Ogando v Kenya Ports Authority Pension Scheme (Defined Benefits) & another (Environment & Land Case 73 of 2021) [2023] KEELC 18544 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18544 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 73 OF 2021

LL NAIKUNI, J

MAY 29, 2023

BETWEEN

JAMES OLUOCH OGANDO ..... PLAINTIFF

AND

KENYA PORTS AUTHORITY PENSION SCHEME (DEFINED BENEFITS) ..... 1ST DEFENDANT

KENYA PORTS AUTHORITY ..... 2ND DEFENDANT

RULING

I. Introduction.

1. What is before this Court for determination are two (2) Notices of Motion applications brought under a certificate of urgency dated the 21st February, 2022 by James Oluoch Ogando, the Plaintiff and 17th March, 2022 by the 1st Defendant.

2. Each of them filed and exchanged their respective replies to the said applications. The Honorable Court will be dealing with these applications separately for ease of reference.

II. The Plaintiff's case

3. The Notice of Motion application by the Plaintiff is dated 21st February, 2022 sought for the following: -

    a. Spent.

    b. Pending the hearing and determination of this Application, a temporary injunction be issued by this Honourable Court restraining the 1st Defendant, their servants and or agents from processing Tender No. Kpaps/disp/003/2022 Of 2022.

c. Pending the hearing and determination of this suit, a temporary injunction be issued by this Honourable Court restraining the 1st Defendant, their servants and or agents from processing the said tender namely TENDER NO.KPAPS/DISP/003/2022 OF 2022.

4. The application is premised on Order 40 Rule 1 and Order 40 Rule 4 of the Civil Procedure Rules 2010. It is grounded on the face of the application, testimonial facts and the averments made out under a 24 Paragraphed Supporting affidavit sworn by James Oluoch Ogando, Dated 21St February, 2022 Together With Annexures Marked As "joo". He averred that:-

a. He was an adult of sound mind and understanding the Plaintiff herein and acting in person hence competent and authorized to swear this affidavit on his on behalf.

b. The 1st Defendant had placed a tender notice for sale of immovable properties in "the Daily Nation Newspaper" of 24th January, 2022 which belongs to the members of Kenya Ports Authority Pension Scheme (Defined Benefits) and he was one of the members. The intended sale was illegal as explained in Paragraph 10 infra.

c. The Tender No. is KPAPS/DISP/003/2022.

d. The 1st Defendant had earlier placed a tender in the Standard Newspaper dated 2nd March, 2021 as tender notice No. KPAPS/DISP/001/2021 for sale of the same scheme properties as in tender notice mentioned in Paragraph 2 above.

e. The Applicant herein filed in this Honorable Court Application dated 20th April, 2021 praying for Orders above.

f. His application dated 20th April, 2021 had not been heard because:

i. The Counsel for the 1st Defendant on 30th September, 2021 requested this Honorable Court with his consent to adjourn the case to allow parties to try to solve the matter outside the court. The court gave the parties 40 days to attempt and explore the negotiations.

ii. Unfortunately, the Counsel for 1st Defendant was not available for the discussion for the entire 40 days. On 17th November, 2021, the Court was approached again for further extension of time.

iii. The court gave another 30 days, still the counsel did not have time to meet the Applicant for discussion.

iv. On 17th January, 2022 the court directed the Counsel to file his defence within 14 days from that date.

v. On this day, namely 21st day of February, 2022 the Applicant had yet to be served with any response from the 1st Defendant.

g. From above, it was clear the 1st Defendant had no intention to have agreement with the Plaintiff/Applicant to settle the matter out of court.

h. The Court was misled in granting six months extension of time while there was no real intention to settle anything.

i. By quietly calling fresh tenders, the Court had been misled to have hearing on a case whose subject matter was not before it.

j. This was an abuse of the court process.

k. First it was his view that tender No. KPAPS/DISP/003/2022 OF 2022 was illegal (just as in the case of tender reference No. KPAPS/DISP/001/2021(which was before this Honorable Court and had not been heard) for the following grounds:-

   i. Some of the properties had encumbrances and contravened the provision of Sections 72 (2), and 73 (1) of *Land Registration Act* (No.3) of 2012. Land reference No. MSA/ BLOCK XX149 in the Tender Notice showed that there was a caution placed on 24th December, 2009 by Island Homes Developers Limited claiming that they bought the property in the year 2009. This property, and others which had issues at the Land Registry could not legally be sold except through fraud to tenderers who have insider information and possibly at throw away prices.

   ii. In accordance with the provision of Section 180 (11) of Public Procurement and Assets Disposals Regulations 2020 procurement entity such as their pension scheme had no power to sell its land and buildings without approval of the National Treasury. There was no evidence that such approval had been secured. This was an abuse of office and illegal.

   iii. The provision of Section 13 (2) of Legal Notice No. 193 of 2020 (Subsidiary Legislation to *Retirement Benefits Act* 1987) provides that members of their pension scheme must participate in drastic decision such as sale of land and buildings. As a member of the scheme he had not been invited to participate in the decision to sell the properties. Participation was on basis of one member one vote.

l. The Honourable Court should stay the processing of this tender until his application is heard and determined as it was illegal for the following reasons:

   i. It contravened the provision of Sections 72 (2) and 73 (1) of *Land Registration Act* No. 3 of 2012 as some properties had encumbrances which meant they could only be sold fraudulently. According to the act, encumbrances could only be rectified by Land Registry or the court or by entity raising it. See annexture marked as "Exhibit J00 – 3".

   ii. According to the provision of Section 180 (11) of subsidiary legislation to Public Procurement and Assets Disposal Act 2015 under Legal Notice No.69, a Procurement entity must, in case of land and buildings, first secure approval of the National Treasury before disposal of its property. The reason was that the pension scheme was partly funded by the Treasury and enjoy immense tax exemptions. The Legal Notice No. 69 was annexed and marked as "Exhibit J00 – 4".

   iii. The tender notice also contravenes the provisions of *Retirement Benefits Act* 1987 and Section 13 (2) of its subsidiary legislation under Legal Notice No.193.

   iv. The provisions were that the members of the Pension Scheme must be allowed to participate in the major decisions involving sale of properties valued at more than a sum of Kenya Shillings two Billion (Kshs. 2,000,000,000/=).

   v. Members, including himself, had not been involved in decision to sell the properties. Legal Notice was annexed and marked as "Exhibit J00 – 5".

m. The upshot of all this was that the Pension Scheme through its Trustees, had no respect for the law and little regard for their Constitution and procurement law which provided, on matters of procurement and asset disposal, that: Tenders must be done under a system which was fair, equitable, transparent, competitive and cost effective.

n. As such, the said tender could not be responsive enough to attract genuine and serious bidders. It was reasonable to conclude that the said tender was intended to be awarded to a few known people at throw away prices. It was his feat that the Pension Scheme would cause their pension fund to be eroded and that, as a Pensioner, he stood to miss his monthly pension and be turned into a beggar as he could not make it in any other way at his advanced age of 78 years.

o. It was important and in public interest that the Honourable Court take interim injunctive measures to stop the 1st Defendant, its servant and or agents from processing the said tender.

III. The Responses to the Plaintiff's Notice of Motion application dated 21st February, 2022 by the 2nd Defendant through:-

A. Grounds of opposition

5. The 2nd Defendant opposed the application dated 21st February, 2022 through Grounds of opposition dated 6th May, 2022 where they contended that:

a. The application disclosed no cause of action whatsoever against the 2nd Defendant and therefore ought to be dismissed forthwith with costs.

b. The Court lacked jurisdiction to deal with the matter which had already been decided by a Court of competent jurisdiction in High Court Civil Suit No. 81 of 2019, hence the present suit was "Res Judicata".

c. The Court lacked original jurisdiction to hear the matter as the Plaintiff prematurely invoked the Court's jurisdiction in disregard to the doctrine of Exhaustion

d. The Application was misconceived, frivolous, vexatious and a total abuse of the Court process and should be dismissed forthwith with costs to the 2nd Defendant.

B. Replying Affidavit

6. The 1st Defendant through Paul M. Mwaka one of the Registered Trustees of the 1st Defendant responded to the application dated 21st February, 2022 sworn on 14th June, 2022 where he averred that:

a. He swore an affidavit on 17th March, 2022 in support of the 1st Defendant's Notice of Motion of an even date seeking to strike out the suit.

b. Additionally, the Plaintiff's application should be refused because;

i. Tender No. KPAPS/DISP/003/2022 was opened and the successful bidders awarded on 5th April 2022

ii. The 1st Defendant and the successful bidders then entered into respective contracts.

iii. The event sought to be restrained therefore, had already happened. The application was thus overtaken by events.

c. Further, the successful bidders had, by entering into the contracts, acquired an equitable interest in the properties. An injunction would interfere with those equitable interests without hearing them.

7. The 2nd Defendant through their Principal Legal Officer STEPHEN KYANDIH swore a Replying Affidavit dated 6th May 2022 where he deponed that:

i. The bone of contention was Tender No. KPAPS/DISP/003/2022 of 2022, which was placed in the Daily Nation Newspaper dated 24th January 2022 for the sale of immovable properties which belonged to the 1st Defendant and the Plaintiff pleaded that he was a member of the 1st Defendant, a registered pension scheme under the *Retirement Benefits Act* No.3 of 1997. He alleged that the intended sale was illegal and a violation of his rights and other members of the scheme as he may lose his monthly pension benefits which was not true.

ii. From the onset, the Notice of Motion application dated 21st February 2022 never disclosed any cause of action against the 2nd Defendant and should therefore be dismissed with costs to the 2nd Defendant.

iii. With the claim arising from the operations of the pension scheme, *Retirement Benefits Act* No. 3 of 1997 required that all disputes between a pension scheme and its members be referred to the Chief Executive Officer of the Retirement Benefit Authority and subsequently to Appeal Tribunal established in the said Act.

iv. Based on the foregoing, the Environment and Land Court has no jurisdiction to entertain this suit.

v. There was no provision granting the High Court original jurisdiction to hear disputes under the mandate by the Retirement Benefits Authority. The jurisdiction was limited to Judicial Review or Constitutional Petition from decision of the Appeals Tribunal.

vi. It was in the interest of justice that the application dated 21st February 2022 be dismissed as the orders sought by the Plaintiff were a nullity.

IV. The Notice of Motion application dated 17th March, 2022 by the 1st Defendant

8. The 1st Defendant filed the Notice of Motion application dated 17th March, 2022 whereby it sought the following: -

i. Spent;

ii. Order No. 3 in the orders issued on 8th March 2022 be suspended pending the inter - parties hearing and determination of this application.

iii. Alternatively, Order No. 3 in the orders issued on 8th March 2022 be suspended until the Plaintiff provides a bank guarantee or insurance bond of Kenya Shillings Six Hundred Million (Kshs. 600, 000, 000.00/=), to cater for any claims arising from the Scheme's failure to process Tender No. KPAPS/DISP/003/2022.

iv. The Plaintiff's suit be struck out for lack of original jurisdiction; for being res judicata and for being an abuse of the court process.

v. In the alternative, and without prejudice to (4) above, Order No. 3 in the orders issued on 8th March 2022 be suspended pending the hearing of the Plaintiff's Notice of Motion dated 20th April 2021.

vi. The costs of this application and suit be awarded to the 1st Defendant.

9. The application was premised on the provision of Sections 1A, 1B, 3, 3A & 7 of the *Civil Procedure Act* Cap 21. It is based on the grounds, testimonial facts and averments made out under a 16 Paragraphed Supporting Affidavit sworn by PAUL M. MWAKA and dated 17th July, 2022 together with annexures. He averred that:-

i. The Honorable Court, on 8th March 2022, issued an order stopping the 1st Defendant from selling, alienating, wasting or transferring the "suit property", amongst other orders.

ii. The order was significantly prejudicial to, and violative of the Defendant's rights, as well as violative of the law, because;

a. The order was issued during a mention. The mention, in fact, was for directions on the Plaintiffs earlier Notice of Motion dated 20th April 2021.

b. Having been issued at a mention, the order was violative of the 1st Defendant's rights to a fair hearing, guaranteed under the provision of Article 50(1) of *the Constitution*.

c. The order was expressed to apply to "the suit property". From the pleadings by the Plaintiff, there was not a single property pleaded.

d. The 1st Defendant may possibly be cited for being in contempt of an order whose precise limits were unclear.

e. Assuming the intention was to stop the 1st Defendant from processing Tender No. KPAPS/DISP/003/2022, then it was violative of the law that an interlocutory order could only be granted where the founding pleading supported it. The Plaint deals only with Tender No. KPAPS/DISP/001/2021.

f. The 1st Defendant's property portfolio accounted for 57% of its investments, well beyond the 30% permitted by law. Tender No. KPAPS/DISP/003/2022, was floated to enable the 1st Defendant comply with the law.

g. If the order was read to mean that the 1st Defendant could not process Tender No. KPAPS/DISP/003/2022, then the Court was putting the 1st Defendant's Trustees in a position of facing sanctions for non-compliance with the law.

h. Tender No. KPAPS/DISP/003/2022 had attracted numerous bidders who had invested significant amounts and who expected that the contracts would be concluded.

i. If the order was read to mean the tender could not be processed, then the Scheme was likely to face claims from the successful bidders. Since the successful bids received amounted to a sum of Kenya Shillings Six Eighty-Four Million Five Hundred Thousand (Kshs. 684,500,000.00/=), the Scheme was likely to face a claim for that much.

iii. The Plaintiff on the other hand, derived no real benefit from the order he had now obtained against the Scheme. His worry, as pleaded in Paragraph 15 of

his Supporting Affidavit, was that he may lose his monthly pension and "be turned into a beggar".

iv. The 1st Defendant was willing to give an undertaking, or even a bank guarantee, to pay the Plaintiff's pension benefits, which were in fact not colossal, as and when they become due.

v. The Plaintiff therefore, suffered no real prejudice if the Scheme completes the sale of its properties. On the other hand, restricting the Scheme Trustees exposed thousands of pensioners to possible losses if colossal sums were paid out to settle third party claims.

vi. Without prejudice to the foregoing, the Plaintiff's suit should be struck out for the reasons that follow.

vii. The Plaintiff did not disclose that, vide a Plaint and Notice of Motion application both dated 8th October 2019, he filed Mombasa HCC No. 81 of 2019 between the same parties and raising the same issues he raised in this suit.

viii. The 1st Defendant here objected to the Court's jurisdiction to entertain the matter on account of the provision of Sections 46 & 48 of the *Retirement Benefits Act* No. 3 of 1997, and "The Doctrine of Exhaustion".

ix. In a ruling delivered on 19th November 2021, the High Court found that it, indeed no superior court, has original jurisdiction to entertain the type of dispute before it.

x. The present suit, which presented the very same dispute decided by the High Court, was therefore in breach of the doctrine of "Res Judicata" and violative of the provision of Section 7 of the *Civil Procedure Act* Cap 21.

xi. Even assuming arguendo, the suit was not "Res Judicata", it was abusive of the Court process to start two parallel processes before two different Courts seeking the same or similar reliefs.

xii. The undesirable result of that approach was that the High Court had declined original jurisdiction but the ELC continued to entertain proceedings on the very same issues, and may even possibly, find it has original jurisdiction.

xiii. The ELC, indeed all other courts, lack jurisdiction to entertain a dispute, such as this, which questions the Trustee's management of the 1st Defendant. This is because;

a. The Trust Deed, to which the Plaintiff was a member, expressly provided for arbitration in the first instance.

b. The provision of Sections 46 & 48 of the RBA Act No. 3 of 1997, provided recourse to the Chief Executive Officer, with access to the Courts, be it the ELC or High Court, being restricted only to appeals.

xiv. It was therefore just and fair that the reliefs sought here be granted "Ex - Parte" in the interim and be confirmed after inter-parties hearing.

V. The Response by the Plaintiff to the 1st Defendant's Notice of Motion application dated 17th March, 2022

10. The Plaintiff responded to the 1st Defendant's application through a Replying Affidavit filed on 31st March, 2022 where he deposed that:

    a. The contents made under Paragraph 1 was a Statement of fact and admitted.

    b. The contents made under Paragraphs 2 (a) and (b) were not true for the following reasons:

        i. His Notice of Motion application dated 21st February, 2022 under Certificate of Urgency was before Justice Lady Nelly Matheka of this Court on 22nd February, 2022.

        ii. On the same date the said Judge directed that the matter be heard "Inter Parties" on 8th March, 2022 before ELC No. 3. His Notice of Motion application was then served on 1st Defendant on 13th February, 2022.

        iii. All parties were present before ELC No. 3 on 8th March, 2022 and, after hearing the concerns of all parties the Judge issued restraining Orders as prayed for and also that the case be heard on 8th May, 2022. His Notice of Mention application dated 20th April 2021 was not fixed for Mention on 8th March, 2022.

    c. The contents made under Paragraph 2 (c) and (d) were not true, as specific properties with full details as to their specific land reference numbers were indicated in Tender Notice reference No. KPAPS/DISP/003/2022. The Tender Notice was annexed to his Supporting Affidavit dated 21st February, 2022 and marked as "Exhibit J00 – 1". Addendum to the said Tender Notice was annexed marked as "Exhibit J00 - 1 (b)" Violation of the alleged law did not arise.

    d. The contents made under Paragraph 2 (e) was also not true as properties in Tender Notice KPAPS/DISP/003/2022 and properties in Tender Notice No. KPAPS/DISP/001/2021 of 2021 were identical as per Land registry Land Reference Numbers. The first property in Tender Notice of 2022 is Kitaruni Road Nyali "Mainland North/Section 1/ 2505 is the same as the first property in Tender Notice of 2021 namely Land Reference Kitaruni Road Nyali MN/1/2505 in the former and land reference in the latter. See Exhibit marked as "JOO – 1" and "J00 – 2". The founding pleadings support the current Notice of Motion application.

    e. The contents made under Paragraph 2 (f) needed to be specific. Which law was being violated here? The Court should not be expected to guess which Law was in the mind of the 1st Defendant. Paragraph 2 (g) was also not explicit on the Law which would lead to sanctions which were not made explicit.

    f. The contents made under Paragraph (g) was denied for reason that:

        i. The terms and conditions of the tender were clear ("Exhibit JOO – 1").

        ii. Bidders were to pay 10% deposit on the bided sum for each property.

        iii. Tenders to be evaluated to determine the successful bidder.

        iv. Successful bidder to be informed in writing and they ought to confirm acceptance in writing.

        v. Tenders to be valid for 90 days from opening date and as per the provision of Section 4.3 (d) Page 16 of Tender document, the Procurement entity (in this case the 1st

Defendant) could CANCEL the Tender without giving any reason so long as the Contract had not been signed. See Exhibit No. JOO – 1".

vi. The Contract could only be entered into with successful bidder after the above terms.

g. As at the time the Court Order was issued by this Court the above had not taken place and no Contract had been entered between 1st Defendant and any bidder. Paragraph (h) was also denied for the following reasons.

h. According to the minutes of the opening of bids on 25th February 2022 each bidder paid only 10% of the tender price in their bids. See Exhibit "JOO – 3" on Page 87.

i. According to Public Procurement and Assets Act 2015 and Regulations, where asset for Disposal was Land and Buildings and the Public Tender Notice had not attracted sufficient response, the same properties could not again be subjected to another Public Tender Notice. The option was auction as provided in the Law.

j. In any case this Tender could not be said to be responsive as each property attracted only one bidder. The very fact that the 1st Defendant disclosed the RESERVE price of each property killed the spirit of competition which was normally aimed at in publicly advertised Tenders for properties. Reserve price was normally used in depreciable assets such as office equipment's which depreciate in value with passage of time, but not non-depreciating assets as land and building which perhaps could profitably be sold through closed tenders.

k. The contents made under Paragraph (i) was also denied for the following reasons:

i. Minutes of Tender opening on 25th February 2022 (see Exhibit No. J00 – 3") showed that the total amount received for deposit was a sum of Kenya Shillings Sixty Seven Million (Kshs. 67, 000. 000./=).

ii. The Notice of Motion application of the 1st Defendant showed that a sum of Kenya Shillings Six Hundred and Eighty - Four Million Five Hundred Thousand (Kshs. 684, 500, 000.00/=).

iii. The Defendant must tell the Court where they (Trustees) had taken a sum of Kenya Shillings Six Nineteen Million Five Hundred Thousand (Kshs. 619, 500, 000.00/=), as otherwise there might be a need to mount criminal investigation by the Division of Criminal Investigation offices (D.C.I.O).

l. The contents made under Paragraphs 3 and 4, the Deponent thanked the 1st Defendant for their readiness to pay him off in case he agreed to allow them to sell the properties. This was not tenable because:

i. In accordance with the provision of Section 91 (1)and (6) of *Land Registration Act* No.3 of 2012 his ownership of the property of the Scheme was in Common along with more than other 5, 000 or so other members of the Scheme.

ii. His ownership was in equal shares with others and these shares were "undivided shares" and hence paying him would mean all other owners in Common (members) ought also be paid off.

m. The contents made under Paragraph 5 was denied on the following grounds:

i. As said Supra, the 1st Defendant had not entered into any Contract with any bidders for the sale of the Scheme properties. Only bid deposits had been received (See Exhibit Marked as "JOO – 3").

ii. Because of the illegalities Characterizing this tender, the 1st Defendant's best option was to cancel (in 90 days) the tender and refund the bidders their deposits which amount to only a sum of Kenya Shillings Seventy Million (Kshs. 70, 000, 000.00/=) as provided under terms and conditions (Exhibit marked as "JOO – 1") of tender which was agreed and signed by the bidders. If the trustees connived with some bidders and received extra money from the bidders then this extra money should also be returned to the bidders concerned. This would obviate any need for criminal investigations. Certainly, he did not want it to go that way. No contract must be signed as long as the Restraining Order was in place. There would be no third-party claims.

n. The contents of Paragraphs 6 -12 were denied on following grounds:

i. Tender Notice of 2019 were for properties located in Mombasa. This was the Notice annexed to his Suit No. 81 of 2019 in the High Court and was properties located in Mombasa (Exhibit J00 - 3b) "JOO - 2").

ii. Tender Notice of 2021 (Exhibit JOO - 1) was for the properties in Nairobi and Mombasa. This was the tender Notice attached to the Civil Suit Number ELC No. 73 of 2021.

iii. The above tenders were not identical in that they were comprised of properties with unique land reference numbers, acreage, location and had unique problems at Land Registry, especially those in Mombasa. See Exhibit marked as "J00 – 5" – being Property sold in the year 2009 being offered for sale in the year 2022.

iv. The question of "Res Judicata" did not arise here as the subject matters were not the same.

v. The Ruling of Justice Lady Dorah Chepkwony in Suit No. 81/19 in the High Curt reads in part:-

> "In the upshot, the Jurisdiction of this Court cannot be exercised until the Statutory remedies provided for are exhausted. It would therefore be an academic exercise to address the other issues under controversy when the Jurisdiction of this Court is yet to crystallize".

o. It was clear that the High Court Judge declared herself incompetent to bring finality to the case as she lacked Jurisdiction. Finality and Jurisdiction were some of the elements which ought to exist for a subsequent case to be declared "Res Judicata". His Civil Suit 81/ 19 could not have any impact on the ELC 73/21 which was before a competent Court on matters relating to transfer of proprietors (member of the Scheme) rights on land to a third party on sale which was clearly mentioned in the terms and condition of tender to be in accordance with the Law Society of Kenya conditions of Sale.

p. Public Procurement and Assets Disposal Act 2015 and Regulations of 2020 were not in use in the year 2019. The Provisions in the regulations raise issues which called for different causes of action which were now brought to play in the 2nd Defendant's Notice of Motion application dated 21st February, 2022. This circumstances which

involved fresh Causes of action were in harmony with elements which must be satisfied before "Res Judicata" was brought into play.

q. The content made out under Paragraph 13 was also denied.

   i. It was not in dispute that the 2nd Defendant's application dated 21st February, 2022 before the Court was about a tender advertisement which invited bidders to bid for purchase of immovable properties (Land) which belonged to members of Kenya Ports Authority Pension Scheme (D.B.)

   ii. The effect of the tender advertisement would be culmination of transfer of rights of the members on specified properties to a third party.

   iii. Transfer of rights in property was governed by the provisions of the *Land Registration Act* No. 3 of 2012 and not the Chief Executive Officer of Retirement Benefits Authority who dealt mainly with disputes on Pensions emoluments such as wrong calculation of Pensions.

   iv. The only Court which was mandated to deal with land matters, including transfer of interest in land, title deeds, etc. was Environment and Land Court as enshrined in the provision of Article 162 (2) (b) of *the Constitution* of Kenya 2010 and its enabling legislation in *Environment and Land Court Act* 2011.

r. The Environment and Land Court has original jurisdiction on Land matters from resident Magistrate's Court for small value property up to high value land at ELC which is a High Court. The question of Land matters being referred to RBA under the provision of Sections 46 and 48 of RBA Act was fishing expeditions and a gamble with the Law.

s. It should be noted that the 2nd Defendant was a Sponsor to two Pension Schemes-DB Scheme, which was before the Court, and DC Scheme. Those in DC Scheme (some) were also members of the DB Scheme and they also had equal and undivided shares in the properties in the DB Scheme as "Tenants in Common". The tender Notice had ignored those members in D.C. He was alive to the desire of the Courts to have their problems solved by parties outside the Court. It was for this reason that the 1st Defendant on 30th September, 2021 approached the Court for extension of time for parties to have had a round table meeting. The Court extended the case by forty (40) days. The 1st Defendant never availed themselves for the discussion. Again similar request was made in Court on 17th November 2021. Again the 2nd Defendant was not available. They never had the impetus for the discussion and, behind his back, they floated another tender for sale of similar properties to those under the Civil Case ELC 73/21 (Exhibit marked as "JOO – 2") which had not been heard. What could he do other than seeking Court assistance.

t. They only had impetus for discussion after the interim Orders were issued on 8th March 2022. He was still willing to sit down with 1st and 2nd Defendants for out of Court settlement. This would be on the condition the Order No. 3 issued on 8th March, 2022 remained in force. If the Order was to be withdrawn then once properties was sold there would be no need to proceed with his case or discuss anything on it as the subject matter would have been extinguished. (See Exhibit Marked as "J00 - 6, 7 and 8").

u. He would be undergoing a surgery of the prostrate on 2nd April, 2022. It would take close to two (2) weeks before he fully recovered. It would therefore not be in the interest of Justice if inter parties hearing set for 5th April, 2022 was to proceed in his absence. It was not his will that he was sick (See Exhibit Marked as "J00 – 9").

VI. Submissions

11. On 6th June, 2022 while all the parties were present in Court, they were directed to have the two Notice of Motion applications dated 21st February, 2022 and 17th March, 2022 respectively be disposed of by way of written submissions. Pursuant to that, all the parties complied. Thereafter, a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiff

12. On 13th June, 2022, the Plaintiff acting in person filed his submissions. He submitted that the Kenya Ports Authority Pension Scheme (Defined Benefit or D.B.in short), 1st Defendant in this case, came into being as a result of a merger of two Pensions Plans-one belonging to now Defunct Kenya Cargo Handling Services Limited and another to Kenya Ports Authority, a parastatal created under *Kenya Ports Authority Act* (Cap 491) of 1978. This was under Legal Notice No. 8 of 1987. The Scheme was a creation of Legal Notice No. 82 of 1999.

13. The Members of the Pension Scheme could be categorized as follows:-

    i. Active members who were still in employment of the Sponsor and 2nd Defendant namely Kenya Ports Authority.

    ii. None Active members, namely Pensioners.

    iii. Heirs or legal family members of the deceased Pensioners in (ii) above.

14. The Pension Scheme Fund was mainly invested in the following portfolios:-

    i. Property Assets-Land and Buildings

    ii. Financial Assets-Government Securities such as Treasury Bills, Quoted and unquoted shares, fixed deposits and so on.

15. The Plaintiff submitted that on 1st January 2012, the Sponsor (the 2nd Defendant) created a second pension Scheme known as Kenya Ports Authority Pension Scheme (Defined Contribution or DC). This was under Legal Notice No.73 of 2012. This second Scheme was for members of the first Scheme (The DB Scheme) who were under the age of 45 years in January, 2012. Members of this second Scheme (The DC Scheme) have their equal and undivided shares in the property assets of the first Scheme (The DB Scheme) as their shares in the said properties were not transferred to the new Scheme. When the members of the second Scheme retire they draw their Pensions from both Schemes because of their interests in shares of the assets of the DB Scheme which were not transferred to the second Scheme.

16. In summary, he averred that his case was that Tender Notice No. KPAPS/DISP/003/2022 in the Daily Nation newspapers dated 24th January, 2022 floated by the 1st Defendant was in violation of the following laws:-

    a. *Land Registration Act* No. 3 of 2012 and its Regulations.

    b. Public Procurement and Assets Disposal Act 2015 and its Regulations.

c. Abuse of Court process by 1st Defendant as the same properties had earlier been advertised under Tender Notice No. KPAPS/DISP/001/2021 in the Standard Newspapers dated 2nd March 2021 which is before this Court under ELC NO. 73 of 2021 and had not been heard and determined. See his Notice of Motion dated 20th April, 2021. See List under "Exhibit marked as J00 – 2" annexed to Supporting Affidavit as contrasted with "Exhibit marked as JOO – 1" in his Notice of Motion application dated 21st April, 2022.

17. The Plaintiff submitted that in response to his notice of motion application above, the 1st Respondent stated that:

a. The Orders of 8th March 2022 were issued on a fixed Mention and was denied the right to be heard as per Kenya Constitution.

b. The Applicant / Plaintiff never pleaded for any single property, thus making the term "Suit Property" none specific.

c. Interlocutory Order could only be given when the Founding Pleadings support it as the Plaintiff had dealt with only Tender No. KPAPS/DISP/001/2021 of 2021 and ignored the Tender No. KPAPS/DISP/003/2022 OF 2022.

d. The Scheme may face sanction for not following the law by exceeding its portfolio by over 30%.

e. Bidders had paid a sum of Kenya Shillings Six Eighty Four Million Five Hundred Thousand (Kshs. 684,500,000.00/=) and would sue the Trustees of the Pension Scheme if they were not awarded the Tender. The Tenders had been successful.

f. The Plaintiff's case was "Res Judicata".

g. It was abuse of the Court process for the Plaintiff to have had two (2) parallel cases in different Courts on similar issues.

h. The ELC Court lacked jurisdiction to hear the Plaintiff's case which questioned the management of the Pension Scheme by the trustees of the Scheme because:

a. The Trust Deed provided for Arbitration in the first instance.

b. Sections 46 and 48 of the RBA Act No.3 of 1997 provided recourse to Chief Executive Officer, with access to Courts, be it ELC.

i. The Relief sought in the Notice of Motion application be granted.

1. The Plaintiff submitted that it was not in dispute that the Law which made provisions on how transfer, sale or disposition in land could be carried out was the *Land Registration Act* No. 3 of 2012, and its Regulations. It was also not in dispute that members of Kenya Ports Authority Pension Scheme were the owners of the Suit Property managed by the Trustees of the said Pension Scheme. Members own the said property jointly in equal but undivided shares as stipulated in provision of Section 91 (i) and (ii) of the *Land Registration Act*. The provision of Section 91 (4) (a) of the Act states that where land is owned jointly (or commonly) Sale or transfer or disposition of such land could only be done with agreement of all Joint Tenants or owners. No dispute had arisen out of this legal position. Tender No. KPAPS/DISP/003/2022 of 2022 for sale of Scheme properties

had been floated without the consent of the members of the Pension Scheme of whom he was one.

2. It was the Plaintiff's submission that the relevant law had been violated and the illegal tender should be cancelled and only be refloated after the trustees had complied with the express provisions of the Law. The book value of the properties under discussion was over a sum of Kenya Shillings One Billion (Kshs. 1,000,000,000.00/=). Trustees of the Scheme did not have any financial powers to sell properties of such magnitude. Their action of floating the tender for sale of the said properties was a violation of the above act. The provisions of Sections 180 (11) of the Legal Notice No. 69 of 2020 states:-

> " For the Disposal of Building or Land, a procurement entity shall obtain the approval of the Treasury". Our Pension Scheme is a Procurement entity under this act. The reason is that the Scheme is exempt of tax on its profits such as returns on its investments and also partly funded by tax payers and therefore this requirement is in the public interest. This act is a creation of Article 227 (i) of Kenya Constitution 2010,which states:
>
> "When a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

20. The Plaintiff argued that the Trustees of the Pension Scheme had in essence violated the Provisions of *the Constitution* which was a matter of public interest. For this reason, the Tender, once again must be cancelled and steps should be taken by the trustees to approach the National Treasury for approval before tenders could be refloated. Specific properties with full details as to their specific Land reference numbers were indicated in Tender Notice reference No. KPAPS/DISP/003/2022. The Tender Notice was annexed to his Supporting Affidavit dated 21st February 2022 as "Exhibit marked as JOO – 1". Addendum to the said Tender Notice was annexed marked as "Exhibit JOO - 1(b)".

21. Example from "Exhibit Marked as J00 – 1" would help. These were:-

    a. Property No. 1 is MN/SEC 1/2595 NYALI MSA. FREEHOLD

    b. Property No. 8 is MN/SEC 1/1332 NYALI MSA LEASEHOLD and so on. The fact that they are grouped together is not depriving them of their unique nature and each is a subject matter as tenders are required to bid for each property as contract will be on each property as separate subject matter.

22. On the issue of whether interlocutory orders could only be given when the founding pleading supported it, the Plaintiff asserted that this was not true as properties in Tender Notice KPAPS/DISP/003/2022 and properties in Tender Notice PAPS/DISP/001/2021 of 2021 were identical as per Land Registry Reference Numbers. The first property in Tender Notice of 2022 is Kitaruni Road Nyali "Mainland North/ Section 1 / 2505 was the same as the first property in Tender Notice of 2021 namely Land Reference Kitaruni Road Nyali MN/1/2505. The founding pleadings supported the current Notice of Motion application. The said tenders were annexed to Supporting Affidavit dated

21st February, 2022 as Exhibit marked as "J00 - 1" and "JOO – 2" in the Supporting Affidavit dated 20th April, 2021.

23. He submitted that the Notice of Motion application dated 21st February, 2022 filed under Certificate of Urgency was before Justice Lady Nelly Matheka of ELC Court on 22nd February, 2022. On the same date the said Judge directed that the matter be heard "inter parties' on 8th March, 2022 in ELC No. 3. His Notice of Motion application was then served on 1st Defendant on 13th February, 2022 and clearly stated that the hearing would take place. There was nowhere the said Judge fixed the case for Mention on 8th March, 2022. All parties were present in ELC No. on 8th March, 2022 and, after briefly hearing the concerns of all parties the Judge issued status quo Order No. 3 and also that the case be heard on 10th May,2022. His Notice of Motion application dated 20th April, 2021 was not fixed for Mention on 8th March,2022 as alleged.

24. In the Civil Appeal No.9 of 2008 in the Court of Appeal of Tanzania at Dar es Salaam, Bwana J.A. made it clear that it was only when the case was fixed for Mention that a party might oppose any substantive Orders being issued. The issue here must therefore be whether the Court FIXED the matter for HEARING or for MENTION. The Court records speak for themselves. He stressed that in any case all parties were present before Court and nobody complained about this issue.

25. On the issue raised by the Respondent on the trustees facing sanction for not complying with the law, the Plaintiff submitted that this needed to be specific. Which Law was being violated here? The Court should not be expected to guess which Law was in the mind of the 1st Defendant. The 1st Defendant clearly in desperate need for the Court to assist it to sell the properties. The Court could only do so if evidence of the law being breached was availed and that specific law being breached was indicated, be it an Act of Parliament, case law or *the Constitution*. The Court must not guess what had not been made specific as he felt the fire alarm was being raised yet there was no fire.

26. The Plaintiff contended that on the issue bidders having paid a sum of Kenya Shillings Six Eighty Four Million Five Hundred Thousand (Kshs. 684,500,000/-) and would sue trustees of the pension scheme if not awarded the tender was wishful thinking and meant to mislead and intimidate the court, and possibly a myth and if not a myth it could be a scandal because:-

    a. Terms and conditions of the Tender were clear. This was attached to Supporting Affidavit in his Notice of Motion application dated 21st February, 2022 as "Exhibit marked as JOO – 1".

    b. Bidders were to pay 10% deposit on the bid sum for each property, not grouped properties.

    c. Tenders to be evaluated to determine the successful bidders.

    d. Successful bidder to be informed in writing and they ought to confirm acceptance in writing.

    e. Tender to be valid for ninety (90) days from opening date and as per the provision of Section 4.3(d) Page 16 of Tender document, the Procurement entity (in this case the 1st Defendant) could CANCEL the tender without giving any reason so long as the contract or Sale Agreement had not been signed. "Exhibit JOO – 1" which was annexed to the Supporting Affidavit would clarify this.

    f. The Contract could only be entered into with successful bidder after the above terms.

    g. As at the time the Court Order was issued by this Court the above had not taken place and no Sale Agreement had been entered into between 1st Defendant and any bidders.

    h. There could be no sanctions on Contract or Sale Agreement which never existed.

27. The Plaintiff submitted that according to the minutes of the opening of bids on 25th February 2022 each bidder paid only 10% of the tender price in their bids. This was attached to his Supporting Affidavit to Notice of Motion application dated 21st February, 2022 marked as "Exhibit JOO – 3" on Page 87. There was no mention in the minutes being a sum of Kenya Shillings Six Eighty Four Million Five Hundred Thousand (Kshs. 684,500,000/-) claimed to have been received Supra. According to the Public Procurement and Assets Disposal Act 2015 and Regulations, where asset for Disposal was the Land and Buildings and the Public Tender Notice had not attracted sufficient response, the same properties could not again be subjected to another Public Tender Notice. The option was auction as provided in the Law. This Law was in Section 183 (3) of the Regulations to the Act under Legal Notice No.69 issued on 27th April, 2020. In any case this Tender could not be said to be responsive as each property attracted only one bidder, and only 40% of the properties in the tender notice had attracted any bids. Nobody tendered for the other 60% of the properties. The reason some of the properties had encumbrances at the Lands Registry among other reasons such as alienations and waste.

28. The Minutes of tender opening on 25th February 2022 showed that the total amount received for deposit was for a sum of Kenya Shillings Sixty-Seven Million ((Kshs.67, 000, 000.00/=). To support this Exhibit JOO – 3" was annexed to his Supporting Affidavit in Notice of Motion application dated 21st February, 2022. The Notice of Motion application of the 1st Defendant showed that a sum of Kenya Shillings Six Eighty Four Million Five Hundred Thousand (Kshs.684, 500, 000.00/=) was received when Tenders were opened. Thus, the 1st and 2nd Defendants must tell the Court where they (Trustees) had taken the balance being a sum of Kenya Shillings Six Nineteen Million Five Hundred Thousand (Kshs.619, 500.00/=), as otherwise there might be a need to mount criminal investigation by D.C.I. The 1st Defendant was trying to make the Court panic and grant them unjustified prayers. The fire alarm was false as there was no real fire anywhere. What there was a myth or a scandal which may very well involve the bidders as well.

29. On the issue of whether guarantee could be given to the Plaintiff on his future pension payments, the Plaintiff submitted that the Plaintiff thanked the 1st Defendant for their readiness to pay him off in case he agree to allow them to sell the properties. This was not tenable because:-

    a. In accordance with the provision of Section 91 (1) and (6) of *Land Registration Act* No.3 of 2012 his ownership of the property of the Scheme was Joint/Common along with more than other five thousand (5, 000) or so other members of the Scheme.

    b. His ownership was in equal shares with others and these shares were "undivided Shares" and paying him would mean all other owners in common (members) must give their consent.

30. The Plaintiff argued that restricting trustees from selling properties would make pensioners suffer. As said Supra, the 1st Defendant had not entered into any Contract with any bidders for the Sale of the Scheme properties. Only bid deposits had been received. Because of the illegalities characterized in this tender, the 1st Defendant's best option was to cancel (in 90 days) the tender and refund the bidders their deposits which amounted to only seventy million as provided under terms and conditions of tender which was agreed and signed by the bidders. If the trustees connived with some bidders and received extra money from the bidders then this extra money should also be returned to the bidders concerned. This would obviate any need for criminal investigations. Certainly, he never wanted to go that way. No contract ought to be signed as long as the Restraining Order was in place. There would be no third-party claims. He stressed that it was mere alarm. There was no fire or object to ignite fire. Just falsehood, one after another.

31. The Plaintiff argued that the Doctrine of Res Judicata was a well-established global doctrine but it was not a one way doctrine as the 1st Defendant would like the Court to believe. There was well established statutes and authorities in Kenya on the doctrine. He held that the Law in Kenya on the doctrine was under the provision of Section 7 of the *Civil Procedure Act* 2010. The authorities were many including that of:- "C.K. Bett Traders Limited and 2 Others – Versus - Kennedy Mwangi and another (2021) eKLR where Honorable Justice E. C. Mwita. stated as follows:-

> " 33 Res judicata is normally pleaded as a defence to a Suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgement, which may have determined the questions Law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or Suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous Suit as in the current Suit and they were conclusively determined by a Court of competent jurisdiction.
>
> 34. n that respect, the Court of Appeal held in the Independent Electoral and Boundaries Commission – Versus - Maina Kiai & 5 others, (2017) eKLR), that:
>
> For the bar of res judicata to be effectively raised and upheld on account of a former Suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:
>
> a) The Suit or issue was directly and substantially in issue in the former Suit.
>
> b) That former Suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former Suit.
>
> e) The Court that formerly heard and determined the issue was competent to try the subsequent Suit or the Suit in which the issue is raised.

At Paragraph 45 of her ruling on my Civil Suit No. 81 of 2019, Honorable Justice Dorah Chepkwony made the following remarks:

1. "In the upshot, the Jurisdiction of this Court cannot be exercised until the Statutory remedies provided for are exhausted. It would therefore be an academic exercise to address the other issues under controversy when the jurisdiction of this Court is yet to crystallize"

32. It was clear from the above remarks that the High Court was not competent to determine the matter before it due to lack of Jurisdiction and therefore could not bring it to finality. It could not therefore be said that the issues involved were heard and finally determined in the former Suit. The other element was whether the pleadings in the High Court were the same as in ELC Court. In the High Court the pleadings were:

a. Pending the hearing and determination of this Application the 1st Defendant be restrained from processing Tender No. KPAPS/PM/2/2019 (Correct Tender No. should have read KPAPS/PM/3/2019).

b. Order of Mandamus be issued to the 1st Defendant forcing them to secure the registration/ transfer of the subject property from Kenya Cargo Handling Services to Kenya Ports Authority Pension Scheme.

c. The Court compel the 2nd Defendant to surrender the Title Deeds of the properties to the 1st Defendant for onward transmission to the custodian.

33. In Suit No. ELC 73 of 2021 the pleadings were:-

a. That pending the hearing and determination of the Suit, injunction be issued by this Honourable Court restraining the 1st Defendant from processing Tender No. KPAPS/ DISP/001/2021 of March 2021.

b. The 2nd Defendant be directed to give vacant possession of all properties belonging to the 1st Defendant but which were still in their possession and control.

c. Pleadings in (b) is in the body of the Suit. The contents of the Tender Numbers in 2019 in the High Court Suit was not the same as those in tender number now before the ELC Court.

34. The Plaintiff contended that the properties in tender before the ELC Court was unique in terms of Land parcel number, acreage and location and therefore could not be said to be the same subject matter as was in High Court. Each of them had different green cards at Land Registry. Provisions of Public Procurement and Assets Disposal Regulations under Legal Notice No. 69 of 2020 had been brought as Cause of action in ELC 73 of 2021 and was not cause of action in High Court Suit 81 of 2019 as this law was not in existence in 2019. The 1st Defendant pointed outrightly that Tender Notice No. KPAPS/PM/2/2019 in High Court had been cancelled and should had not been pleaded for. The other pleadings in High Court case were no longer necessary when he filed another Suit in ELC Court as the 2nd Defendant had effected the pleaded transfers, i.e. pleadings in 3(b) and (c) above.

35. The Plaintiff argued that the tender Notice No. KPAPS/DISP/001/2021 of 2021 in the ELC Court were for properties which had not been tendered before and therefore cannot be said to have been the subject matter in the High Court case. It was admitted that the parties to the suit in High Court were the same as was in case No.73 of 2021 in the ELC Court. The other requisite elements had not been satisfied to sustain defence of "Res Judicata". Kindly also see the Tanzania authority Supra. It was therefore within his Legal right to file independent Suit in the ELC Court to stop an illegality, which was a matter of public interest. The defence of Res - Judicata must fail and the question of the Deponent abusing the Court process never arise.

36. The Plaintiff submitted that he had already said that the only statute which dictated how transfer of interest in land could be effected was the *Land Registration Act* No.3 of 2012. The Act stated that the ELC Court has jurisdiction on any dispute relating to titles to land as provided under the written law and he quoted what Section 101 of the *Land Act* No. 6 of 2012 provides:

> "The Environment and Land Court established by the *Environment and Land Court Act*, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act"

37. The Plaintiff asserted that what the *Land Act* states was derived from Article 162(2) (b) of the Kenya Constitution. In the Supreme Court Petition No. 3 of 2016, Albert Chaurembo Mumba and 7 others - Versus -Maurice Munyao and 148 others, the 4 (four) judges of the Supreme Court (under Paragraphs 136 and 137). Emphasized the fact that jurisdiction of the Courts must be as provided in the Kenya Constitution and he reproduce below what the judges said:

> " This is clear from the following passage in this Court's ruling in Samuel Kamau Macharia case (Supra):
>
> "(68) 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 counsel for the first and second respondents...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*".
>
> To give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute. Whether in the circumstances of the case, it is a dispute contemplated to be adjudicated by...."

38. The provision of Section 13 (1) (2) of the *Environment and Land Court Act* of 2011 states as follows:

1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution*, and with the provisions of this Act or any other Law applicable in Kenya relating to Environment and Land.

2) In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes...

39. The Plaintiff averred that it must therefore be admitted that assertion by the 1st Defendant that the ELC has no jurisdiction on his case had no merit. Of importance was, as emphasized by the justices of the Supreme Court, was the fact that, "as port of the first call", Courts should be able to identify the inherent nature of the dispute. This Court should be able to discern the nature of the dispute by the Pensioners in the Supreme Court Petition No. 3 of 2016 and the dispute of the Civil Case ELC/73 of 2021 which was before the Court. The Trustees of the Pension Scheme had floated a tender to sell properties of the members without getting their consent as envisaged in the *Land Registration Act* No. 3 of 2012. In Petition No. 3 of 2016 Supra Pensioners of the same Scheme disputed the action of the same trustees in amending the Trust Deed, which amendment had the result of reducing their accrued Pensions emoluments. Trust Deed deals exhaustively with the issues raised in the Petition.

40. The Plaintiff submitted that as a document approved by Chief Executive Officer of the RBA, any amendment to it should normally be referred to RBA. The manner in which property of the Scheme could be transferred to a third party was not contained in the RBA Act, RBA regulations, nor in the Trust Deed of the Scheme. The trustees of the Scheme had, however, the power to sell and lease the property of the Scheme but in accordance with the written law. The ELC Court therefore has original and unlimited jurisdiction to consider and determine disputes on transfer of Land in its inferior and superior Courts. My Lord my case before you is not questioning management of the Scheme by

trustees as covered in the trust deed and approved under RBA Act and Regulations. The fact that the jurisdiction of the ELC Court on disputes on Land emanated from our Constitution and that tribunals, be it RBA Tribunals, could only handle disputes mandated to it by the statute such as RBA Act, was also emphasized in the case of "Paulo Di Maria & 5 others (2021)e KLR at the ELC Court at Malindi.

41. The Plaintiff averred that it was also the position of the 1st Defendant that the Plaintiff had not allowed for internal dispute resolution mechanism to apply so that the matter could be settled domestically. This was simply not true and the Honorable Court was humbly requested to find time and refer to the first Court Proceedings on 30th September,2021 and on 17th December 2021 and also on 24th January, 2021 to see that the 1st Defendant was talking about an event that never existed. This Court has original jurisdiction to hear and determine the Plaintiff's case which involved violation of *the Constitution* and the written Law-*Land Registration Act* No. 3 of 2012 and Public Procurement and Assets Disposal Act 2015 and Regulations of 2020.

42. On 24th January, 2022 the 1st Defendant through Tender Notice No. KPAPS/DISP/003/2022 in the local dailies advertised for sale the same properties which were under dispute and were before the Honourable Court for determination, clear indication of abuse of the Court process. It was at this stage that it crystalized to him that he was being taken for a ride and had to raise red flags to the court with his notice of motion dated 21st February, 2022 with prayer to Court to slap the trustees of the scheme with an order restraining them from proceedings with sale of individual properties in tender notice. The Court granted the prayers. Having been shaken by the Court order, the Chairman of the scheme rang him and later wrote to him requesting that he agrees to resume the talks. With interlocutory Court order in place, he had no good reason to refuse. It was because of his hospitalization that they never met the internal settlement. Perhaps, this meeting may not had any added value now because of the following events which took place while he was still in the hospital, a fact which was brought before the Court through his letters dated 1st April, 2022 and 20th April, 2022 with documentary evidence of his sickness annexed:

    a. The 1st Defendant, through their Notice of Motion application dated 17th March 2022 asked this Honourable Court to set aside interlocutory Order it had issued on 8th March 2022 in favour of the Plaintiff.

    b. The Court fixed 5th April 2022 as the date for "the inter parte' hearing of the Notice of Motion application.

    c. On 4th April 2022 the 1st Defendant filed its written Submission dated the same date namely 4th April, 2022 a day before the hearing, yet the parties had not met on the scheduled date of 5th April 2022. This was because by that date no settlement had been reached nor had the Court given Order or direction that parties canvass the matter through Written Submissions.

    d. On 5th April 2022 the matter was fixed as scheduled but the Plaintiff was absent. His absence was explained through a letter dated 1st April, 2022 well received by the court and the 1st Defendant to the effect that it was due to him being sick and hospitalized.

    e. The Court adjourned the case. At the same time, it set aside the interlocutory order it had issued on 8th March, 2022 by declining to extend it further. In any case, the Plaintiff had not requested for extension.

43. The Plaintiff submitted that from the above, the following questions arose:

a. The 1st Defendant filed his Submission on 4th April,2022 before the Court ordered parties to do so, and the Court only did so on the following day, namely 5th April 2022. Was this done with the intention of influencing the Court to reach a certain decision on 5th April, 2022?

b. The Court made a decision not to extend the interlocutory Order from unspecified date in the future. Was this decision based on prayers of the 1st Defendant during the adjourned hearing? If so then it was his humble opinion that the Court had no intention of hearing him.

c. It was his Submission that the Court made a decision which was prejudicial to his right to be heard as provided under *the Constitution*.

d. The interlocutory Order issued by this Court on 8th March 2022 was the result of his prayer on his Notice of Motion application dated 21st February 2022. Could the validity of an interlocutory Order lapse before the relevant Notice of Motion application had been heard and determined?

e. Could the Trustees of the 1st Defendant be acting legally if they proceed to sell the properties in question without express Written Order from this Honourable Court setting aside the interlocutory Order it issued on 8th March 2022, taking into account the fact that the same Court declined to grant them "ex – parte' Orders on their Application dated 17th March 2022 just two weeks earlier?

f. In view of the above it was his prayer that the Honourable Court sustains the interlocutory Order (Order No. 3) it issued on 8th March 2022 until his Suit was heard and determined.

44. The Plaintiff concluded by stating that his submissions and the Replying Affidavit dated 31st March, 2022 were clear and merited.

B. The Written Submissions by the 2nd Defendant

45. On 15th June, 2022, the Learned Counsel for the 1st Defendant through the Law firm of Messrs. Muriu Mungai Advocates filed their written submissions dated 14th June, 2022. Mr. Kongere Advocate commenced their submission by stating that the Plaintiff's Notice of Motion application dated 21st February 2022 seeking an injunction to restrain the 1st Defendant from processing Tender No. KPAPS/DISP/003/2022 pending the hearing of the suit.

46. The Learned Counsel submitted that the Notice of Motion application dated 17th March 2022 was provoked by a status quo order issued on 8th March 2022. It sought to set aside that order. It ultimately seeks to strike out the suit for being "Res Judicata" and an abuse of the court process. The Plaintiff had responded vide a Replying Affidavit he swore on 31st March 2022. It was not necessary to go into the facts at this stage. Instead, the 2nd Defendant the isolated the issues he think the Court should address.

47. The Learned Counsel averred that the issues for determination were:

a. The order of Status quo should be set aside.

b. The suit was Res Judicata.

c. The suit was an abuse of the court process.

d. The ELC has original jurisdiction to hear the matter.

48. On the issue of the order of status quo, the Learned Counsel submitted that although the Plaintiff stated that Matheka J. had fixed the application for hearing on 8th March 2022, that was false. The

order, extracted by the Plaintiff, was loud that the matter was coming up for mention. They did not need evidence beyond the very order under challenge, to settle that issue. Accepting that the order of 8th March 2022 was made during a mention, was there jurisdiction to make that order on a mention? Authorities abound that there was no such jurisdiction. The case "Floriculture International Limited – Versus - Central Kenya Limited & 3 others [1995] eKLR is one of them. Recently, the case of: "Africa Centre For Open Governance & another – Versus - John Harun Mwau & 2 others [2020] eKLR reiterated that:-

> " This Court has consistently held that unless the parties otherwise consent, a Court should not delve into and determine substantive issues on a date when the case is listed for mention. The rationale is too plain to belabour..."

49. The Learned Counsel submitted that an order which restrained the 1st Defendant from proceeding with the tendering process was a substantive order. Being substantive, it could not be made during a mention. The effect of such an order, as AFRICOG (supra) noted, "……..is that the parties were denied a fair opportunity to be heard...". When that happens, AFRICOG (supra) stated that:-

> " It is trite that a decision made in violation of the rules of natural justice is null and void.

50. In the case of: "Omega Enterprises (Kenya) Limited – Versus - Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR, the three Judges were ad idem that an order, an injunction there, issued in breach of the rules of natural justice was a nullity. Gicheru JA (as he then was) was emphatic:-

> " ……the order of the superior court...was illegaI, invalid and of no effect……as it affected the interests of and without the appellant being given an opportunity to be heard, clearly in breach of the rules of natural justice and attracts ex debito justitiae the right to have it set aside."

51. If they accepted, as they ought, that an order made in breach of the rules of natural justice was void, they posed the question; what was the fate of a void order? Tunoi JA in case "Omega Enterprises (supra) answers it for us with reference to the wisdom of Lord Denning:-

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so."

52. There may be merit in the Plaintiff's pending motion, but that was no answer to a breach of natural justice (Daniel Musau Mbithi – Versus - Rael Kavili Munyao & another; Timothy Ngila Nzuki & 6 others [2020] eKLR). So, the Plaintiff's suggestion that there was a valid reason for granting the order on 8th March 2022, missed the point by a mile. There were two (2) additional reasons for setting aside the order of status quo. First, the pleadings just did not support it. The Plaint here was brought to challenge the tendering process commenced under Tender No. KPAPS/DISP/001/2021. It made no mention of Tender No. KPAPS/DISP/003/2022. Without amendment to the Plaint, the Court could not entertain a challenge to the year 2022 tender. That argument was supported by authority. Ringera J. (as he then was) was cited in case of "Lukas Njuguna S. Karobia – Versus - Consolidated Bank (K) Limited [2005] eKLR as having said as much. Otieno J. reiterated that in "Juja Coffee Exporters Limited – Versus - National Bank of Kenya Ltd [2019] eKLR, and says that the only way the new issues in the interlocutory application could be addressed was if the Plaint there was amended.

53. Second, the order results in more prejudice to the 1st Defendant than any reasonable advantage to the Plaintiff. The 1st Defendant had received bids worth a sum of Kenya Shillings Six Eighty Four Million Five Hundred Thousand (Kshs. 684, 500, 000.00/=) from third parties (the Plaintiff says it is only Kshs. 67 million, which was still colossal). If the 1st Defendant was precluded from processing those bids, it may face claims from those third parties. Additionally, it was indisputable that the 1st Defendant's property portfolio, standing at 57%, far exceeded the 30% limit imposed by the RBA Investment Regulations & Policies. The sales were being done to ensure compliance with the law. Should a court of law stop a process meant to comply with the law? Against that obvious prejudice to the 1st Defendant, the Plaintiff's claim was simply that he may lose his monthly pension. Was he suggesting that the 1st Defendant, with an asset base of a sum of Kenya Shillings Twenty One billion (Kshs. 21, 000, 000, 000.00/=) would be unable to meet his pension contribution if it disposed assets worth a sum Kenya Shillings Six Eighty Five Million (Kshs. 685, 000, 000.00/=) . In any event, the 1st Defendant was prepared to give an undertaking to pay the Plaintiff's pension as and when it fell due.

54. The Learned Counsel submitted that the Plaintiff stated, in response, that it was not just his interests that need to be taken care of, but those of all 5,000 members of the Scheme. The Plaintiff could not agitate the case for the 5,000 members unless he brought a representative suit. He had not; his claim must be taken to be his alone. The right of appeal never oust a court's jurisdiction to correct a patent illegality (Nairobi "Business Park Limited & Another – Versus - Kenya Forestry Service [2013] eKLR). So, the course taken by the 1st Defendant was proper.

55. The Learned Counsel submitted that the Plaintiff deserved credit for his understanding of "the doctrine of Res Judicata". However, he had not fully understood the various forms which that doctrine takes. In case "John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, it was explained that:-

> " The doctrine of Res Judicata has two main dimensions: cause of action res judicata and issues Res Judicata...Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

56. The Plaintiff, in saying the present suit is not Res Judicata because it deals with the years 2021 & 2022 tender, while HCC No. 81 of 2019 dealt with the year 2019 tender, misses the point. True, HCC No. 81 of 2019 arose from the 1st Defendant advertising Tender KPAPS/PM/3/2019. It was however clear as daylight that the issues raised in HCC No. 81 of 2019 regarding the 2019 tender, was word for word, the issues raised here regarding the years 2021 & 2022 tenders. In HCC No. 81 of 2019, the High Court has held that those complaints could not be resolved by the Courts when there is an alternative dispute resolution mechanism provided by statute. Those same disputes were then brought to the ELC, and the ELC was invited to find that it has jurisdiction to entertain them, notwithstanding what the High Court has said. Apart from that approach being an abuse of the court process (a point we come to shortly), it is plainly res judicata. Res judicata because a court of coordinate jurisdiction has held that the complaints presented by the Plaintiff were for resolution in other fora. As "John Florence Maritime (Supra) notes:-

> " Res judicata ensures the economic use of 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 essential ingredients in maintaining respect for justice"

57. Those fears had come to pass in this suit. The ELC may hold a view different from the High Court on the court's jurisdiction, but it would be absurd for the ELC to assume jurisdiction between the same parties on the same issue, when the High Court has said those issues are for resolution elsewhere; not in the courts. Whether the High Court's view was right or wrong should be the subject of an appeal. It would certainly not be for the ELC to reverse the High Court. If the Plaintiff's argument that the advertisement in year 2022 gave rise to a new cause of action, was taken to its logical conclusion, illogical results would arise. It would mean that if the ELC hears this suit to conclusion, and the 1st Defendant advertises another tender say in the year 2023, the Plaintiff would, in a fresh suit, raise the very same issues against that tender.

58. The Learned Counsel argued that the suit was an abuse of the court process. The Plaintiff failed to appreciate the distinction between the objection based on Res Judicata and that based on abuse of the court process. He therefore only responds to Res Judicata. Abuse of the court process was not dependent on a finding that this suit was Res Judicata; it was independent of that finding. Borrowing from "Satya Bhama Gandhi – Versus - Director of Public Prosecutions & 3 others [2018] eKLR:

> " Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice. I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above."

59. The initiation of two parallel processes before two different courts on the same or similar issues, was an abuse of the Court process. The ELRC held as much in the case of:- "Catherine Nyakoboke Nyang'au – Versus - Evangeline Njoka & 3 others [2021] eKLR; so too did the High Court in the case of:- "Republic – Versus - Paul Kihara Kariuki, Attorney General & 2 others Ex - Parte Law Society of Kenya [2020] eKLR. So that even if, as the Plaintiff contended, it was the ELC with jurisdiction to resolve the issues, he could not have moved the ELC when his suit, raising the same issues, was pending before the High Court. Assuming, without admitting, that the ELC has jurisdiction, why did the Plaintiff file his suit in the High Court? And if he feigned ignorance of the law, why didn't he withdraw that suit when the objection to jurisdiction was taken?

60. The Learned Counsel averred that it was obvious to them that the Plaintiff had been playing a game of chance, Russian roulette even, with the justice system. They echoed Mativo J. in the case of:- "Satya Bhama Gandhi (supra) that:-

> " The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception, fraud and blatant abuse of judicial processes.

61. The Learned Counsel opined that it was possible that management disputes may include disputes over the manner in which the 1st Defendant managed the land it held. The mere mention of land however, never without more, remove the matter from the remit of the other statutory bodies and bestow it on the ELC. Indeed, in the case of "Fredrick Okwomi Anyasi & 4 others – Versus - Kenya Railways" land

was in issue yet the exhaustion doctrine was invoked by the ELC. The Plaintiff's argument that the ELC has jurisdiction is without merit.

62. The 1st Defendant filed a Replying Affidavit sworn on 14th June 2022 adopting the grounds in its affidavit sworn on 17th March 2022. The Learned Counsel submitted that the 1st Defendant had presented various letters of award issued on 5th April 2022. Subsequently, contracts were entered into with the successful bidders. There was, as it were, nothing left to be processed in Tender No. KPAPS/DISP/003/2022. Their understanding was that once a tender was evaluated, awards made and contracts entered into, there was nothing left to be processed. If their understanding is correct, and it was not in doubt then what was left to be restrained by an interlocutory injunction. The horse had long bolted; to borrow that famous phrase. In those circumstances, they could only say, as did "Eric – Versus - J. Makokha & 4 others – Versus - Lawrence Sagini & 2 others [1994] eKLR, that:

> "……..the highest court of the land, on the 8th October, 1993, solemnly granted a temporary order or injunction to restrain an action which took place as long ago as 6th April, 1993. It is plain to us that a Court of Equity would regard this order as a pious farce.

63. The Learned Counsel opted that it should be far from this court to grant orders which are characterized as "a pious farce". There may be some argument that "Eric – Versus - J. Makokha (Supra) was a case where the Court was approached after the fact. That however, never answer the force of the argument made there. Even if a court was approached before the fact, and the event happens before the injunction was granted, the result remained the same. That was what "Moses M Wairimu & 24 others – Versus - Kenya Power & Lighting Co Ltd & another [2020] eKLR thought; and they could only agree. Injunction would interfere with third party rights. So, if the Plaintiff knew of that hallowed principle, why would he want to condemn third party purchasers without hearing their side of the story? It may be that they have nothing of substance to say; but they must be heard nonetheless.

64. The Learned Counsel concluded that the order of status quo made on 8th March 2022 should be interfered with; that the claim here was "Res Judicata" and an abuse of the court process; and that the ELC lacks original jurisdiction to entertain it.

VII. Analysis and Determination

65. I have carefully read and put into account all the filed pleadings, being the two interlocutory Notice of Motion applications dated 21st February, 2022 and 17th march. 2022 filed by the Plaintiff and the 1st Defendant respectively, the written submissions, myriad of authorities relied on by parties herein and the relevant provisions of *the Constitution* of Kenya, 2010, the appropriate and enabling laws with regard to these applications filed in this court.

66. In order to arrive at an informed, just, fair, reasonable and Equitable decision, I have crystalized the subject matter into the following salient five (5) issues for its determination. These are:-

    a. Whether the suit instituted by the Plaintiff should be struck out for lack of original jurisdiction and offending the doctrine of Res Judicata?

    b. Whether the Plaintiff should provide a bank guarantee before the Court proceeds with the hearing of this suit?

    c. Whether the Plaintiff has made a case for granting of a temporary injunction?

    d. Whether order No. 3 of the Court Order issued on 8th March, 2022 should be set aside?

    e. Who will bear the Costs of this application.

ISSUE NO. a). Whether the Plaintiff's suit should be struck out for lack of original jurisdiction; for being Res Judicata?

67. Under this Sub heading, and taking that it has been strongly relied on by the 1st Defendant to attack the Plaintiff's case, its imperative that the Honorable Court critically deliberates on the concept of "the doctrine of Res Judicata" in slight depth. It is instructive to note that the doctrine of "Res Judicata" is codified under the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 which provides as follows:

> " 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.

68. This Court takes Judicial notice to the fact that a pile and acres of papers and ink has been spent on this subject matter and therefore it has no intention to re – invent the wheel on it at all. For the doctrine of "Res Judicata" to apply in a particular matter, these ingredients ought to be there:-

a. there must have been a previous suit in which the matter was in issue;

b. the parties in both matters must be the same or litigating under the same title;

c. the previous matter must have been heard and finally determined by a competent court and the issue is raised once again in the new suit.

1. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See the case of:- "Maithene Malindi Enterprises Limited – Versus -Kaniki Karisa Kaniki & 2 others [2018] eKLR.' Additionally, Res judicata operates as a bar to subsequent proceedings involving same issue which had been finally and conclusively decided by a competent court in a prior suit between the same parties. In the case: "John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others (supra) the Court of Appeal stated:

> " ..... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -
>
> ".....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 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 ...."
>
> .... Simply put Res Judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

70. This Court relishes a lot on record. Like numbers, records are stubborn and always reveal the factual truth and position of each matter unless otherwise stated. In the instant case, the proceedings are clear and plain. There is no dispute that the Plaintiff vide a Plaint and Notice of Motion application both dated 8th October 2019, filed before the High Court being Mombasa HCC No. 81 of 2019 between the same parties and raising the same issues he raises in this suit.

71. While before the High Court, the 1st Defendant here objected to the court's jurisdiction to entertain the matter on account of the provisions of Section 46 & 48 of the *Retirement Benefits Act* No. 3 of 1997, and the doctrine of exhaustion. Subsequently, in a ruling delivered on 19th November 2021, the High Court found that it, indeed no superior court, has original jurisdiction to entertain the type of dispute before it. The particular matter was settled then.

72. Thereafter, the Plaintiff instituted this suit before this Court. The Plaintiff argues that Provisions of Public Procurement and Assets Disposal Regulations under Legal Notice No. 69 of 2020 has been brought as Cause of action in the Civil Case ELC No. 73 of 2021 and was not the cause of action in High Court Suit 81 of 2019 as this law was not in existence in year 2019. The 1st Defendant pointed outrightly that Tender Notice No. KPAPS/PM/2/2019 in High Court had been cancelled and should have not been pleaded for. The other pleadings in High Court case were no longer necessary when he filed another Suit in ELC Court as the 2nd Defendant had effected the pleaded transfers, i.e. pleadings in 3(b) and (c) above.

73. The Plaintiff submitted that the tender Notice No. KPAPS/DISP/001/2021 of 2021 in the ELC Court were for properties which had not been tendered before and therefore could not be said to have been the subject matter in the High Court case. It was admitted that the parties to the suit in High Court were the same as is in the Civil Case ELC No.73 of 2021. The other requisite elements have not been satisfied to sustain defence of Res Judicata. Also see the Tanzania authority Supra. It was therefore within legal right of the Plaintiff to file independent Suit in the ELC Court to stop an illegality, which was a matter of public interest. The defence of Res-Judicata must fail and the question of the Plaintiff abusing the Court process does not arise.

74. The 1st Defendant contended that the Plaintiff, in saying the present suit was not Res Judicata because it deals with the years 2021 & 2022 tender, while HCC No. 81 of 2019 dealt with the 2019 tender, missed the point. True, HCC No. 81 of 2019 arose from the 1st Defendant advertising Tender KPAPS/PM/3/2019. It is however clear as daylight that the issues raised in HCC No. 81 of 2019 regarding the 2019 tender, are word for word, the issues raised here regarding the year 2021 & 2022 tenders. In HCC No. 81 of 2019, the High Court has held that those complaints could not be resolved by the courts when there was an alternative dispute resolution mechanism provided by statute. Those same disputes are then brought to the ELC, and the ELC is invited to find that it has jurisdiction to entertain them, notwithstanding what the High Court has said. According to the Learned Counsel for the 2nd Defendant, apart from that approach being an abuse of the court process, it was plainly Res Judicata.

75. A perusal of the current suit by the Plaintiff, it shows that the orders issued in HCC No. 81 of 2019 refers to different tenders which fact the 1st Defendant has agreed to. I also fully concur with the

Plaintiff that the Cause of action in both cases are like day and night extremely distinct and separate. While the issues before the High Court emanated from the management and regulations of the shares within the Pension scheme whereby and I fully agree with the Learned Counsel for the 2nd Defendant, in accordance with the provision of Sections 46 and 48 of the RBA No. 3 of 1997 provides recourse to the Chief Executive Officer for arbitration. It was only upon being aggrieved by the decision of the CEO that a party preferred an appeal before this Court. That is exactly, the legal position and rightfully so, taken by High Court in its ruling. Juxtapose, the matters before this Court are regarding the legalities of the sale of the properties belonging to the Pension Scheme through tenders. Certainly, these are issues governed under the provision of the Environment & Land Court, No. 19 of 2011 under Sections 3 and 13 and the *Land Registration Act*, No. 3 of 2012 of which its only this Court that has Jurisdiction to deal and not the CEO as the 1st Defendant would like to imply. As the English saying goes, the matter before High Court is now old hat. It is moot. Suffice it to say, the said doctrine applies to both suits and applications as was held in the case "Abok James Odera – Versus - John Patrick Machira Civil Application No. Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of Res Judicata there must be:-

(i). a previous suit in which the matter was in issue;

(ii). the parties were the same or litigating under the same title;

(iii). a competent court heard the matter in issue;

(iv). the issue had been raised once again in a fresh suit.

76. As regards the rationale of the doctrine of Res Judicata, reliance was placed on the decision of the Court of Appeal in case: "Independent Electoral & Boundaries Commission – Versus - Maina Kiai & 5 Others (2017) eKLR.

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

77. It is therefore clear that parties are not to evade the application of Res Judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit. For these reason, therefore I discern that this doctrine is not applicable in the instant case. Accordingly, the plea of Res Judicata fails and is disallowed.

ISSUE NO. b). Whether the Plaintiff should provide a bank guarantee before the Court proceeds with the hearing of this suit?

78. Under this Sub – heading and turning to the issue of guarantee, there is no where in the tender agreement that the Plaintiff is to offer guarantee before there are given orders by the court.

79. In that regard, the Court has the discretion to grant any orders sought as long as the party had attained the threshold for grant of such orders without compelling another party to undertake to provide

security for the orders they seek. In this case it would be unfair to compel the Plaintiff to guarantee yet the Defendants are not being compelled.

ISSUE NO. c). Whether the Plaintiff has made a case for granting of a temporary injunction?

80. The principles for granting a interim injunctions are now well settled. The court will only grant injunctions in clear cases and where there exists special circumstances. The Plaintiff argued that it had met the criteria which was set out in the case of "Giella – Versus - Cassman Brown & Co. Ltd [1973] E.A 360, where case it was held:-

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

81. Consequently, the Plaintiff ought to, first, establish "a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of "MRAO Ltd – Versus - First American Bank of Kenya Ltd (2003) eKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

> " ... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

82. In support of his application, the Plaintiff stated that the tender process contravenes the provision of Sections 72 (2) and 73 (1) of *Land Registration Act* No. 3 of 2012 as some properties have encumbrances which mean they can only be sold fraudulently. According to the act, encumbrances can only be rectified by Land Registry or the court or by entity raising it. See Exhibit marked as J00 – 3". According to the provision of Section 180 (11) of subsidiary legislation to Public Procurement and Assets Disposal Act 2015 under Legal Notice No.69, a Procurement entity must, in case of land and buildings, first secure approval of the National Treasury before disposal of its property. The reason is that the pension scheme is partly funded by the Treasury and enjoy immense tax exemptions. The Legal Notice No. 69 is annexed as Exhibit marked as J00 - 4.

83. The Plaintiff further went ahead to argue that the tender notice also contravenes the provisions of *Retirement Benefits Act* 1987 and Section 13 (2) of its subsidiary legislation under Legal Notice No.193. The provisions are that members of the Pension Scheme must be allowed to participate in the major decisions involving sale of properties valued at more than a sum of Kenya Shillings Two Billion (Kshs. 2,000,000,000/=). Members, including himself, have not been involved in decision to sell the properties. The Legal Notice is annexed and marked as "Exhibit J00 – 5".

84. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of case "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that 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 by which he will protect himself from the consequences of the apprehended injury.

85. The Plaintiff has deposed of how the tendering process is in contravention to *the constitution* of Kenya going ahead to stated that members including himself have not been involved in the process of the sell of the property and eventually these acts may affect their pension. In my view, the act of the 1st Defendant carrying out sale of property held by the Pension Scheme without the knowledge or permission of the pensioners is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

86. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in his favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR which defined the concept of balance of convenience as:

'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

87. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

88. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR where the Learned Judge offered further elaboration on what is meant by "balance of convenience" and stated

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

89. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits during the full trial. This is especially so because I have not had opportunity to in indepth interrogate all the documents that might be relevant in providing a history and/or chronology of events as pertains the suit property and the subject matter.

90. In the case of "Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR where the court in deciding on an injunction application stated:-

> " circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

91. I am convinced that if orders of temporary injunction are not granted in this suit, the suit properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I am completely satisfied and do find that the Plaintiff/ Applicant has met the criteria for grant of orders of temporary injunction. Thus, t that extent the application succeeds.

ISSUE NO. d). Whether Order 3 of the Order made on 8th March, 2022 should be set aside?

92. The law on setting aside of "ex parte" orders is found under the provisions of Order 12 Rule 7 and Order 40 Rule 7 of the Civil Procedure Rules, 2010. Order 12 Rule 7 provides thus:

> " Where under this Order Judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the Judgment or order upon such terms as may be just."
>
> Order 40 Rule 7 provides:-
>
> "Any order for an injunction may be discharged, or varied, or set aside by the Court on application made thereof by any party dissatisfied with such order"

93. These provisions are amplified by the provision of Order 51, Rule 15 which provides that the court may set aside an order made "Ex - Parte". The main bone of contention by the 2nd Defendant herein, is to set aside the Ex Parte orders this Court granted through an application brought to Court by way of certificate dated 21st February, 2022. The said application by the Plaintiff sought temporary injunctive orders which were granted on the interim pending the hearing of the application.

94. Be that as it may, in this ruling I have already granted the orders prayed for in the same application dated the 21st February, 2022 therefore I find it contradictory and unnecessary to be issuing orders setting aside the same orders which I have just granted above on this ruling. For this reason this prayer fails.

ISSUE No. f). Who bears the Costs of the application?

95. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean an award that is granted to a party at the conclusion of a legal action and proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Rules, Cap. 21 holds that Costs follow the event. By event it means the result or outcome of the said legal action or proceedings. See the Supreme Court decision of "Jasbir Rai Singh – Versus – Trachalans Singh" (2014) eKLR; Kenya Sugar Board – Versus – Ndungu Gathini and Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya Limited" (2016) eKLR.

96. In the instant case, although the Plaintiff/Applicant has succeeded in prosecuting his application and granted the orders as prayed, taking that the matter is still proceeding for full trial, it just fair, equitable and reasonable that the costs to be in the cause.

VIII. Conclusion and Disposition

97. Consequently, having caused such an elaborate analysis of the framed issues herein, the Honorable Court on preponderance of probabilities finds that the Plaintiff has managed to prove its case for being granted the interim orders as prayed. Specifically, I do proceed to order as follows: -

    a. THAT the Notice of Motion dated 21st February, 2022 by the Plaintiff/Applicant herein be and is found to have merit and the same is allowed entirely.

    b. THAT the Notice of Motion application dated 17th March, 2022 by the 1st Defendant herein be and is found to lack merit and is hereby dismissed entirely.

    c. THAT for expediency sake, this matter should be heard and disposed off within the next One Hundred and Eighty (180) days from this date hereof commencing on 9th October, 2023. There shall be a mention on 11th July, 2023 for purposes of holding a Pre – Trial Conference on compliance with the provisions of Order 11 of the Civil procedure Rules, 2010.

    d. THAT the costs of the two applications to be in the cause.

98 It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUALLY MEANS, SIGNED AND DATED AT MOMBASA THIS .....29TH .....DAY OF .....MAY.....2023.

.....

HON. JUSTICE MR. L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:-

a. M/s. Yumnah – the Court Assistant.

b. Mr. James Oluoch Ogando acting in person as the Plaintiff/Applicant.

c. No appearance for the 1st Defendant/Respondent.

d. Mr. Billy Kongere Advocates for the 2nd Defendant/Respondent.