Chengwony & 3 others v PS Minstry of Lands & Physical Planning & 91 others (Environment & Land Petition 4 of 2022) [2023] KEELC 17560 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17560 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND PETITION 4 OF 2022

FO NYAGAKA, J

MAY 29, 2023

BETWEEN

DAVID M. CHENGWONY ..... 1ST PETITIONER

JACKLINE CHERUGUT ..... 2ND PETITIONER

BERNARD C. NGEIYWO ..... 3RD PETITIONER

VINCENT M. NGONZANI ..... 4TH PETITIONER

AND

PS MINSTRY OF LANDS & PHYSICAL PLANNING ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

COUNTY COMMISSIONER, COUNTY OF BUNGOMA ..... 3RD RESPONDENT

COUNTY COMMISSIONER TRANS NZOIA COUNTY ..... 4TH RESPONDENT

DEPUTY COUNTY COMMISSIONER MT. ELGON SUBCOUNTY .... 5TH RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT ..... 6TH RESPONDENT

COUNTY LAND ADJUDICATION & SETTLEMENT MT ELGON SUB-COUNTY ..... 7TH RESPONDENT

DEPUTY COUNTY COMMISSIONER CHEPTAIS SUB-COUNTY .... 8TH RESPONDENT

OMAR SALAT ..... 9TH RESPONDENT

BENSON W. KAOS & 82 OTHERS ..... 10TH RESPONDENT

RULING

1. By an application dated 21/11/2022 the 11th Respondent moved this Court under Sections 3, 3A and 7 of the Civil Procedure Rules. In the Application he prayed for an order that this Petition be dismissed with costs for being res judicata, and also for being an abuse of the process of the court.

2. The Application was based on four grounds. These were that, one, the matters in issue in this Petition were the subject of a former suit, namely Kitale ELC No. 50 of 2017 (Benson Kaos and 72 Others -v- The Hon. Attorney General & 87 Others), wherein judgment was delivered on 27/05/2021 and no appeal was preferred against it. Second, the Petitioners were Defendants No. 43, 10, 59 and 62 respectively in the Kitale ELC suit already determined. Third, the Petitioners sought to set aside the judgment of 27/05/2021 but they failed to comply with the condition of setting aside the said judgment by reason of which the judgment was reinstated. Fourth, the present Petition is a backdoor attempt to circumvent the orders of the Court in Kitale ELC No. 50 of 2017 hence an abuse of the process of the Court.

3. The Application was supported by the Affidavit sworn by the Applicant on 21/11/2022. To it were seven annextures. In brief the Applicant depend therein that the matters raised in the instant Petition were directly and substantially in issue in Kitale ELC No. 50 of 2017. He annexed and marked as BWK1 a photocopy of the Plaint in the said suit. He deponed further that in the former suit the Petitioners were defendants whose designation was No. 43, 10, 59 and 62 respectively. He swore that in the suit, Defendants 1-6 filed a defence through the Attorney General but other defendants did not. His deposition was that the suit was finally determined vide a judgment delivered on 27/05/2021 which he annexed and marked as BWK2.

4. He deponed further that the Attorney-General applied to set aside the judgment on the ground that the submissions of the parties he represented were not placed on the record but vide a ruling delivered on 3/02/2022 the Application was dismissed. He annexed a copy of the ruling and marked it as BWK3. He swore further that through another application dated 17/08/2021 the 7th - 86th Defendants whose supporting Affidavit was sworn jointly by the four Petitioners herein sought to set aside the judgment delivered on 27/05/2021 in order to file a Defence. He annexed a copy of the Application and marked it as BWK4. He deponed further that the Court heard the Application on merits and delivered a ruling on the 01/03/2022 setting aside the judgment on three specific conditions which he reproduced in the paragraph he deponed about them. He annexed the copy of the Ruling and marked it as BWK5. He deponed further that when the Defendants failed to fulfil the condition within the period the Court gave them the judgment was automatically reinstated as per the condition of setting aside.

5. He swore further that again one of the Defendants, the 70th in the former suit, applied to set aside the Ruling delivered on 01/03/2022 and the court delivered its ruling on 18/05/2022 dismissing the same. He annexed a copy of the Ruling of the Court and marked it as BWK6.

6. After that the Applicant deponed that it was not true that the Petitioners had not been accorded a hearing in Kitale ELC No. 50 of 2017. Moreover, the issues in the said former suit were the same as those in the instant Petition hence the Petition was an abuse of the process of the Court. He stated further that the issue as to which of the two Lists presented for registration was genuine and who were the rightful beneficiaries of Patwaka Settlement Scheme were determined in the former suit. Further, he stated that these were the same as those raised in the instant Petition.

7. He deponed that the Petition amounted to being an Appeal against the decision in Kitale ELC No. 50 of 2017. He deponed that the land dispute which the Court heard and determined in the former suit was now clad in a constitutional gown in instant Petition. Lastly, he deponed that an eviction order had since been issued in the former suit against the 7th - 86th Defendants. He annexed and marked as BWK7 a copy of the eviction order. He prayed for the dismissal of the Petition.

8. By a Replying Affidavit sworn on 15/12/2022, David Mwecher Chongwony, the 1st Petitioner, responded to the Application. He deponed that he did so on his own behalf and that of the other Petitioners who gave him authority to do so. He deponed that he had read through the instant Application which was served on them without annextures and the Petitioners had written to the 11th Respondent to serve them with a complete copy of the Application at hand but he had not done so.

9. He deponed that the Petition was on the process at Kapsiro, Mt. Elgon, in Bungoma and the Chepyuk III Settlement Scheme [2005/2006] on identification of 7,000 Ndorobo (Mosop) and Soy People in Chepkatur in Emla Location, the identification and settlement of many Ndorobo (Mosop) and Soy people in Chepyuk I and Chepyuk II Settlement Scheme and identification and vetting of the spill-over or remaining or unsettled Soy and Ndorobo people at the Chepyuk III Scheme.

10. He deponed that clashes between the satisfied and unsatisfied people arose in 2006 after the allocation of land by balloting hence two groups of people came out: those who wanted to be settled as per the ballots picked and those who were unsatisfied who claimed ownership of the parcels picked by the successful. He then gave the detail of the settlement of 1732 Ndorobo/Mosop and Soy people as 866 (Ndorobo/Mosop of Chekpyuk III Scheme), 866 (Soy of Chepyuk III Scheme) and 352 (unsettled or spill overs) of whom he deponed a number of 120 consisting of 80 (Ndorob/Mosop) and 40 (Soy) of the Chepyuk III Scheme, and a number of 232 consisting of 80 (Ndorobo/Mosop) and 272 (Soy) of Patwaka Farm in Trans Nzoia.

11. He deponed further that the 232 people unsettled were settled in Patwaka Farm after the 120 were resettled in Chepkatur and Chepyuk III Settlement Scheme. He swore further that a Task Force, led by one Solomon Ouko, on Resettlement of the beneficiaries in Chepyuk III Scheme was appointed vide a gazette on 04/12/2008 and it conducted a balloting for the 232 people. Its work was done in a public meeting or baraza at Kapsiro and the vetting of the 232 people done. It recorded the numbers of the plots or parcels picked in the ballot. It supervised the vetting of the 232 people. The movement of the 232 people from Mt. Elgon in Bungoma to Patwaka Farm in Trans Nzoia was based on the Task Force recommendation or work. They used personal means to move rather than wait for government to do so.

12. He deponed further that the Settlement-Select Committee at Kapsiro had no role in the recommendations of the Ouko-led Task Force regarding where the 232 people were accommodated and settled in Trans Nzoia whereat the local Chief of Kisiwai Location and Teldet sublocations, the Assistant Chief of Kinyoro sublocation. A record of the 232 people who were beneficiaries of the Patwaka Settlement Scheme was kept at the Chief's office as a Black Book.

13. He deponed that a survey involving all the 232 people was done by the Government and all of them settled.

14. He deponed further that the dispute arose when the Deputy Commissioner came to the farm, read out names and summoned them to his office in Cheptais, put "stars" (sic), understood to mean asterisks, on the names of the Chairman, Secretary and some members of the 232 and asked them the creator of the problem. He went further to say that the initial list of beneficiaries dated 25/03/2015 and the final approved one were not prepared and approved by the Ouko-led Task Force. The 232 people including

the deponent protested against the move and became hostile to the Deputy County Commissioner. The Deputy County Commissioner ran away leaving the Chief Surveyor and other surveyors with the Chairman of the 232 people in Patwaka Farm.

15. It was upon then that the Surveyors assured the people that the List to use was the one approved by the Ouko-lef Task Force and given at Kapsiro. He deponed further that he and others were advised that the List used by the Deputy County Commissioner was not the one approved by the Ouko-led Task Force. He accused the Deputy County Commissioner of not being in the Task Force.

16. He deponed that the survey was done, beacon put in place and the 232 people shown their respective parcels. He deponed that the instant Petition was on the process of handing over by the County of Bungoma to and the taking over of the 232 people by the Trans Nzoia County after the conclusion of the Task Force work. He stated that it was to be in accordance with the terms of reference and the list of the 232 people at Patwaka Farm whose list was generated by seven offices he listed in paragraph 22 of the Affidavit. He deponed that the Deputy County Commander and the other government agencies had no role in the Ouko-led Task Force that identified all the 232 beneficiaries.

17. He swore that the titling of the parcels in Patwaka took place in Nairobi in accordance with the Task Force report. Further that the issuance of the title deeds to the 232 people informed the decision in Kitale ELC No. 50 of 2017. His deposition was that third parties claim of ownership of land belonging to the 232 people arose in 2014/2015 after the Task Force work and the survey had been done and the 232 people settled. The beneficiaries were asked to obtain copies of the List of the 232 from the Chief Land Registrar and when they did so from Ardhi House at Kitale the List certified on 14/03/2013 had 266 members and the Minutes of the meeting of the Settler-Selection Committee held on 28/02/2013. He deponed further that the difference of 34 people in the two lists, one of the Task Force and the other from the Land Registrar in Kitale did not affect the allocation of land to the 232 people.

18. The Deponent swore further that when the District Officer at Kapsiro Headquarters released to the 232 people a list of 352 of people not settled, "unsettled" (sic), as per the Ouko-led Task Force, a dispute arose. He accused the Trans Nzoia security and peace teams of making the additional 34 members into the Ouko-led Task Force list for Patwaka Farm. He deponed that the 232 beneficiaries as contained in the Ouko-led List of the Patwaka Farm settlement were victims of the actions or omissions of the agencies he accused.

19. He said that the third parties in the Patwaka Farm began a dispute with the 232 people when there were movements to and from Mt. Elgon and Patwaka Farm before the protest letter dated 10/03/2014 which remained unresolved until the conclusion of some criminal cases in 2018 and Kitale ELC No. 50 of 2017. He repeated that Kitale ELC No. 50 of 2017 was brought about by the release of the title deeds from Nairobi to the 232 people. He deponed that the 232 people are from Chepyuk location where clashes took place in 2005-07 between Soy and Ndorobo people. The Western Regional Commissioner at Kakamega vetted 7,000 people from the two communities, thereby reducing the list to 1,732 of whom the 232 were among the remained of the "352 unsettled" (sic). He gave a breakdown of the 1732 people as 1500 from Chepyuk III Settlement Scheme and 232 from Patwaka Farm.

20. The Deponent stated that the 232 people were the spill-overs or unsettled people and were not heard or given opportunity to be heard and they should not be condemned unheard. He accused the Cheptais Subcounty Deputy County Commissioner, one Omar Salat for making the list dated 25/03/2015 for 195 people way after the Ouko-led Task Force has concluded its work. He also accused him of coming up with the list of the 232 people whose title deeds were the subject of Kitale ELC No. 50 of 2017 as beneficiaries of Patwaka Farm.

21. He then deponed that the issues in the Ouko-led Task Force were different from those in the former suit. He summarized the findings of the Court at various stages in the former suit. To bring out the difference he deponed to a summary of the issues in Kitale ELC No. 50 of 2017 which he gave as 14 in number ((a) - (p)), and I need not repeat them.

22. The Application was disposed of by way of written submissions. The Application having come up four times and could not be concluded for reasons of delays on one party or other, the Court decided to give a date for ruling despite the fact that learned counsel for the 1st - 10th Respondents had not filed and served their submissions. And as at the time of preparing this Ruling there were no submissions on the part of the said parties although they were given seven days to file them from 20/03/2023.

23. The Applicant filed his dated 02/02/2023 on the same date. The Respondents filed theirs dated 14/02/2023 on 27/02/2023. In his submissions that Applicant began by making a point that the issue of Res Judicata is provided for in Section 7 of the *Civil Procedure Act* and has been decided on by many Courts. He gave the holdings of the court in Christopher Kenyariri versus Salama Beach [2017] eKLR, Kenya Commercial Bank Ltd versus Muiri Coffee Estates Ltd and another [2016] eKLR, John Florence Maritime Services and another versus Cabinet Secretary for Transport & Infrastructure & 3 others [2015] eKLR, and E.T. -vs- Attorney General & Another [2012] eKLR. Then he went to explain that the four Petitioners were parties in the former suit wherein the 11th Respondent and 72 others were Defendants. He summarized the issues in that suit as which between the two Lists before the court presented for registration were genuine, who the rightful beneficiaries entitled to benefit from Patwaka Settlement Scheme were, the payment or not of exemplary damages, and costs. He submitted that after the judge had heard the matter he found that the List bearing the names of the Plaintiffs in the former suit was the genuine one. He pointed out further that the Plaintiffs in the former suit were the Respondents 11 - 86 in the instant Petition.

24. About the issue of who are the rightful persons entitled to benefit from Patwaka Settlement Scheme he submitted that the court, in paragraph 26 of the judgment in the former suit, held that those in the genuine List, the plaintiffs, were. Further that the defendants Nos. 7 - 86 (including the 4 petitioners herein) had no right over the suit land and must vacate it to the plaintiffs. Regarding the suit land, he submitted that in the former suit it was LR. No. 13503/2 commonly referred to as Patakwa farm, and it was the same one referred to in the instant Petition.

25. He then proceeded to compare the pleadings and prayers in the former suit with the ones in the instant Petition wherein the Petitioners pleaded that they were denied an opportunity to be heard in the former suit and are threatened with eviction as ordered in the former suit, being, ELC at Kitale No. 50 of 2017. He summed the prayers as are in the instant Petition as follows:

    a. That Court is supported to declare the list that was rejected by the court in the former suit, and which included the names of the defendants and those of the petitioners herein as the genuine list.

    b. Another declaration that the petitioners and the others who were defendants Nos. 7-86 in the former suit are genuinely occupying Patwaka Farm.

    c. Another declaration that the list found in the former suit as the genuine one is invalid, unlawful, fake, illegal, null and void.

    d. A permanent injunction restraining the respondent Nos. 10-82 (plaintiffs in the former suit) from interfering with the petitioners' occupation of Patakwa Farm, yet the former suit has already ordered the eviction of the petitioners and the co- defendants in the former suit.

26. He submitted that for the reliefs sought in the Petition are similar to the issues the Court determined in the former suit and the they each seek this Court to contradict the findings of the former suit. He submitted that this Court was being called upon to contradict its findings as if it is an appellate Court. He summed it that the Petition was res judicata and it be dismissed with costs.

27. On their part, the Petitioners submitted that the issues raised in the Petition were not res judicata. They listed seven issues that they considered new, for instance the gazettement on 04/12/2008 of the Task Force on resettlement of the beneficiaries of Chepyuk III Settlement Scheme, the 352 Un-Settled persons, the Task Force set up by the Natioanl Assembly to settle Internally Displaced Persons (IDPs) from Mt. Elgon, Cheptais District, the Minutes of the Settler Selection Committee held on 28/02/2013, the List of 266 beneficiaries of Patwaka Farm, an appreciation letter by the Deputy County Commissioner and a letter dated 10/03/2014 by the IDPs' secretary one Joseph Ngeiywa to the Cabinet Secretary.

28. After listing the issues, Petitioners went on to give the details of the Kenya Gazette Notice of 4/12/2008 and each of the issues. Then they also quoted Section 7 of the *Civil Procedure Act*. On the import of that they relied on the cases of Uhuru Highway Development vs Central Bank [1996] KLR CAK 2126, the case of E.T. (supra), Okiya Omtatah Okoiti & Another v Attorney General & 2 Others, Petition No. 593 of 2013, the one of John Florence Maritime (supra) and the one of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR .

29. They submitted that as part of the 232 beneficiaries of the Patwaka Farm, they were entitled to bring the Petition as their rights had been or were likely to be violated, denied, infringed or were threatened hence the Petition was not an abuse of the process of the Court. He then listed 23 reasons why they were of the opinion that the Petition had to be brought by them. I will not repeat them here at this stage because, as I will explain below, they are not relevant to the determination of the instant Application.

30. In concluding their submission, they stated they clustered the Defendants in the Kitale ELC No. 50 of 2017 in terms of where they hailed from or resided in, more so that they were from Kericho and had been introduced in groups by the 6th Defendant who brought in six (6), 3rd and 4th brought nine (9), the 3rd, 4th and 6th brought in sixteen (16), and 45 were IDPs from Teldet. They then stated that the title deeds in respect of 73 parcels out of parcels Trans Nzoia/ Patwaka Scheme/1-262 were not produced in Court in ELC No. 50 of 2017 in order to know who was affected.

31. Lastly, they submitted that the reliefs sought were different from those in the previous suit hence had nothing to do with it or the judgment delivered on 27/05/2021. They prayed that the Application be dismissed with costs to them.

Issues, Analysis and Determination

32. I have considered the Application, the Response to it, the submissions by both the Applicant and the Petitioners, both case law and statutory law on the issues raised. I am of the view that two issues lie before me for determination. They are whether the Petition is res judicata and who to bear the costs of the Application, and if it is successful, of the Petition.

33. Thus, turning to the main point of argument by the 11th Respondent, when a party raises the point that res judicata applies, it is a preliminary point of law which does not require adduction of evidence. The Court needs only to look at the law and the pleadings before it. A preliminary objection was defined in the locus classicus case of Mukisa Biscuits Manufacturing Ltd. vs West End Distributors Ltd. [1969] E. A. 696. If it succeeds, it disposes of a matter.

34. The concept of res judicata is not a complex doctrine. It is a preliminary point of law taken by anyone when he or she is of the view that an issue between him and the other parties litigating under the same title had been determined previously on merits by a court of competent jurisdiction. It means that the Court that handled it must have been legally empowered to make findings on it on merits. Res judicata basically ousts the jurisdiction of the Court of competent jurisdiction to handle the matter once more since it is functus officio on the issue.

35. In Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR the Court of Appeal stated as follows:

> " To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

36. Section 7 of the *Civil Procedure Act* provides for the application of the doctrine in Kenya. It stipulates that, "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

37. In the instant matter the Petitioners raise the point that they were was not heard in Kitale ELC No. 50 of 2017. In essence they contend that the Court that dealt with the matter was a competent forum which considered the same issues as the ones they raise now or they were directly or indirectly substantially is issue in that former matter but they were not given opportunity to be heard.

38. The contention above is that such opportunity could have been denied by virtue of not being accorded a chance to speak if they were in the proceedings or they were left out of the proceedings. The record in Kitale EL No. 50 of 2017 is clear from the annextures BWK2, BWK3 and BWK4 that the Petitioners herein who were among the Defendants in that matter as singled out above, were accorded an opportunity to present their case regarding many of the issues they now raise. They failed to seize the moment, especially when the judgment in the said suit was set aside to allow them to ventilate the issues but they failed to utilize it. Thus, if the contention is that they were left out of the proceedings, they can only go back to the same forum or matter, inform it or the Court that they should have taken part in the proceedings but for reasons beyond their control they could not. They cannon purport to move the Court through another matter, whether a suit, claim or petition. To do so would amount to abusing the process of the Court and forum-shopping, hoping that they will sneak away with favourable orders or reliefs. Therefore, the complaint raised in the Petition herein, particularly at paragraphs 37 and 52, which form the backbone of this Petition is misconceived and abuse of the process of this Court.

39. But remaining on analyzing the issue of res judicata, I will refer to the authorities that both the Petitioners and the Applicant relied on. But as I say so, it is worth noting that learned counsel for the Petitioners merely reproduced paragraphs of the case of John K. Keny & 7 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 4 others [2018] eKLR, wherein the learned judge cited the Court of Appeal decision of Uhuru Highway Development vs Central Bank [1996] LLR CAK 2126 which summarized the test in res judicata as follows:

> " (i) There must be a previous suit in which the matter was in issue;
>
> (ii) The parties must be the same or litigating under the same title;
>
> (iii) There must be a competent Court which heard the matter in issue;

(iv) The issue must have been raised once again in a fresh suit;"

40. In the John Keny case (supra) the learned judge also cited the case of John Florence Maritime Services Ltd & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR wherein the Court of Appeal held as follows:

> " The rationale behind res judicata is based on public interest that there should be an end to litigation, coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of the Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.
>
> It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the Courts and predictability which is one of the ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nut shell res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are Constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the Court may be raised as a valid defence to a Constitutional claim even on the basis of the Court's inherent power to prevent abuse of the process of the Court under Rule 3(8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013"

41. Further the learned Judge cited the case of f E.T V Attorney General and Another (2012) eKLR wherein the Court stated as follows:

> " The Court must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction"

42. All these the Petitioners relied on verbatim as their submissions. The added the case of Mumo (supra).

43. Incidentally the Applicant cited the cases of John Florence (supra) and E.T. (supra), in addition to the one of Christopher Kenyariri (supra) which also gave the list of elements to be followed in case of a call to determine whether or not a matter is res judicata. Since the list is essentially the same as was in the Uhuru Highway case (supra) I will not repeat them here. But in the Kenya Commercial Bank case (supra), at paragraph 52, the Supreme Court of Kennya was emphatic that:-

> " 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. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories,..."

44. And at paragraph 45 of the same case, the Court went on to say:

> " 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."

45. At paragraph 55 the Court stated:

> "...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."

46. In sum, the doctrine of res judicata acts as a bar to anyone bringing the same issues against a party with whom he has litigated before any court of competent jurisdiction and they have been decided on merits. It does not matter that the party raising them participated by giving evidence in the former suit or not. As long as the issue was decided on merit based on evidence by one side but with the opportunity having been afforded to the other as the rules of natural justice require but he does not choose to utilize it, that suffices.

47. In the instant Petition, both parties understand what it means for a matter to be res judicata. The only difference is that for the Petitioners they argue that all the issues they raised are not res judicata. How I wish they were candid to admit to even some that were glaringly clear and leave the rest for the Court to read through and discern! But they did not.

48. I have deeply perused the pleadings before me. The Petitioners were Defendants No. 43, 10, 59 and 62 in Kitale ELC No. 50 of 2017 where the 11th Defendants herein was the 1st Plaintiff of the eight-seven (87) therein. The Petitioners did not deny this fact. Again, while the Petitioners subtly tried to include more parties as Respondents than were Defendants in the previous suit, it is clear that the issues relate to the 1st - 5th Defendants in that suit.

49. On the similarity of the subject, the reliefs in the suit were a declaration that the list of beneficiaries of LR. No. 13503/2 who were the Defendants was fraudulent, illegal and corrupt hence they were not qualified to get land meant for members of Chepyuk Phase III, an order for preparation of titles in terms of the Plaintiffs while those prepared in the defendants' names be cancelled, and order for the 7-86 defendants to vacate the plots occupied in Patwaka Farm, general damages and costs. It is about the same suit land LR. No. 13503/2 in the instant Petition, and is known as Patwaka Farm. In the Petition before me, the relief are about a declaration regarding the List of beneficiaries for parcel LR. No. 13503/2 (Patwaka Farm) Trans Nzoia, a declaration about the Minutes of the Trans Nzoia West District Settler Selection Committee of 28/02/2013 which were also in issue in the former suit, a declaration about the Task Force of Solomon Ouko which issue was also one among the facts in the former suit, a declaration that the 352 people who were landless and the Petitioners in Mt. Elgon and Patwaka were settled which issue was part of the evidence in the former suit, among all the other reliefs sought.

50. As was held in the case of E.T. (supra), courts must be vigilant and guard against litigants evading the doctrine of res judicata by introducing new causes of action to seek the same remedy as previously determined. I must state here that courts must not only be vigilant but guard jealously the doctrine of res judicata in order to unmask it when parties subtly draft pleadings as to add new reliefs and break down facts and issues that were previously determined in order to present them as new. This is what the Petitioners sought to do in this case and the court cannot permit it to be.

51. This Court determined the issues between the parties in Kitale ELC No. 50 of 2017 on merit. It is being called upon to determine the same in a subsequent matter, clothed in the form of a Constitutional Petition but in essence seeks to re-open the closed chapter as between the parties. As was deponed at paragraph 18 of the Supporting Affidavit to the Application before me, the Petitioners have brought a land dispute which the court has heard and finalized in a former suit but have now clad it in a constitutional gown. The Applicant reminded this Court of the biblical warning, for those who believe in the Holy Bible, when Jesus cautioned His followers in Mathew 7:15, when He said, "Beware of false prophets (and I hear that in Kenya it is the trending topic currently). They come to you in sheep's clothing, but inwardly they are ravenous wolves."

52. In this Petition I saw a 'ravenous wolf' in the form of a Constitutional Petition which sought to rekindle issues that had long been settled. I can only send it out of the seat of justice by justly declaring it as such. And to do so only requires that I unmask it to the whole world that it is a matter that is res judicata. I therefore allow with costs to the Applicant the application that sought to have it so found and I strike out the entire Petition with costs to the Respondents.

53. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 29TH DAY OF MAY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE