REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

ELCLOS NO. E017 OF 2025

ROBERT KADENGE KARISA & 66 OTHERS ..... APPLICANTS

VERSUS

SIGINON CO-OPERATIVES SAVINGS & CREDIT SOCIETY LIMITED ..... 1ST RESPONDENT

THE LAND REGSITRAR ..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

[NOTICE OF MOTION DATED 21ST MARCH 2025

1. The notice of motion dated the 21st March 2025 was filed by the applicants on the 4th April 2025, and they seek for the following prayers:

    1. *"Spent.*
    2. *Spent.*
    3. *Spent.*
    4. *Spent.*
    5. *THAT pending hearing and determination of the Originating Summons Application filed herewith or until*

further orders, this Honourable Court be pleased to issue an injunction restraining the Respondents whether by themselves or servants from evicting, demolishing the Applicants' structures, selling, leasing, surveying for purposes of subdividing or in any way interfering with the Applicants' peaceful use, occupation and enjoyment of property title number Subdivision Number 12914 ((Original Number 405/3) Section I Mainland North.

6. *THAT in the alternative to prayer number 4 [sic], and pending hearing and determination of the Originating Summons filed herewith or until further orders, this Honourable Court be pleased to grant an order of status quo that there shall be no eviction, demolition of the applicant's structures and/or interference with the Applicants' peaceful use and possession of property title number Subdivision Number 12914 ((Original Number 405/3) Section I Mainland North.*
7. *Spent.*

8. *THAT the Officer Commanding Kiembeni Police Station or any other officer(s) as may be designated by him to ensure tranquillity in execution of this court orders.*
9. *THAT costs of this Application be provided for."*

The application is premised on the sixteen (16) grounds on its face marked (a) to (p) respectively, and supported by the affidavit of Rashid Baraka Kaburu, one of the applicants, sworn on the 21st March 2025, deposing inter alia that they have been in possession of Subdivision Number 12914 (Original Number 405/3) Section I Mainland North, suit property, together with their families which comprise women and children from as far back as 1980's; that the suit property is registered with the Respondent, and by virtue of the applicants' long and continuous occupation for over 12 years, they have acquired title over it; that they enjoyed quiet possession of the suit property until 20th March 2025 when officials of the 1st respondent visited the suit property in the company of police officers and vowed to demolish their structures; that out of sheer apprehension, the applicants made enquiries and discovered from the OCS Kiembeni that they have received a Decree with

instructions to forcefully evict the applicants; that the eviction is imminent as in the morning of 21st March 2025, some unknown persons, who introduced themselves as officials of the 1st respondent, driving government vehicles visited their homesteads and were seen placing beacons; that no other persons have brought any claim to the suit property during the applicants' possession, the respondent will not suffer any prejudice if this application is allowed; that as it stands the atmosphere on the suit property is volatile and unless the application is allowed, there will be bloodshed.

2. The application is opposed by the 1st respondent through the replying affidavit of David Kones Kiptum, sworn on 3rd July 2025, and the ten (10) grounds of opposition dated 7th April 2025. The grounds are summarized as follows:

    a) That there exists a decree which was issued on 11th March 2019 and extracted on 23rd April 2025 together with warrants of eviction dated 31st October and extended on 10th December 2024 and that execution should proceed as ordered.

b) That this application herein is res judicata to the judgment delivered in Honourable C.K Yano on 11th March 2019, and the decree thereof.

c) That this court is functus officio and the court cannot re-open and re-litigate the matter on merit.

d) That the judgment of 11th March 2019 is in rem under *section 44* of the Evidence Act because it conferred ownership on the 1st respondent.

e) That the applicants will not suffer any damage since they are not the owners and are not paying rent to the 1st Respondent.

In the replying affidavit, David Kones Kiptum, deposed inter alia that the 1st respondent is the registered owner of the suit property, which it bought from one William Kamiti for valuable consideration of Kshs.20,492,200; that he had visited the suit land personally before purchase and never saw any of the applicants there; that the applicants invaded the suit property sometime in 2016 which necessitated them filing ELC No. E226 of 2016, which was determined through the aforesaid judgment of 11th March 2019, and the application herein is res judicata to that judgment; that

the application is also res judicata to the application dated 15th March 2024 in the previous suit; that the applicants are engaging in forum shopping and abuse of court; that the applicants will not suffer any damage if the application is not allowed.

3. The court issued directions on filing and exchanging replies and submissions on 8th April 2025 and 7th July 2025. During the mention of 7th July 2025, the 2nd and 3rd respondents indicated through their learned counsel that they were not participating in the application. The learned counsel for the 1st respondent filed their submissions dated the 5th July 2025 which the court has considered.
4. The application raises the following issues for the court's determinations:
    a. *Whether the issues raised in the application are res judicata the application dated 15th March 2024 and judgement delivered on 11th March 2019 in Mombasa ELC No. E226 of 2016.*
    b. *Whether the applicants have met the threshold for the temporary injunction or status quo orders sought to be issued.*

c. *Who bears the costs in the application?*

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, grounds of opposition, submissions by the learned counsel for the respondent and come to the following determinations:

a. Res judicata is a legal principle codified under *section 7* of the Civil Procedure Act chapter 21 of Laws of Kenya, and has been discussed by superior courts in several cases. In the case of Communications Commission of Kenya & 5 others versus Royal Media Services Limited & 5 Others [2014] eKLR the court expressed itself as follows on the issue of res judicata:

> *"[317] The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....*
>
> *[319]There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent*

Court; *(ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89. (Emphasis supplied)"*

The position taken about suits in the above case applies mutatis mutandis to applications. The instant application is said by the 1st respondent to be res judicata the judgment delivered on 11th March 2019 and application dated 15th March 2024 in Mombasa ELC No. 226 of 2016.

b. I have perused the plaint, defence and judgement delivered on 11th March 2019, in Mombasa ELC No. 226 of 2016, that are annexed to the 1st defendant's replying affidavit and noted the 1st Defendant herein was the plaintiff, while Kiriga, Kanja, Chengo and Mumba were the 1st to 4th defendants respectively. I

have also perused the application filed therein dated 15th March 2024 and the ruling thereof of 2nd October 2024, and noted the applicants/intended defendants are indicated as Robert Kadenge Karisa & 72 others, and the said Robert Kadenge Karisa is the one who swore the supporting affidavit. In the instant suit and application, the applicants are Robert Kadenge Karisa & 66 others, and the supporting affidavit is sworn, by Rashid Baraka Kaburu, the 62nd applicant. The court has called for the original record for ELC No. 226 of 2016 and upon perusal confirmed that though the heading of the application date 15th March 2024 indicated the intended defendants as *"Robert Kadenge Karisa & 72 others"*, the heading on the certificate of urgency had the names of 67 persons starting with Robert Kadenge Karisa and ending with Emily Mwandime, who incidentally appear in the same order as the 1st to the 67th applicants in the current suit.

c. The 67 applicants had in their application dated 15th March 2024 filed in Mombasa ELCC No. 226 of 2016, sought for among others to be joined as defendants

and the suit to be set down for hearing. Their application was opposed by the plaintiff through the notice of preliminary objection dated 12th April 2024, and replying affidavit of David Kones Kiptum sworn on 25th April 2024. In its ruling delivered on 2nd October 2024, the court dismissed the application with costs. Surprisingly, though the applicants in that application dated 15th March 2024 are the applicants in in the suit and application herein, they did not disclose the existence of the previous suit through their originating summons and or notice of motion.

d. That as can be seen in (c) above, applicants application dated 15th March 2024 in Mombasa ELCC No. 226 of 2016 did not seek for any injunctive orders, but was for primarily joinder that was rejected, and the ruling thereof of 2nd October 2024 does not make the current application res judicata. From the finding in (b) above, the applicants were not parties in that suit, Mombasa ELCC No. 226 of 2016, and the decision thereof delivered on 11th March 2019 does not make the suit herein res judicata.

e. *Order 40 Rule 1* of Civil Procedure Rules provides for applications for temporary injunction orders. The principles guiding the courts in considering whether or not to grant temporary injunction orders were elaborated in the case of Giella versus Cassman Brown & Co. Ltd (1973) EA 358 and reiterated in the case of Nguruman Limited versus Jan Bunde Nelson & 2 Others (2014) eKLR, as follows:

   a) The applicant must prove a prima facie case with a probability of success.

   b) The applicant must demonstrate that there will likely be irreparable harm/loss if the application is not allowed.

   c) That the balance of convenience tilts to his favour.

f. The pictures attached in the supporting affidavit by Rashid Baraka Kaburu show that there has been substantial developments on the suit property, and that suffices for the ingredient of prima facie case. The applicants have deposed that there is a likelihood of the situation on the ground deteriorating to bloodshed,

which the court considers real, in view of the developments thereon, and suffices for irreparable loss. The balance of convenience tilts towards issuing the order sought in the alternative, and accordingly, it is only fair that the parties do maintain the obtaining status quo on the use and possession of the suit property pending the hearing and determination of the originating summons.

g. The court is left wondering why the 2nd respondent would decline to provide the applicants with a copy of a postal/certificate of search, forcing the applicants to seek for the relief sought at prayer (7). To the court's understanding, the 2nd respondent, has a legal, and indeed constitutional duty under *Article 35* of the Constitution to provide the applicants with the said certificate on application, and subject to payment of any applicable statutory payments being made. It would be a shame if Kenyans are forced to come to court to get service from government agencies on matters following on their dockets. However, and so as to fast track this matter, the 2nd Respondent is directed

to provide a certified copy of the green card and certificate of official search in respect of the suit property in thirty (30) days upon the applicants lodging an application for the same.

h. Under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where otherwise ordered by the court. In view of the contestations herein, I am of the view that costs abide the outcome of the suit despite the applicants having succeeded in their application.

6. From the foregoing conclusions, the court finds merit in the applicants' notice of motion dated the 21st March 2025, and the same is allowed in the following terms:

a. THAT pending hearing and determination of the Originating Summons filed herein or until further orders, the parties to maintain the obtaining status quo, that there shall be no eviction of the applicants, and demolition of their structures/developments or new/further developments of structures thereon, and or interference of the applicants' peaceful use and

possession of the Subdivision Number 12914 ((Original Number 405/3) Section I Mainland North, suit property.

b. That the Land Registrar, 2nd respondent, do provide a certified copy of the green card and certificate of official search in respect of Subdivision Number 12914 ((Original Number 405/3) Section I Mainland North to the applicants in thirty (30) days upon the applicants lodging a fresh formal application for the same, and paying and fees required.

c. That the costs to abide the outcome of the suit herein.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF NOVEMBER 2025.

S. M. Kibunja, J.
ELC MOMBASA.

IN THE PRESENCE OF:
APPLICANTS : M/s Kanasi for Odunga

RESPONDENTS : Mr Karina

NECHESAH-COURT ASSISTANT.

S. M. Kibunja, J.
ELC MOMBASA