



**Commission for Human Rights and Justice (CHRJ) & 3 others v Cabinet Secretary
Ministry of Agriculture, Livestock, Fisheries and Cooperatives & 3 others; Private
Shareholders Kenya Seed Company (Interested Party) (Constitutional Petition E18 of 2021)
[2023] KEHC 18303 (KLR) (Constitutional and Human Rights) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18303 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E18 OF 2021**

**AC MRIMA, J
MAY 30, 2023**

BETWEEN

**COMMISSION FOR HUMAN RIGHTS AND JUSTICE
(CHRJ) 1ST PETITIONER
PETER CHEMUGUT 2ND PETITIONER
ERICK IMBUYE 3RD PETITIONER
JOB K NDEMO 4TH PETITIONER**

AND

**THE CABINET SECRETARY MINISTRY OF AGRICULTURE, LIVESTOCK,
FISHERIES AND COOPERATIVES 1ST RESPONDENT
AGRICULTURAL DEVELOPMENT COOPERATION 2ND RESPONDENT
KENYA SEED COMPANY LTD 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

AND

PRIVATE SHAREHOLDERS KENYA SEED COMPANY ... INTERESTED PARTY



RULING

Background:

1. The dispute in this matter arises primarily from the legal status of Kenya Seed Company Limited (hereinafter simply referred to as ‘the Company’, or ‘KSC’ or ‘the 3rd Respondent’) and the attendant management intricacies.
2. The Commission for Human Rights and Justice (‘CHRJ’), Peter Chemuigut, Erick Imbuye and Job K. Ndemo, the 1st to 4th Petitioners herein respectively, are diversely aggrieved that The Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives and Agricultural Development Cooperation (‘ADC’), the 1st and 2nd Respondents herein respectively, have been micromanaging and mismanaging KSC to the detriment of the shareholders and has resulted in emergence of fake seeds, decreased food production, increased food insecurity and has left the country’s economy at stake.

The Application:

3. Through an application by way of a Notice of Motion dated 30th July 2021 (hereinafter ‘the application’), supported by the Affidavit of Julius Ogogoh, the 1st Petitioner’s Executive Director, deposed to on a similar date, the Petitioners sought to put to a stop, albeit temporarily, the running of affairs at the Company.
4. The Petitioners averred that the control the 1st and 2nd Respondent assert over KSC has denied its shareholders a chance to hold and participate in Annual General Meetings for the last 20 years, negatively impacting on the shareholder’s investment returns.
5. The Petitioner asserted that that KSC has been subsisting without a properly constituted Board of Directors and the 1st Respondent has singlehandedly been hand picking a person to act as such without consulting the shareholders.
6. The Petitioners contended further that KSC has committed its shareholders’ funds in purchasing 200 acres of land without their approval, a transaction, they contended, may lead to loss of monies.
7. It was further the Petitioners’ case that the KSC had brazenly misapplied shareholder’s funds who have not been paid dividends in the last 20 years by constructing boreholes in Meru County, the home County of the 1st Respondent where he seeks to vie for the position of governor.
8. The Petitioners pleaded that the Respondents’ mismanagement of KSC has jointly and severally violated the Petitioners’ and shareholders rights, farmers whose livelihood depend on maize farming, in violation of their property and socio-economic rights protected in Article 40 and 43 of the Constitution respectively.
9. In Peter Chemuigut’s Affidavit deposed to 23rd December 2021, it was his deposition that the 3rd Respondent is not a State Corporation.
10. He deposed that KSC is not wholly owned or controlled by the Government or controlled as a state corporation as per the Register of Companies.
11. To support his position, he deposed that the period between 1976 to December 2000, 2nd Respondent made periodic purchases of shares in 3rd Respondent Company and by the year 2000 it had raised to



- 52.8% (5,700,720) million shares with Private Shareholders dropping to 47.1% (5,080,545) million shares.
12. It was his case, therefore, that in order to redress the issue of the 3rd respondent being illegally operated as a State corporation, this Court could grant the appropriate reliefs.
 13. Job Ndemos filed his Replying Affidavit deposed to on 12th November 2021, in response to the 3rd Respondent's Affidavit deposed on 30th July 2021.
 14. He reiterated that the 3rd Respondent is not a State Corporation according to the provisions of *State Corporations Act*.
 15. It was his deposition that the circumstances of the case warrant the grant of conservatory orders.
 16. To that end, he reiterated failure by the 1st and 2nd Respondents to allow him and other shareholders to participate in the affairs of the 3rd Respondent contrary to Article 48 of the Articles of Association of the 3rd Respondent and Section 131 of the then *Companies Act*.
 17. On the foregoing factual and legal backdrop, the Petitioners sought the following interim reliefs;
 - a. Spent
 - b. That pending hearing and determination of this application, this honourable Court be pleased to issue an order directing that the 3rd Respondent do conduct an Annual general Meeting in line with the provisions within 21 days of the Order and all registers members and or shareholders of all cadres be allowed to attend and participate.
 - c. That pending the hearing and determination of this Application and Petition, the Court be pleased to issue conservatory order restraining the 1st and 2nd Respondent by themselves, their agents, employees, servants, officers and any other person acting on their behalf and instruction from interfering with the affairs of and running of the 3rd Respondent.
 - d. That pending hearing and determination of the honourable court (sic) be pleased to issue a conservatory order restraining the 3rd Respondent by itself, agents, employees, officers and servants from proceeding with purchase of property, assets and interests whose assets value exceed the sum of Kenya Shillings ten million until a full and regular Board of Directors is constituted and proper Annual General meeting is held.
 - e. That pending hearing and determination of this application and petition the court be pleased to issue a conservatory restraining the 1st and 2nd Respondents from further violating the shareholders rights and fundamental freedom by denial f the right to participate in Annual General Meeting and to participate in the running of affairs of the 3rd Respondent.
 - f. That pending hearing and determination, the Court be pleased to grant any Order as it may deem fit and just to grant in advancement of the proper management of the 3rd Respondent.
 - g. The Costs of this Application be provided for.

The Petitioners' Submissions:

The 1st Petitioner's Submissions:

18. The 1st Petitioner did not file any written submissions.



The 2nd Petitioner's Submissions:

19. In his written submissions dated 23rd December 2021, the 2nd Petitioner largely reiterated the contents of The Application and his depositions.
20. It was his case that that the illegal operation of the 3rd Respondent as State Corporation has a created legal vacuum where the 1st and 2nd Respondents are unilaterally micromanaging and locking out the Petitioner and other 124 Private shareholders in running of affairs including participation in General meeting in breach of 3rd Respondent's Articles of Association and Section 30(1) of the *Companies Act* 2015 and Article 40 of the *Constitution*.
21. To demonstrate the foregoing, it was his case that no AGM had been held for a period of 10 years, from the year 2003 to 2014. It was his case that the 2015- 2016 AGM was only held due to court intervention in HCCC No. 525 of 2013 which yielded the 48th AGM held on 22nd June 2015 and 49th AGM held in 28th September 2016.
22. It was his case that no AGM held in 2017 and 2018 due to cancellation by the 1st Respondent at the Eve of the AGM.
23. The 2nd Petitioner submitted that it had demonstrated the incidence of all the essential principles for the grant of conservatory orders.

The 3rd & 4th Petitioner's Submissions

24. Erick Imbuye and Job Ndemo supported their case through written submissions dated 11th February 2022.
25. In urging the court that they had established a prima facie case, they submitted that the mere fact that they are shareholders with the 3rd Respondent, they stand to be greatly disadvantaged should the 3rd Respondent continue to be mismanaged. It was their case that as shareholders, they are entitled to participate in the daily running and management of the Company.
26. To demonstrate that they had a prima-facie case, the 3rd and 4th Petitioners relied on the Court of Appeal decision in *Mrao Limited v First American Bank of Kenya & 2 others* (2003) eKLR where a prima facie case was defined as follows;

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
27. On the aspect of irreparable injury, they submitted that having been denied the right to participate in the management and daily running of affairs of the 3rd Respondent, they will suffer irreparable injury if the orders are not granted.
28. It was their case that if this Court does not stop the mismanagement, they stand to lose lifetime of their investment in KSC.
29. The 3rd and 4th Petitioner submitted that should the Respondent s action be allowed to prevail they will suffer damage that could not be recovered from damages. Support to that end was drawn from



the decision in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR where irreparable injury was stated to mean;

“Irreparable injury means the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima-facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him...”

30. The Petitioners submitted that the balance of convenience leans in favour of the Petitioners. They urged the Court to be guided by the precedent set in the case of *R.J.R Macdonald v Attorney General* (1941)1 SCR 311 where it was observed;

“In determining the balance of convenience, the Court which assesses which party will suffer greater harm from granting or refusing the remedy pending a decision on merits. The Court needs to weigh relative strengths of the parties.”

31. In summing up their case, the 3rd and 4th Respondent submitted that the Respondents illegal action of taking over Kenya Seed Company and converting it from public company by shares to State Corporation had contravened shareholders rights and fundamental freedoms.

32. It was their case further that, non-compliance of section 319 and 780 of the *Companies Act* on the requirement of holding Annual General Meetings, the malicious and fraudulent sale of shares and carrying out corporation activities with a smaller number of directors than prescribed by law ought to be remedied by this Court.

33. The 3rd and 4th Petitioners submitted that this Court was vested with jurisdiction to intervene in protecting their constitutional rights and fundamental freedoms.

The Responses:

The 1st, 2nd and 4th REspondents' Cases:

34. The Cabinet secretary for Agriculture Livestock, Fisheries and Cooperative, Agricultural Development Cooperation and Kenya and the Attorney General challenged the application through Grounds of Opposition dated 13th October 2021 and the Replying Affidavit of Honourable Peter Munya, the Cabinet Secretary for Agriculture, deposed to on 21st October 2021.

35. In the Grounds of Opposition, it was their case that Petition does not raise constitutional issues but rather, raises issues related to corporate governance, and especially dispute between the shareholders of a company.

36. They claimed that the Petitioners were misleading the court to advance their own selfish interests, to the detriment of the 3rd Respondent.

37. It was further their case that the Petitioners' allegations relating to Annual General Meeting are untrue as KSC held it on 26th March 2021.

38. They further asserted the position that the prayers for conservatory orders are fatally defective since they do not satisfy the test of proving that they will suffer real prejudice as a result of the violation of the *Constitution*, a principle established by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.



39. It was their case further that if the Application is allowed, it will interfere with management and the operations of the 3rd Respondent, in contravention of the *Companies Act*, 2015, as well as its Articles of Association.
40. The Respondents urged the Court to dismiss the Application for violating the Constitutional avoidance doctrine.
41. They asserted further that the Petitioners are forum shopping since a similar matter is being canvassed in Eldoret High Court Petition No. 5 of 2021.
42. In conclusion, it was urged that, it was in public interest and the interest of justice to dismiss both the Application and the Petition with costs for being an abuse of process.
43. In the Replying Affidavit, Hon. Munya deposed that the 3rd Respondent is a State Corporation in accordance with section 2(d) of *State Corporations Act*.
44. It was his case further that, having been converted into a public company pursuant to Special Resolution of 12th October 1960, the 3rd respondent acquired the status of State Corporation then a status it enjoys to date.
45. He deposed that the 3rd Respondent was found to be a State Corporation by the Court of Appeal in the Case of *R v Attorney General & 15 Others ex- Parte Kenya Seed Company Limited & 5 Others* (2010) eKLR, a decision, he deposed, that has not been varied, stayed or reviewed or appealed against.
46. Hon. Munya referred to the formation of KSC which shows that the Government, through ADC owns 52.88%, Kenya Farmers Association, 14.85% and Private Shareholder at 32.27%.
47. He deposed that the 3rd Respondent thus, being a state corporation as well as maintaining its status has a limited liability Company by shares and being guided by the Memorandum and Articles of Association is subject to Mwongozo, the Code of Governance for State Corporations.
48. He deposed that as far as the appointment, composition and size of the 3rd Respondent is concerned, it was compliant with Article 27 of the *Constitution*.
49. It was his deposition that the Application had failed to attain the minimum threshold for the grant of conservatory Orders under Article 23 of the *Constitution*.
50. He deposed that the Petitioners have wrongly invoked the Jurisdiction of this Court since the dispute ought to be determined in the Commercial and Admiralty Court.

The Submissions

51. The 1st 2nd and 4th Respondents filed written submissions dated 7th March 2022 where they stated their case as captured in the Ground of opposition and the Replying Affidavit of Hon. Peter Munya.

The 3rd Respondent's Case:

52. Kenya Seed Company opposed the application through Grounds of Opposition dated 31st August 2021, the Replying Affidavit and Supplementary Replying Affidavit of Fred Oloibe, its Managing Director, deposed to on 12th October 2021 and 9th December 2021 respectively.
53. In the Grounds of Opposition, the 3rd Respondent claimed that both the application and the Petition were fatally defective and instituted in bad faith to advance selfish interests.



54. It was its case that the prayer calling for Annual General Meeting cannot be granted since one was held on 26th March 2021.
55. It also stated that the prayer is contrary to the procedure of requisitioning for meetings under the *Companies Act*.
56. In sum, it was its case that the Application, if allowed, would be tantamount to the Court hijacking operations of the 3rd Respondent contrary to the *Companies Act* and its Articles of Association.
57. It urged the Court to dismiss the Application in the interests of Justice and that of the public.
58. In the Replying Affidavits, the 3rd Respondent was categorical that the Petitioners had not established a case worthy of grant of conservatory orders.
59. It was deposed at length that 3rd Respondent, is a limited Liability Company incorporated under the laws of Kenya and as already held in Eldoret High Court Miscellaneous Application No.1 of 2004 and the Court of Appeal in Civil Appeal No. 137 of 2005.
60. It further was the 3rd Respondent's deposition that KSC is a State Corporation within the meaning of section 2(b)(v),(c) and (d) of *State Corporation Act* and in view of the fact that Agricultural Development Corporation is a State Corporation wholly owned by the Government that holds majority shareholding in KSC while various shareholders hold the rest of the shares.

The Submissions:

61. The 3rd Respondent filed written submissions dated 4th February 2022.
62. It largely was in support of the 1st, 2nd and 4th Respondents case that the dispute before this Court was conclusively resolved in Judicial Review Miscellaneous Application No. 1 of 2004 where it was observed that the 3rd Respondent was a State Corporation and government was justified in taking steps to remove the Petitioners form the office and to appoint a new Board.
63. It was their submission that on appeal to the Court of Appeal through Eldoret Miscellaneous Civil Appeal No. 137 of 2005 where the learned Judges upheld the position that indeed KSC was a State Corporation and Government could not be faulted for removing Petitioners form office.
64. It was therefore the 3rd Respondents case that the dispute is res-judicata.
65. With respect to the prayer for the calling of AGM, the 3rd Respondent submitted that it could not be granted as it was final in nature and the Petitioners had failed to demonstrate exceptional circumstances.
66. To buttress the foregoing, reference was made to the decision in *Olive Mwihaki Mugenda & another v Okiya Okiita Omtata & 4 others* (2016) eKLR where the Court observed;

Analysis of persuasive decisions from India shows that if a trial is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reason for granting such final orders must be stated.
67. The 3rd Respondent further submitted that prayer c requesting the Court to restrain the 1st and 2nd Respondent from interfering with the 3rd respondent was vague for failing to identify the interference sought to be restrained.
68. It was its case that an order restraining the 2nd Respondent from interfering with the 3rd Respondent will have the effect of irregularly and unfairly curtailing its rights despite being the majority shareholder.



69. The 3rd Respondent submitted that the Petitioners had not achieved the threshold set in *Centre for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 others* (2017) eKLR where it was observed that;
- “A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation or threatened violation is likely to continue unless a conservatory Order is granted...”
70. The 3rd Respondent further rejected the invitation to restrain the purchase of property whose asset value exceed Kshs. 10 million, stating that the figure was arrived at arbitrarily.
71. It was also its case that under section 158 of the *Companies Act* does not provide a monetary limit only that a substantial transaction between a Director and Principal Company must be approved by resolution of the shareholders.
72. The 3rd Respondent submitted that a minority shareholder is not at liberty to singly institute proceedings seeking to control the way a company operates as it is a preserve of the Board and the body of shareholders.
73. With respect to prayer (e) which asked the Court to restrain the 1st and 2nd Respondent from denying the Petitioners the right to participate in Annual general Meetings, the 3rd Respondent submitted that the Petitioners did not produce any evidence whatsoever to support the allegation that they had been barred from attending AGM.
74. In the end, the 3rd Respondent maintained that the Petitioners claim was not a constitutional issue and could not rightly be adjudicated in this proceeding. It urged that the Application and the Petition be dismissed with costs.

Analysis:

75. This Court has carefully appreciated the nature of the dispute as presented in the pleading, supporting documents and during oral highlights in Court.
76. Central to all the disputants is the contestation as to ownership/legal status of the Whereas the Petitioners are of the firm position that the Company is a private entity, the Respondents are of the view that legally speaking, it is a State Corporation and as such a public company.
77. Concomitant with the foregoing rival positions is the management and running of affairs at the Company. The Petitioners claim that the 1st and 2nd Respondent are mismanaging it when they ought not to have a hand in its management.
78. The Respondents are of the contrary view. They claim that since KSC is a public entity, the 1st and 2nd Respondents are well within the law to run its affairs.
79. Before delving into the merits of the dispute, what comes to the fore is the challenge on this Court’s jurisdiction. The Respondents, variously contended that the dispute herein is res-judicata the decision in Eldoret High Court Miscellaneous Application No. 1 of 2004 and the Court of Appeal decision in Civil Appeal No. 137 of 2005.
80. In Petition E343 of 2020, *Anthony Miano & others v Attorney General & others* [2021] eKLR, this Court comprehensively addressed the concept of jurisdiction in the following fashion.



20. At this point in time, I will deal with the legal aspect of jurisdiction. Jurisdiction is defined in *Halsbury's Laws of England* (4th Ed) Vol 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". *Black's Law Dictionary*, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.

21. In *Words and Phrases Legally Defined* Vol 3, John Beecroft Saunders defines jurisdiction as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

22. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

23. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulabi Abdi & another* Civil Appeal No 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.



24. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* (2013) eKLR stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.

25. On the source of a Court's jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -

A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

26. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -

(44) a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

81. As illustrated above, the centrality of jurisdiction cannot be gainsaid. It behoves any Court to pause dispute resolution until jurisdiction is ascertained.
82. Having said so, I now turn to the doctrine of *res-judicata*, a well-trodden path by the Courts including the Supreme Court.
83. In Petition Nos. 42 & 43 of 2014 (Consolidated), *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* [2016] eKLR, the Apex Court, in an elaborate fashion, illustrated the operation of doctrine of *res-judicata*. It observed;



- (52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.
- (54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
- (55) It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of the Constitution}, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.
84. In view of the fact that at the heart of the dispute is the management and operational aspects of KSC, its conclusive resolution cannot be divorced from its legal status.
85. The latter, the Respondents contend, has been resolved and is now res-judicata. The Petitioners did not respond to the assertion. This Court will be guided by the decision in Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another supra where the essence of res-judicata was discussed as follows;
- (57) The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson (1843) 67 E.R. 313, as follows:
- “... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].
- (58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction
86. In the circumstances, this Court declines to further address the merits of the application pending substantive resolution of the question whether the dispute is caught up by the doctrine of res-judicata.
87. In the premises the following Orders hereby issue: -



- a. The determination of the Notice of Motion dated 30th July, 2021 is hereby held in abeyance pending the determination of the issue of res judicata.
- b. The parties shall, in the first instance, address the issue as to whether this dispute is res judicata High Court of Kenya at Eldoret Miscellaneous Application No. 1 of 2004 and the Court of Appeal Civil Appeal No. 137 of 2005R v Attorney General & 15 Others ex- parte Kenya Seed Company Limited & 5 Others.
- c. Parties shall take directions before the Presiding Judge on the way forward on a date to issue.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF MAY, 2023.

A. C. MRIMA

JUDGE

