Waitaluk/Mabonde Block 7/Koiyo/9 into five plots namely, Waitaluk/Mabonde Block 7/Koiyo/283, 284, 285, 286 and 287 and transferred them into their children; that having achieved their goal the Respondents filed a notice of withdrawal of their claim at no costs to the Applicants yet the applicants were entitled to the costs; that the Applicant and the beneficiaries of the deceased's estate stand to be deprived courtesy of the illegal activities of the Respondents; and no prejudice would be suffered if the application was granted.

3. The Application was supported by the Affidavit of Timothy Cheruiyot sworn by him on 30/05/2022. In his Affidavit, the Applicant deponed that he was the eldest son of the deceased Joseph Metto and had the authority of the co-administrator to swear the Affidavit. Further, he swore that there was a valid decree of the Court in Kitale SPMCC 150 of 1995 directing the excising of 0.8 acres from Waitaluk/Mabonde Block 7/Koiyo/9 for it to be made part of Waitaluk/Mabonde Block 7/Koiyo/8. He annexed and marked as TC1 a copy of he decree. He then deponed the contents of the grounds in support of the Application as given on the face thereof. He annexed and marked TC2 a copy of the Affidavit sworn by one of the Respondents, Zippy Khavere Jumba on 4/08/2021 that land parcel No. Waitaluk/Mabonde Block 7/Koiyo/9 had since been subdivided into the five parcels of land and registered in the names of her children. He stated that the subdivision and transfer of the parcels was done contrary to the orders of the Court and during the pendency of this suit in order to obstruct the decree that may be issued herein. He then deponed that in 2015 the Respondents purported to withdraw the claim herein but without costs. He annexed and marked TC3 a copy of the order dated 25/06/2015. He swore that the Respondents had continued to utilize the said plots to the Applicants' detriment and that the Respondents at one time demolished their homes rendering them homeless. He then deponed the rest of the contents as given.

4. The Respondents filed a Replying Affidavit sworn on 13/12/2022 by one Zippy Khavere Jumba. She deponed in it that she was the 1st Respondent. She stated that they were not in contempt of the Court and that they had not subdivided the parcel of land (namely, Waitaluk/Mabonde Block 7/Koiyo/9) to defeat and or obstruct the decree of this Court. She then deponed that the Applicant had admitted that 0.8 acres was given to the late Joseph Metto by their deceased's father, Jeremiah Kiti Jumba from his own parcel number 99 Koiyo Farm.

5. She then deponed that the 2nd Plaintiff/Respondent purchased 8 acres from his deceased father, one Jeremiah Kiti Jumba. She annexed and marked as ZKJ1 a copy of the agreement of sale. Further, that the said parcel was transferred to her as a gift. She annexed and marked as ZKJ2 a copy of the agreement.

Her further deposition was that she added 0.2 acres to make the total of the land 8.2 acres. That after a while a dispute arose between Joseph Metto, the directors of Koyo farm and Jeremiah Kiti Jumba regarding the 0.8 acres. The dispute was resolved that Jeremiah Kiti Jumba does give 0.8 acres to the said Joseph Metto. She annexed a copy of the letter of settlement as ZKJ3. Her further deposition was Jeremiah Jumba curved 0.8 acres out of his Koyo farm and transferred it. That she was authorised by the directors of Koyo farm to collect the two title deeds. She annexed and marked as ZKJ4 a copy of the letter of authorization. She then deponed that the issues herein could only be best determined during the hearing of the counter-claim herein.

6. Regarding the titles resulting from the subdivision of parcel No. Waitaluk/Mabonde Block 7/Koiyo/9, she deponed that this Court cannot cancel the title deeds in respect of parcel numbers Waitaluk/Mabonde Block 7/Koiyo/283, 284, 285, 286 and 287 at this stage because she carried out the subdivision and transfers of the same lawfully in order to secure that interests of her children. She then deponed that the Applicant wanted to benefit twice from the matter over the 0.8 acres of land herein. She then stated that the prayer of prohibition was made in bad faith and was designed to prevent them from carrying out activities on the land. She then deponed that the prayer of cancellation of the titles was not merited as no evidence had been adduced to show that the subdivision was in breach of a court order. She asked that the Application be dismissed with costs.

Submissions

7. The Application was disposed of by written submissions. Both parties filed their submissions. The Applicant did file his dated 11/01/2023 on 16/01/2023 while the Respondents did theirs dated 14/11/2022 on the same date.

8. The Applicant summarized the Application and first of all defined contempt of Court using the Blacks Law Dictionary. He submitted that there having been an order dated 22/01/1996 which was specific, the Respondents were in contempt thereof for failing to honour it. They relied on the case of Kristen Carla Burchell vs. Grant Burchell (Eastern Cape Division Case No. 364 of 2005 where the court held that for such a punishment to ensue, there has to be terms of the order, knowledge of the terms by a respondent and failure to comply with the terms. He then summed up how the Respondents were aware of the order of the Kitale SPMCC 150 of 1996 directing that they curve out 0.8 acres out of Waitaluk/Mabonde Block 7/Koiyo/9, to be made part of Waitaluk/Mabonde Block 7/Koiyo/8 and failed to do so but rather they subdivided the title and registered it in the names of the children of the 1st Respondent. They also cited the case of B vs. Attorney General [2004] 1 KLR 431 and the Court of Appeal case of Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others, Civil Application No. Nai 247 of 2006.

9. He then submitted that the subdivision of the land parcel No. Waitaluk/Mabonde Block 7/Koiyo/9, the subject matter of the suit herein was done deliberately and with the full knowledge of the pending suit in contravention of the doctrine of lis pendens which binds the Respondents. His submission was that the Respondents' conduct was to demean the dignity of the Court and in disregard of a valid decree of the Court.

10. He summed it that Order 40 Rule 1 & 2 of the Civil Procedure Rules 2020 empowers the Court grant a temporary injunction aimed at restraining acts of damage or wastage of the property in issue pending the determination of the case. He relied on the case of American Cyanimid Co.(No 1) v Ethicon Ltd [1975] UKHL 1 and Giella v Cassman Brown & Co. Ltd [1973] EA 358. He then argued that the contention that the issues raised in respect of parcels No. Waitaluk/Mabonde Block 7/Koiyo/283-287 await the determination of the case was misconceived as ownership of the original parcel in question had never been determined and so the Respondents lacked power to subdivide and transfer the same

before the determination of the suit hence an order of cancellation of the titles was appropriate. They further relied on the case of Rajender Sungh & ors vs. Santa Singh & ors, AIR, 1973, SC 337 where the Court explained the purpose of the doctrine of lis pendens. Further, he relied on the case of Mbugua Njuguna v Elijah Mburu Wanyoike and Another [2004] eKLR and Anne Jepkemoi Ngeny v. Joseph Tereito & Another [2021] eKLR where the Court of Appeal held that alienation of properties registered in the names of the parties during the pendency of litigation runs afoul the doctrine of lis pendens.

11. The Respondents on the other hand submitted that the instant Application was premised on an Application dated 11/03/2019 which revived the suit, ultimately. They stated that there was no suit to be revived since it had abated on 06/04/2010 since the said Joseph Metto died on 06/04/2009. They relied on Order 24 Rule 3 on revival of suits. Also, they cited the case of Mbaya Nulwa vs. Kenya Power & Lighting Co. Ltd, Mombasa High Court, Civil suit No. 39 of 2014. It was on abatement of suit.

12. They then submitted that in respect of seeking the implementation of the decree in SPMCC No. 150 of 1995, it could only be done in that suit and not this one. Also, they stated that the orders ought in prayers (d) and (e) were substantive ones only meant for the hearing of the main suit. Furthermore, that the suit having abated the orders cannot be granted. They relied on the case if Nairobi West hospital Limited vs. Joseph Kariba & another, Nairobi Misc. Application No. 415 of 2018 and Witmore Investment Limited vs County Government of Kirinyaga & 3 others, Kerugoya Constitutional Pet. No. 7 of 2015. They prayed that the Application be dismissed with costs.

Issues, Analysis And Determination

13. Upon carefully considering the Application, the rival Affidavits both in support and opposition, the submissions filed, as well as the statutory law and authorities cited, this Court finds that the issues for determination are:

    a. Whether the Respondents are in contempt of court;

    b. Whether the cancellation of the titles resulting from the subdivision of Waitaluk/Mabonde Block 7/Koiyo/9 should be made and the titles revert to the original;

    c. Whether the Court should order the excise of 0.8 acres from Waitaluk/Mabonde Block 7/Koiyo/9 as ordered in Kitale SPMCC No. 150 of 1995;

    d. What orders to issue and who to bear the cost of each Application.

14. The issues before me for determination are pretty simple. I will begin with the first one, on contempt of Court.

(a) Whether the Respondents are in contempt of court

15. The Applicant contends that the Respondents are in contempt of the Court orders issued on 22/01/1995 and should be found guilty of that order and be punished. It is clear that punishment for contempt of court is provided for under Section 29 of the *Environment and Land Court Act*. The provision reads as follows:

> " ....Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both."

16. For this Court to determine whether or not there was breach of the orders of the Court which can lead to punishment for contempt of Court, it is worth understanding what constitutes Contempt of Court.

17. In Black's Law Dictionary, 11th Edition, Thompson Reuters, 2019, p. 397, Bryan A. Garner borrows from Edward M. Dangel's definition of contempt in his work, "Contempt" S 1, at 2 (1939) to render the term as "...a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or impair the respect due to such a body..."

18. Therefore, any party served with a court order or is in one way or other aware of the order of the Court is bound to obey it. The cardinal point is that the party has knowledge of the existence of the order. Courts of law do not issue orders in vain. It is imperative that any party against whom orders are directed obeys them. That would firm the rule of law and preserve the dignity of the Court.

19. Courts have not fallen short of emphasizing on obedience of orders of the Court. Thus, in Kenya Human Rights Commission v Attorney General & Another [2018] eKLR, the Court emphasized as follows:

> "Article 159 of *the Constitution* recognizes the judicial authority of courts and tribunals established under *the Constitution*. Courts and Tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with *the constitution* and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.

20. Similarly, in Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another CCT 19/11(75/2015). Nkabinde, J observed that:-

> "The rule of law, a foundational value of *the constitution*, requires that the dignity and authority of the courts be upheld.
>
> This is crucial, as the capacity of courts to carry out their functions depends upon it. As *the constitution* commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

21. In Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2) [1975] 48 D.LR(30), the Court stated that:

> "To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrong can be ignored, then

there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.

Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in Carey v Laiken [2015] SCC17 that;

> "Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect"

It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (Louis Ezekiel Hart v Chief George 1 Ezekiel Hart (-SC 52/2983 2nd February 1990). And in Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.""

22. In order for one to be found guilty of the Contempt of Court, four (4) elements must be proved. There must have been:

    (a) a valid order of the Court.

    (b) the order must have been served or been constructively in the knowledge of the alleged contemnor.

    (c) there must be an action or actions of a contemnor contrary to the order.

    (d) the actions of the contemnor in violation must be deliberate.

23. Therefore, it is not to be taken light of the fact that contempt of Court is an egregious act against the dignity of the Court and the functioning of the rule of law. It ought to be frowned at and punished swiftly. But it can only be done within the confines of the law otherwise it would defeat the purpose of the power of the Court to punish. I find so because, courts themselves cannot take part in the breakdown of the rule of law in the quest to enforce the observance of the rule of law itself.

24. As was held by the Court of Appeal in Michael Sistu Mwaura Kamau vs DPP & 4 Others [2018]eKLR, so I would hold, that:

> " It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra)".

25. Similarly, in Shimmers Plaza Ltd -vs- National Bank of Kenya Ltd [2015] eKLR, emphasized as follows:

> " It is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it... The threshold is quite high as it involves possible deprivation of a person's liberty".

26. In this case, both the Applicants and respondents agree that there was an order issued on 22/01/1996. It was given in Kitale SPMCC No. 150 of 1995. They all agree it ought to have been obeyed by the parties to whom it was directed. It appears it was not, and actually the Respondents went ahead to subdivide the title No. Waitaluk/Mabonde Block 7/Koiyo/9 into five parcels and transferred them into other parties rather than first subdividing it in accordance with the order of the Court in the Kitale SPMCC 150 of 1995 matter. While that might appear to be a clear sign of disobedience, the question that remains unanswered is, can this Court find a party guilty of contempt of Court in a matter that is not before it? I am of the view that the answer is in the negative for two reasons. One is that for this matter to do so would raise a jurisdictional issue. Second, it would amount to interfering with the power and discretion of the Court that issued the order, even if it could have been of the same status. For these reasons, I decline prayer (c) of the instant Application.

(b) Whether the cancellation of the titles resulting from the subdivision of Waitaluk/Mabonde Block 7/Koiyo/9 should be made and the titles revert to the original

27. The Applicant prayed for the cancellation of the titles to land parcel numbers Waitaluk/Mabonde Block 7/Koiyo/283-287. His contention was that the same were resultant from the subdivision of land parcel No. Waitaluk/Mabonde Block 7/Koiyo/9 which is the subject of the suit herein. He contented that the subdivision was done during the pendency and knowledge of the existence of the suit herein hence runs afoul to the doctrine of lis pendens. On the part of the Respondents, while it was admitted that indeed the five parcels of land were a subdivision of the original land parcel No. Waitaluk/Mabonde Block 7/Koiyo/9, they argued that there was no court order barring them from subdividing the land and that the same was done to preserve the interests of the children of Zippy Khavere Juma, the deponent of the replying Affidavit.

28. The doctrine of lis pendens has a long history in its application in our courts. It has both statutory and common law origins. It is defined in Black's Law Dictionary 11th edition, as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

29. The doctrine is a common law principle which was enacted into statute by Section 52 Indian Transfer of Property Act (ITPA)-now repealed. The statute found its application in Kenya before the new land laws came into existence. Its purpose was well articulated by Turner L. J., in Bellamy vs Sabine [1857] 1 De J 566. He held as follows:-

> "It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."

30. In Kenya, the doctrine would be considered over a century and two decades later by our courts. Thus, in the case of Mawji vs US International University & another [1976] KLR 185, Madan, J.A. stated thus:-

> "The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other..."

31. The Court went on to state that:-

> "Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit."

32. While the ITPA was repealed, Section 107 (1) of the *Land Registration Act* which provides the saving and transitional provisions of this Act, had the effect of this permitting the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation hence the doctrine remains applicable to relevant cases. But even then, since the doctrine is a common law principle, by virtue of Section 3 (1) of the *Judicature Act* Cap 8 stipulates it is applicable herein.

33. The circumstances of this case are that on 01/07/1997 the Plaintiffs brought this suit against Joseph Metto claiming a declaration that plot No. 9 Koyo Farm belonged to the Plaintiffs to the exclusion of the defendant whatsoever, and an injunction against the defendant from occupying or interfering in any manner with the plaintiff's use of the said parcel of land.

34. The Defendant filled a Defence and Counterclaim on 20/01/2000. In the Counterclaim he averred that he was entitled to 0.8 acres to be curved out of Plot No. 9 Koyo Farm as per the decree of the Court in Kitale SPMCC No. 150 of 1995 and that contrary to the said decree the Plaintiff's had curved out 0.8 acres from the Plaintiff's father's land known as Plot 99 Koyo Farm which was far off from the suit land and purported to give it to him. He prayed for the amendment of the Map and curving out of the 0.8 acres from plot No. 9 Koyo Farm as per the decree of the Court. The suit was initially filed in the Eldoret High Court as HCC No. 238 of 1997. It was transferred to Kitale and given HCC No. 22 of

1999 and then to Kakamega and allocated HCC No. 158 of 2000 and now is back to the Kitale ELC as No. 30 of 2020, the current number. Thus, it is clear that this is a very old matter before the Court.

35. It appears that on various occasions in the various courts, it was fixed for hearing. For instance, on 06/02/2001 it was fixed for hearing on 26/09/2001. On that date an adjournment was sought by the Plaintiffs and was declined. The suit was dismissed for non-attendance with costs to the Defendant. An Application was made to set aside the orders of the Court and on 23/07/2002 it was allowed by consent with costs of Kshs. 15,000/= being payable within seven days. After that other interlocutory proceedings were made but a hearing date for 18/12/2003 was given.

36. The record shows that from 22/02/2005 when the matter was for hearing and was put off for reasons that the Plaintiff ought to have amended their Plaint, nothing took place until 26/03/2015 when the Plaintiffs filed a Notice of Withdrawal of Suit. It was dated 18/03/2015. The Notice was noted on the Court file on 26/03/2015 that the suit was wholly withdrawn. But as this Court found by its Ruling of 1/02/2022, there was no suit to be withdrawn on that date because by virtue of the death of the Defendant on 06/04/2009, the suit against him abated on 06/04/2010 which was about six (6) years and two (2) months before the purported withdrawal.

37. But even so, it is borne from the record that after that purported withdrawal, nothing took place until 11/04/2019 when an application was filed seeking the transfer of the matter to Kitale ELC and a consent was filed settling part of the application to the effect that the file be transferred to this Court and the rest of the Application be canvassed before this Court.

38. Further record position shows that after the suit was transferred, on 24/03/2022 when the matter came up for the Application dated 11/03/2019, learned counsel holding brief for the Plaintiffs' informed the Court the Plaintiffs were not opposed to the prayers (b) and (c) which were outstanding after the one of transfer was allowed. Thus, a consent was recorded in that manner. Prayers (b) and (c) were to the effect that the Court to issue an order of revival of the suit and in particular the Counterclaim does issue, and the Court substitutes the Applicants (being Timothy Cheruiyot and Pauline Chebet Serem) being legal representatives of the deceased Defendant to assume the position of defendants/ Plaintiffs in the Counterclaim.

39. This Court has given the summary of the history of this suit above so that it may now make a finding on the contention raised by the Respondents that there was no suit to be revived vide the application dated 11/03/2019 since it had abated and that no application for extension of time was filed, that indeed the prayers in the Application were clear about the revival of the Counterclaim. Further, the prayer was allowed and the Counterclaim was revived by consent and substitution made. It is therefore illogical that there can be an argument along those lines.

40. Having found that the suit herein was revived according to the law, I now proceed to consider the issue of the subdivision of the title Waitaluk/Mabonde Block 7/Koiyo/9 during the pendency of the suit. In my view that was done with the intention to defeat or obstruct the suit herein and was against the doctrine of lis pendens. I therefore would grant the prayer for cancellation of all the titles that resulted from the subdivision of the parcel in question. And by virtue of Section 3A of the *Civil Procedure Act*, and to preserve the same, after cancellation of the titles and the reverting to the original land parcel number, an order of inhibition is issued to be registered against the said title pending the hearing and determination of this suit.

(c) Whether the Court should order the excise of 0.8 acres from Waitaluk/Mabonde Block 7/Koiyo/9 as ordered in Kitale SPMCC No. 150 of 1995

41. It was urged that the Court does grant the order to excise 0.8 acres of land from land parcel No. Waitaluk/Mabonde Block 7/Koiyo/9. My understanding of the Counterclaim is that the prayer being sought at this stage is at the nerve centre of the Defendant's/Applicant's claim against the Plaintiffs. It cannot therefore issue at this stage for that would amount to concluding the Counterclaim without evidence being tendered thereon. I decline the prayer.

(d) What orders to issue and who to bear the cost of each Application

42. The upshot is that the Application dated 30/05/2022 succeeds in part. I therefore allow it on the following terms, that prayer No. (d) is hereby granted. This Court issues and order cancelling the survey of land parcel No. Waitaluk/Mabonde Block 7/Koiyo/9 and the resultant subdivisions, namely, Waitaluk/Mabonde Block 7/Koiyo/283, Waitaluk/Mabonde Block 7/Koiyo/284, Waitaluk/Mabonde Block 7/Koiyo/285, Waitaluk/Mabonde Block 7/Koiyo/286 and Waitaluk/Mabonde Block 7/Koiyo/287 and directs that the title to land parcel No. Waitaluk/Mabonde Block 7/Koiyo/9 be restored. This Court further issues an order of inhibition to be placed on the restored title forthwith pending the hearing and determination of this matter. The Applicants shall have the costs of the Application.

43. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 27TH DAY OF FEBRUARY, 2023.

HON DR IUR FRED NYAGAKA

JUDGE, ELC, KITALE