REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 86 OF 2010

SAMSON NGUGI ICHUNGWA T/A GLENAIR.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL INDUSTRIAL & CREDIT BANK LIMITED....1ST DEFENDANT/RESPONDENT

RAJU DHANANI.....2ND DEFENDANT/RESPONDENT

JOSEPH GIKONYO T/A GARAM INVESTMENTS.....3RD DEFENDANT/RESPONDENT

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 2(1) & 2(2), 12(1), 20(2), 22, 23(1) & (3) 27, 50& 159 OF THE CONSTITUION OF KENYA 2010, FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM OF SAMSON NGUGI ICHUNGWA THE APPLICANT HEREIN

AND

IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE APPLICANT BY ORDERS MADE IN THIS SUIT ON 26TH JUNE 2014 AND 31ST JULY 2015 AND IN THE COURT OF APPEAL BY THE SAID COURT.

AND

IN THE MATTER OF CONTRADICTING CONFLICTING AND UNLAWFUL DECISIONS OF THE HIGH COURTAND COURT OF APPEAL ON THE ISSUE OF DEFAULT JUDGEMENTS

RULING

1. The application for consideration is the Plaintiffs' Notice of Motion dated 6th November, 2019 filed on even date. It is brought under **Articles 12, 20, 22, 23, 27, 47, 50** and **159** of the **Constitution of Kenya, Section 3 & 3A** of the **Civil Procedure Act**, **Order 50** of the **Civil Procedure Rules**, the inherent power of the court and all enabling provisions of law**.** The Application seeks the following orders:

1. Spent

2. THAT an order be made referring this matter to the learned Chief Justice for him to constitute a bench to hear this application and generally to give any directions relating to the hearing hereof.

3. THAT a declaration that the following rulings issued by the High Court and the Court of Appeal were and still are likely to contravene the Applicant fundamental Constitutional right Under Articles 2,12,20,22,23,47, 50 and 159 of the Constitution:

a. The Ruling of Kimaru J in HCCC No. 297 of 2009 dated 4th November 2009

b. The Ruling of Havelock J in HCCC No. 86 of 2010 dated 24th June 2014.

c. The Ruling of Ogola J dated 31st July 2015 in HCCC No. 86 of 2010.

d. The Ruling of Court of Appeal in Nairobi Civil Appeal No. 38 of 2016 (corum- Waki, Nambuye, Makhandia)

4. THAT an Order be made that all Rulings and Judgment in 3 above are unconstitutional, and contra-statutes illegal and the same be declared null and void and of no legal effect.

5. THAT the Rulings in 3 above be permanently stayed and such order orders, writs and/or directives as are just and appropriate to safeguard the constitutional right of the Applicant be made.

6. THAT cost of this application be borne by the Respondents in any event.

2. The application is based on the grounds on the face of it and supported by the Affidavit of the Plaintiff herein **SAMSON NGUGI ICHUNGWA** sworn on even date. He averred that he instituted this suit by a Plaint dated 27th April, 2009. He was granted leave to amend the Plaint by the court on 8th November, 2013 and the Defendants were allowed to file their amended and/or further Amended Defences within 14 days of being served with the Amended Plaint. He served the Amended Plaint on the Defendants on 15th November, 2013 so each of the Defendants had until the 29th day of November, 2013 to file and serve their Amended/Further Defenses.

3. The 1st and 3rd Defendants filed their Amended Defence on 29th November, 2013. The 2nd Defendant filed his further Amended Defence and Counterclaim on 2nd December, 2013 and served the same on 3rd December, 2013 which was clearly out of time and an invalid document which was null and void for non-compliance with the order of Havelock J. In view of that, his advocates did not file a Reply to the 2nd Defendant's time barred Defence & Counterclaim.

4. He averred that from the prayers sought by the 2nd Defendant in his counterclaim *inter alia* (i) Declaration (ii) Vacant possession (iii) Mesne profits (iv) Special damages for income and (v) Special damages, it was clear that his claim was not liquidated claim.

5. It was the Plaintiff's contention that under the provisions of the previous Civil Procedure Rules, the law allowed for entry of Judgment in default of appearance or defense for both liquidated and pecuniary claims. For unliquidated claims, interlocutory judgment would be entered and the matter would thereafter go for formal proof.

6. The Plaintiff stated that by dint of legislative supplement No. 42 of 10th September, 2010, the Civil Procedure Rules then in force were revoked vide Gazette No. 65 and the Civil Procedure Rules 2010 came to effect. That Order 10 Rules 4, 5, 6 and 7, of the 2010 Rules limited the instances where one can apply for Judgment in default to liquidated and pecuniary claims only. He contended that since the 2nd Defendant's Counterclaim was an unliquidated claim, it was clearly excluded from the summary default judgment process,

7. The Plaintiff faulted the Deputy Registrar of this court for entering a default judgment against it in respect of the 2nd Defendant's unliquidated claim and directing that the matter goes for formal proof. According to him, the said order was made in gross violation of the *Audi Alterum Partem* Rule. He deposed that his advocates filed his Reply to Amended Defence and Defence to the 2nd Defendant's Counterclaim on 19th March 2014 and thereafter made an application for the same be declared as duly filed but the said application was dismissed by the Havelock J. (as he then was) who failed to appreciate the new legal dispensations.

8. Consequently, he filed an Application for review of the Ruling. The Application was heard and dismissed by Ogola J. who made a number of misguided illegal pronunciations without jurisdiction. He argued that the findings by Ogola J. were clearly erroneous and unconstitutional because all that the previous court had dealt with were the interlocutory applications for injunction and it did not follow that since the injunction application was dismissed the suit would fail. According to him, the suit was and is still pending.

9. As such, he appealed against the ruling of Ogola J. The Court of Appeal upheld the High Court's decision but failed to address and/or rule on the issue of whether an interlocutory Judgment could be entered in the circumstances. In his view, all the three learned Judges did not dispense Justice which they are obliged to do under the Constitution but rather prejudged the issues pending before them.

10. It was the Plaintiff's further contention that even though he has filed a Preliminary Objection against the intended formal proof, due to the constraint in the Rulings above, he will not get objective, impartial and unbiased justice in the current circumstances and the Orders may not be set aside. He argued that the orders, Rulings and Judgment have been made in gross violation of the due process of the law and in breach of his Constitutional fundamental rights to a fair trial, equality before the law and protection of the law.

11. In addition, he averred that being a citizen within the meaning of both Article 12(1) and 20(2) of the Constitution of Kenya, he is entitled to every fundamental right and freedom expressed and/or implied in the constitution of Kenya 2010. He argued that Articles 20(1) and 20(4) of the Constitution declares that the Bill of rights applies to all law and binds state organs and the court is to interpret the Bill of right to promote value that undertake an open and democratic right.

12. Further, he stated that Article 22(1) of the Constitution of Kenya 2010 entitles him to move the Court whenever a right or fundamental freedom in the Bill is denied violated, infringed or threatened. That Articles 23(1) and 23(3) gives this Honourable Court jurisdiction to hear and determine this matter and discretion to grant appropriate relief including an order of Judicial Review.

13. Further, that Articles 27(2), 27(4) and 27 (5) entitles him to the right to equal protection and benefits of the law and oblige the court not

to discriminate against him on any basis. In addition, that Article 47 (1) of the constitution of Kenya 2010 entitles him to the fundamental inalienable right to a lawful and procedurally fair administrative action.

14. He maintained that the defective proceedings have deprived him of inalienable and unlimited rights of fair trial and unless the same are quashed and set aside, he will be irredeemably and irremediably injured and his constitutional rights will continue to be infringed.

15. In response, the 1st and 3rd Defendants filed joint Grounds of Opposition dated 3rd March 2020 contending that the Plaintiff's application is frivolous, misconceived, bad in Law and lacks merit. That the issue of challenging the previous decisions of this Honourable Court is *res judica*ta as the same has been severally raised by the Plaintiff in his previous countless applications to this Court, all of which have been dismissed, and also in his appeal to the Court of Appeal, to wit ***Civil Appeal No. 38 of 2016***, which was dismissed on 5th July, 2019. That this Honourable Court cannot sit on appeal of a decision of the Court of Appeal, whose findings remain binding on this Court. That the Plaintiff's suit has always been and remains a purely commercial natured suit, which raises no iota of constitutional issues, and the Plaintiff is merely belatedly resorting to rely on non-applicable constitutional provisions to grasp at straws.

16. That the present suit has been ongoing since 2010 during which time the Plaintiff has denied and continues to deny the 2nd Defendant his rightful possession of the suit premises, which have been severally held by this Court to have been rightfully sold by the 1st and 3rd Defendants to the 2nd Defendant, hence it is the Plaintiff who is in fact infringing on the 2nd Defendant's constitutional rights.

17. That the Plaintiff lacks ***locus standi*** to raise the issue of constitutional rights as he is not the registered proprietor of the suit premises, the same having been sold to the 2nd Defendant, and rightfully so as upheld by this Court and the Court of Appeal.

18. That the Plaintiff's suit against the 1st and 3rd Defendant's was vide a Ruling of this Court on 31st July, 2015 marked as overtaken by events, hence dismissed, which finding was duly upheld by the Court of Appeal. The said decisions stand uncontroverted and unchallenged.

19. The 2nd Defendant also filed Grounds of Opposition dated 29th November, 2019 as well as a Replying Affidavit sworn on even date in opposition to the Plaintiff's application. He averred that Havelock J, in the Interlocutory Judgment, gave clear and valid reasoning for entering judgment against the Plaintiff.

20. The 2nd Defendant stated that the averment by the Plaintiff that his Counter Claim was time-barred is misconceived and utterly untrue and in any event, the issue is now *res judicata*, with the effect that the Plaintiff is barred or estopped from re litigating an issue that should have been raised before Havelock J or in the Court of Appeal. Further, it was averred that the issue of the 2nd Defendant's claim being unliquidated has already been determined by this Court and the issue is now spent as it has been overtaken by events.

21. The 2nd Defendant further denied the averment that the Plaintiff was not given an opportunity to be heard. In his view, the basis of the issuance of the Interlocutory Judgment was that the Plaintiff, by not filing his Reply to Defence and Defence to the 2nd Defendant's Counterclaim within the time permitted under the law, forfeited that opportunity.

22. The 2nd Defendant contended that the Plaintiff's attempt to impugn the ruling of Ogola, J. in this Application is akin to asking this Court to sit on appeal in a judgment of the Court of Appeal whereas the said jurisdiction is only available to the Supreme Court.

23. Further, the 2nd Defendant noted that the Plaintiff's Notice of Preliminary Objection dated 25th July, 2019 is still pending hearing hence his allegation that he will not "get objective, impartial and unbiased justice", is not only baseless and without reasonable justification but also an affront to this Honourable Court's and indeed the Court of Appeal's unimpeachable integrity.

24. It was further averred that the matters to which the instant application and indeed this entire matter relate are purely of a commercial nature and should be resolved as such. In addition, that the Application as drawn and filed does not disclose any non-compliance with the constitutional provisions cited or any justiciable constitutional issues and is merely clothed in the garb of a constitutional violation. In the 2nd Defendant's view therefore, the Application does not meet the prerequisites and requirements of a constitutional petition under the law.

25. Additionally, it was contended that the Plaintiff's attempt to re-open litigation on issues that have been substantively determined on several occasions only serves to buttress his concerted efforts at continuing to unlawfully occupy the suit property and, thereby, unjustly enriching himself while infringing upon the 2nd Defendant's constitutional right to own, possess and derive income from the suit property.

26. The 2nd Defendant stated that litigation must come to an end and a successful litigant must reap the fruits of his success and the unsuccessful one such as the Plaintiff herein must learn to let go. He urged that the current Application, therefore, ought not to be allowed.

Submissions

27. The Application was canvassed by both written and oral submissions. In his written submissions dated 14th May, 2020 the Plaintiff formulated four issues for determination and argued as follows:

a. Does the court have jurisdiction?

28. The Plaintiff submitted that the application raises the question of whether this Court should certify this application as one raising a substantial question of law and thus warranting the constitution of an uneven bench assigned by the Chief Justice in terms of **Article 165(4)** of the **Constitution**. He argued that pursuant to the said provision of the constitution, this court has jurisdiction to handle the application

and determine whether the same raises a substantial question of law.

29. He cited the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Another [2012] eKLR** in support of the position that a Court's jurisdiction flows from either the Constitution or legislation or both. The Plaintiff also relied on the case of **Community Advocacy Awareness Trust & Others v The Attorney General & Others (2012) eKLR (Petition No. 243 of 2011*)*** where the court held that it up to an individual judge to satisfy himself or herself that the matter is substantial and warrants reference to the Chief Justice.

30. Further, the Plaintiff relied on the test for assessing whether a matter raises substantial questions of law as laid down in **Chunilal V. Mehta v Century Spinning & Manufacturing Co. AIR 1962 SC 1314**. Reliance was also placed on the case of **National Gender and Equality Commission v Cabinet Secretary, Minister of Interior and Coordination of National Government & 2 others [2016] eKLR,** where the court highlighted the relevant factors in deciding what constitutes a substantial question of law.

31. The Plaintiff reiterated that interlocutory judgment entered herein entered has infringed his constitutionally guaranteed rights and that is the subject matter of this application. He argued that despite the changes in the law brought by the Civil Procedure Rules 2010, interlocutory judgments continue to be entered in matters outside the scope of Order 10 hence the issue is of general public importance.

32. He stated that the issue has not been addressed by the Supreme Court and argued that the difficulty of the issue is that, without addressing the constitutionality and legality of the Interlocutory Judgment herein, there are consequential Orders even from the Court of Appeal in other issues pegged on the judgment. He thus urged the court to find that it has jurisdiction to refer the matter to the Chief Justice for constitution of the bench to address the issues raised.

b. Whether the Application is Res Judicata

33. The Plaintiff contended that the Defendants allegations that the Application raises issues which are *res judicata* are misleading and baseless. He stated that the legality of the interlocutory judgment under Order 10 of the Civil Procedure Rules, 2010 and its constitutionality has never been subject of the proceedings in this court or the Court of appeal.

34. The Plaintiff cited the case of **Oyugi & 2 Others *vs.* The Attorney General [2016] eKLR**, and **Edward Okongo Oyugi & 2 Others *vs.* The Attorney General [supra]** where it was held that the doctrine of *res judicata* applied with even force to constitutional litigation though it was important that caution is exercised lest a person whose rights were being violated a fresh is unjustly locked out from the wheels and seat of justice.

35. He was emphatic that the interlocutory judgment herein locks him out from the altar of justice and seeks to subject him to formal proof proceedings which are unknown to law as it lacks the minimum requirements of Order 10. The Plaintiff submitted that the constitution gives the high court the exclusive jurisdiction to deal with matters of violation of fundamental rights under Article 23 as read with Article 165 thereof. According to him therefore, the Application is not res-judicata.

c. Breach of fundamental rights and freedoms

36. The Plaintiff contended that *Audi Alteram Partem* rule dictates that no person should be condemned unheard. In his view, the same principles are enshrined in Articles 25, 48 and 50 of the Constitution of Kenya 2010. He argued that the right to a fair hearing is a non-derogable constitutional guarantee enshrined under Article 50(1) of the Constitution. He stated that the 2nd Defendant's Further Amended Defence and Counter-claim and the resultant interlocutory judgment are invalid and unconstitutional since the counter-claim which was introduced by the Amended defence was introduced vide an amendment done without the leave of court. He stated that he sought leave to defend the counterclaim assuming that the same was proper and that application was the subject of the proceedings that went up to the Court of Appeal.

37. Relying on the rules of natural justice, the Plaintiff further submitted that even in circumstances of a defaulting party, giving such a party opportunity to be heard has remained a cardinal constitutional principle in the common law jurisdiction. He reiterated that he is being denied the right to be heard on a judgment entered without jurisdiction and premised upon non existing legal provisions.

d. Constitutionality of the proceedings based on the interlocutory judgments

38. The Plaintiff posited that the interlocutory judgment entered herein is in breach of Article 50 of the Constitution as it is based on non-existent legal provisions. He argued that the proceedings that followed the entry of the interlocutory judgment are premised on the wrong notion that the judgment was proper. The setting aside of the interlocutory judgment corrects that notion and takes back the parties to the position before it was entered. The Plaintiff thus urged that he be given an opportunity to be heard on the illegality and constitutionality of the mentioned rulings and judgment of the courts.

39. Learned Counsel Mr. King'ara reiterated these submissions during the oral highlighting of the same before this court.

40. The 1st and 3rd Defendants relied on their joint written submissions filed on 29th April 2015 in respect in respect of three applications which have already been heard and determined. The court will therefore not delve into the said submissions.

41. However, learned counsel for the 1st and 3rd Defendants, Ms. Karanja, was emphatic that the application is res judicata in view of the history of the applications filed by the Plaintiff and determined by both the High Court and the Court of Appeal. She submitted that the Plaintiff is now trying, through the back door, to topple the Court of Appeal decision and he must be stopped as it is illegal and unprocedural for this court to sit on appeal of decisions made by courts of concurrent jurisdiction and the court of appeal. Counsel urged that the

application be dismissed with costs.

42. The 2nd Defendant on its part filed written submissions dated 21st July 2020 in which it submitted on four issues as follows:

Whether the court has the jurisdiction to hear this case

43. On this, the 2nd Defendant submitted that this court does not have jurisdiction to hear this application because the Court of Appeal has already determined all the issues raised by the Plaintiff

Whether the interlocutory judgment and consequential orders for matters outside the scope provided under Order 10 of the Civil Procedure Rules are Constitutional.

44. The 2nd Defendant reiterated that the interlocutory judgment entered by the court in his favour was regular and in compliance with the law. He noted that Havelock J rightfully held that the Plaintiff failed to comply with Order 7 Rule 17(1) and in exercising his discretion the Judge refused to set aside the said interlocutory judgment. It was also the Defendant's contention that the Plaintiff has no defence or case against him as this court and the Court of Appeal all found that the sale of the Plaintiff's property to him was within the law and therefore valid.

Whether the interlocutory judgment and consequential orders are in breach of the Plaintiff's fundamental Rights and Freedom.

45. It was submitted that the Interlocutory Judgment and consequential orders issued by the High Court and the Court of Appeal were not in breach of the Plaintiff's fundamental rights and freedom in any way. That on the contrary, it is the Plaintiff who is infringing on the 2nd Defendant's right to enjoy his property under Article 40 of the Constitution of Kenya. According to the 2nd Defendant, the only purpose the current application has fulfilled is to ensure the Plaintiff continues to collect rent from the subject property whose ownership passed to him over a decade ago.

Whether the application is res judicata.

46. The 2nd Defendant also reiterated that the current application is *Res judicata* because the issues in relation to setting aside the interlocutory judgment have already been dealt with by both the High Court and the Court of Appeal.

47. Ms. Wanyama, learned counsel for the 2nd Defendant, reiterated the foregoing submissions when parties appeared in court for oral highlighting of the submissions. She added that there is no substantial issue of public importance demonstrated to warrant the referral of the matter to the Chief Justice. She maintained that the Plaintiff has had several instances to argue the issues raised today and that the application is an afterthought. In totality therefore, the 2nd Defendant urged that the Plaintiff's application be dismissed with costs to the Defendants.

Analysis and Determination

48. I have carefully analysed the Plaintiff's application, the Defendants' responses and the parties' respective submissions. In my considered view, the only issues arising for determination are whether the application raises a substantial question of law to warrant certification under Article 165(4) of the Constitution and whether the application is *res judicata.*

Whether the application raises a substantial question of law to warrant certification under Article 165(4) of the Constitution

49. The Plaintiff contends that the instant application raises a substantial question of law which warrants the constitution of an uneven bench by the Chief Justice in terms of **Article 165(4)** of the **Constitution**. He also argued that this is a matter of general public importance since, despite the changes in the law brought about by the Civil Procedure Rules 2010, interlocutory judgments continue to be entered in matters outside the scope of Order 10 thereof as in his case. All the three Defendants are in agreement that the Plaintiff's suit and the matters raised in this application are purely commercial in nature and do not raise any substantial questions of law as alleged.

50. In the case of **Philomena Mbete Mwilu v Director of Public Prosecution & 4 others [2018] eKLR**, the court while dealing with an issue of referring a matter to the Chief Justice for empanelment of an uneven bench held that:

> **"18. Article 165(4) of the constitution provides that a matter certified by the court as raising a substantial question of law under clauses 3(b) and (d) should be heard by an un even number of judges being not less than three, assigned by the Chief Justice. The constitution does not define what constitutes a "substantial question of law" thus leaves it to the discretion and interpretation of the court sitting on the matter to determine whether issues raised before it amount to a substantial question of law to warrant reference to the Chief Justice for assignment of uneven bench to hear it.**
>
> **19. What is however clear from the constitutional text, is that the issue must be one that falls either under clause 3(b) or (d) of Article 165 of the constitution. Clause 3(b) confers jurisdiction on the court to hear and determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened; while clause 3 (d) gives the court jurisdiction to hear any question respecting interpretation of the constitution. In that context, the issue must either be one of violation or infringement of fundamental rights or interpretation of the constitution or even both."** (Emphasis added)

51. In **Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, the Supreme Court of India considered what

is meant by a substantial question of law as follows:

> **"A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."**

52. The court further held that:

> **"...a substantial question of law would depend on the facts and circumstances of each case. …it is a matter that has not been previously settled by a Court such that it does not have a binding or persuasive precedent. It also would be a matter that is intertwined and involving diverse areas of the law therefore making the matter relatively complex as compared to other matters normally canvassed before the same Court. It is also a matter that would require extensive research to resolve. In determining whether the case raises a substantial issue of law,…a court ought to consider the jurisprudential value of the matter, its importance to the parties and the impact of the case as well as the general conduct of the case."**

53. In **Okiya Omtatah Okoiti & Another v Anne Waiguru, Cabinet Secretary Devolution and Planning & 3 Others [2017] eKLR**, the Court of Appeal laid down the principles that determine whether an issue raises substantial questions of law in the following terms:

> **"i. For a case to be certified as one involving a substantial point of law, the intending Applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;**
>
> **ii. The Applicant must show that there is a state of uncertainty in the law;**
>
> **iii. The matter to be certified must fall within terms of Article 165(3) (b) 0r (d) of the Constitution;**
>
> **iv. The Applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought."**

54. In the instant case, I am unable to find any substantial question of law raised in the application that warrants certification of this matter as a constitutional matter for referral to The Honourable The Chief Justice to empanel an uneven bench. Indeed, the Plaintiff has not demonstrated how the judgments and rulings delivered herein infringed any of his constitutional rights as alleged.

55. The issues that the Plaintiff is raising have already been heard and determined to conclusion by both this Court (differently constituted) and the Court of Appeal and cannot be reopened under the guise of constitutional issues. In my view, the Plaintiff is simply trying his luck and deliberately delaying the conclusion of this case so that he can continue to benefit from the suit property at the expense of the 2nd Defendant's constitutional right to own the same.

56. In any event, issues relating to interlocutory judgments are matters that the courts are seized with on a daily basis. As such, elevating such matters to issues of general public importance as suggested by the Plaintiff would amount to an unjustified discrimination in mechanisms for dispute resolution. (See **Republic v President & 5 others Ex-parte Wilfrida Itolondo & 4 others [2013] eKLR)**

57. In the premises, I decline to refer the application to the Honourable Chief Justice for empanelment of an uneven bench or at all.

Whether the application is *res judicata*

58. It is noteworthy that this application has been brought very late in the day. An interlocutory judgment was entered in favour of the 2nd Defendant on 4th February, 2014. The Plaintiff made an application in which he sought to set the same aside but the application was dismissed by Havelock J in a Ruling delivered on 26th June, 2014. He sought a review of the said ruling but Ogola, J. declined to review it noting that it was proper since the decision of whether or not to set aside an interlocutory judgment is a discretionary exercise by the trial court. Thereafter, the Plaintiff appealed against the Ruling of Ogola, J and the Court of Appeal upheld the High Court's decision.

59. I have no doubt in my mind that the present application is *res judicata* in view of the history of the applications filed by the Plaintiff in which both the High Court and the Court of Appeal conclusively determined the issues now being raised by the Plaintiff. The Plaintiff already had the opportunity to ventilate the issues he is purporting to raise now. He had his day in court all the way to the Court of Appeal. There is nothing more that this court can do that has not been done.

60. The doctrine of *res judicata* bars re-litigation of matters that have already been determined since there must be an end to litigation so as to accord parties closure. It is provided for under **Section 7** of the **Civil Procedure Act** 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."**

61. In my view, the application herein is just a clever ploy by the Plaintiff to invite this court to sit on appeal of decisions made by courts of competent concurrent and superior jurisdictions which is impossible. Be that as it may, I am unable to see how the said rulings and judgment are unconstitutional and contra statute as alleged.

Disposition

62. The upshot is that the Plaintiff's application dated 6th November, 2019 lacks merit and is hereby dismissed with costs to the Defendants. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Mirie h/b for Mr. King'ara for the Plaintiff/ Applicant.

2. Ms. Karanja for the 1st & 3rd Defendants/ Respondents.

3. Mr. Walubengo for the 2nd Defendant/ Respondent.