REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 199 OF 2018

HON. BENSON MUTURA.....PETITION

VERSUS

COUNTY SECRETARY COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

COUNTY CLERK COUNTY GOVERNMENT OF NAIROBI.....2ND RESPONDENT

LAPFUND.....3RD RESPONDENT

NAIROBI COUNTY GOVERNMENT.....4TH RESPONDENT

AND

MARIAKANI ESTATE WELFARE ASSOCIATION.....1ST INTERESTED PARTY

AGGREY OWITI.....2ND INTERESTED PARTY

JUDGMENT

1. Hon. Benson Mutura is the Petitioner. The County Secretary County Government of Nairobi, the County Clerk County Government of Nairobi, LAPFUND and Nairobi County Government are the 1st to 4th respondents respectively. Mariakani Estate Welfare Association and Aggrey Owiti, were, upon their application, admitted to join these proceedings on 12th March, 2019 as the 1st and 2nd interested parties respectively.

2. The Petitioner's case as narrated through the petition dated 22nd May, 2018 is that on 8th August, 2012, the 4th Respondent reached an agreement with the 3rd Respondent in which the 4th Respondent was to relinquish and transfer several properties in the name of the defunct City Council of Nairobi to the 3rd Respondent. The transaction was meant to offset statutory debts owed to the 3rd Respondent.

3. The debt swap which was approved on 10th August, 2012 by the defunct Nairobi City Council's special finance committee involved the transfer of Jamhuri, Ring Road Estate in Westlands and Jevanjee Estate in Kariokor.

4. It is the Petitioner's case that there is no mention of members who supported or opposed the transfer in the minutes of the meeting. Further, that there was no audit to establish the indebtedness of the defunct Nairobi City Council to confirm exactly how much the Council actually owed the 3rd Respondent. The Petitioner avers that the failure to conduct an audit exposed public resources to pilferage and loss contrary to the Public Finance Management Act, 2012.

5. According to the Petitioner, the 3rd Respondent eventually ended up transferring the property known as Mariakani Estate No. 209/6612 to the 3rd Respondent in place of the properties mentioned in the minutes. This, the Petitioner states, was despite the fact that there was no mention of the property in the Council meeting as one of the properties to be transferred.

6. According to the Petitioner, transfer of public property requires the Ministry of Lands and two independent professional valuers to

undertake valuations before the transfer. His case is that there was no valuation by independent valuers and the Council never presented any valuation reports for the property.

7. It is further the Petitioner's case that the memorandum of registration of transfer dated 18th March, 2013 indicates that it is Nairobi City Council which transferred the property but by that date the Council was non-existent in law as its functions had been taken over by the 4th Respondent.

8. It is also the Petitioner's averment that the said transfer was irregular and illegal as at 18th March, 2013, there was a moratorium order from the Transition Authority stopping such a transfer pursuant to the Transition to Devolved Government Act, 2012. He states that such a transfer would have required the sanction of the Transition Authority in accordance with Section 35 of the Transition to Devolved Government Act, 2012.

9. Other grounds raised in the petition are that the entire process was not subjected to public participation; that the consent of the Ministry to transfer a public property was not obtained; that the tenants in the property were not consulted although the transfer affects their housing rights; that despite the property being transferred to the 3rd Respondent, the 4th Respondent being the successor of the defunct Nairobi City Council still demands rent from the tenants of the estate; and that the Public Accounts Committee of the County Assembly of the 4th Respondent had recommended the immediate transfer of the estate by the 4th Respondent to the 3rd Respondent. The Petitioner fears that if the transfer is actualized, his rights and that of other residents will be violated.

10. It is the Petitioner's averment that the actions of the respondents will violate the right to decent and affordable housing under Article 43 of the Constitution as the tenants of the estate would be evicted. He also deposes that the right to equality and freedom from discrimination will be violated in that although the agreement for the asset swap was in respect of other estates named therein it is incomprehensible as to how the respondents settled on Mariakani Estate No. 209/6612 as the tenants were not involved in the decision-making process.

11. It is also the Petitioner's case that the lack of public participation in the process violated Articles 118 and 117 of the Constitution and Section 87(a) and (b) of the County Governments Act. Further, that the transfer process does not meet the threshold of the fiscal responsibility principles outlined under Section 102 of the Public Finance Management Act.

12. The Petitioner therefore prays for orders as follows:-

"a) An order declaring the transfer of the estate known as Mariakani Estate No. 209/6612 null and void.

b) An order declaring the registration process and the title registered in favour of the 3rd Respondent thereof null and void.

c) Costs of this Petition be awarded in favour of the Petitioner.

d) Any other orders this Honourable Court may deem just, fit and expedient to award in favour of the Petitioner."

13. In the affidavit sworn on 21st January, 2018 by the 2nd Interested Party in support of the interested parties' application for joinder dated the same date, the 2nd Interested Party introduces himself as the Vice – Chairman of the 1st Interested Party which is a society duty registered under the Societies Act, and whose membership is comprised of the tenants of Mariakani Estate.

14. The interested parties support the petition. The 2nd Interested Party avers that the debt swap deal contravened the Constitution as there was no public participation. Further, that the transfer was null and void as it was done by the Nairobi City Council, an entity that had ceased to exist by law, by the time of the execution of the transfer. They also fault the respondents for not consulting the tenants before effecting the transfer.

15. The 1st, 2nd and 4th respondents opposed the petition.

16. The 3rd Respondent opposed the petition through grounds of opposition dated 2nd October, 2019 and a replying affidavit sworn by its Chief Executive Officer, David Koross on 15th November, 2019. In summary, the seven grounds of opposition is to the effect that the petition does not disclose a case and is therefore frivolous, vexatious, an abuse of due process and a waste of judicial time.

17. Through the replying affidavit, David Koross avers that the 3rd Respondent was duly mandated under the Local Authorities Provident Fund Act, Cap. 272, to collect, invest and manage retirement benefits from all local authorities in respect of their employees. His averment is that the retirement benefits comprise of employee and employer contributions at the rate of 12 % and 15% respectively of the employee's basic salary and house allowance. He states that the 4th Respondent was under a statutory obligation to remit the deductions from its employees and its own contribution to the 3rd Respondent.

18. It is the deposition of David Koross that the 4th Respondent in utter contravention of the Local Authorities Provident Fund Act and the Retirement Benefits Act, 1997 had failed to remit the deductions and was thus heavily indebted to the 3rd Respondent. He states that as a result of the indebtedness, the 4th Respondent entered into negotiations with the 3rd Respondent on how the pending debt would be settled in the interest of the employees of the 4th Respondent whose salaries had been lawfully deducted towards the fund but not remitted by the 4th Respondent.

19. David Koross avers that in August 2012 the special finance committee of the defunct Nairobi City Council permitted the then town clerk to enter into negotiations with the 3rd Respondent with a view to settling the debt. The negotiations resulted in an agreement whereby Nairobi City Council was to transfer its property known as Mariakani Estate No. 209/6612 to the 3rd Respondent in a debt swap deal in order to settle the debt and prevent continuous accumulation of interest. He states that the transfer instruments were executed on 18th March, 2013 and registered on 3rd April, 2013 thus making the 3rd Respondent the *bona fide* legal registered owner of the property.

20. It is David Koross' further deposition that the debt swap deal did receive the blessings of the Ministry of Local Government and the Transition Authority. His position is that the transfer of the property was done procedurally and legally and it is not correct to say that the same was irregular. Further, that the action taken was for the welfare of the employees of the 4th Respondent who are members and contributors to the fund. The action, according to him, was therefore taken in the public interest.

21. It is the averment of David Koross that the property herein has been a subject of Nairobi Judicial Review Miscellaneous Application No. 76 of 2015, now Nairobi ELC Case No. 218 of 2015 and is therefore *res judicata* and should not be entertained by this court because it amounts to an abuse of due process.

22. It is also David Koross' evidence that the Petitioner and the interested parties who are tenants in the property were not involved in the negotiations of the debt swap because this is a matter of ownership of property that only concerned the parties involved. He avers that there is no obligation in law placed upon a landlord to consult the tenants before he can transfer his property. He also avers that the concern of the Petitioner and the interested parties that the rents may be hiked was addressed in Nairobi ELC Case No. 218 of 2015.

23. It is averred by Mr Koross that the 4th Respondent had through a letter dated 12th January, 2018 notified all tenants, including the Petitioner, that Mariakani Estate had been transferred to the 3rd Respondent and the rent should be paid to the 3rd Respondent but the Petitioner had refused to comply and was in arrears of Kshs.720,000. It is therefore the 3rd Respondent's position that the Petitioner has approached the court with unclean hands. The petition is termed frivolous, vexatious and an abuse of the process of the law and the court is asked to dismiss it.

24. Through the submissions dated 21st January, 2019 and filed on 22nd January, 2019, the Petitioner submits on three issues. On the first issue as to whether the transfer of the property in the debt swap was regular, it is submitted that the transfer was irregular for the reasons that it was done during the existence of a moratorium order from the Transition Authority; that the transfer documents were executed by individuals who didn't have capacity to sign the same on behalf of the 4th Respondent; that the Auditor General noted anomalies in his report for the year ended June 2016; and that there was non-compliance with the Public Finance Management Act, 2012.

25. In respect of the transfer being effected during the existence of a moratorium order from the Transition Authority, the Petitioner points to Section 35(1) of the Transition to Devolved Government Act, 2012 as legislating that a state organ, public office, public entity or local authority shall not transfer assets and liabilities during the transition period. He states that the transfer instrument and the memorandum of registration were executed on 18th March, 2013 and subsequently registered at the lands office on 3rd April, 2013, which period is defined as phase two of the transition period being the period between the date of the first election under the Constitution, 2010 and three years after the first election. The Petitioner states that the transfer could only be done with the sanction of the Transition Authority in consultation with the National Treasury, the Commission on Revenue Allocation, the Ministry of Local Government and the Ministry of Lands. He contends that Section 35(4) of the Transition to Devolved Government Act, 2012 invalidates any transfer of assets or liabilities made in contravention of subsection (1). He relies on the decision of **Macfoy v United Africa Co. Ltd [1961] 2 All ER 1169,** as cited in **Republic v Cabinet Secretary, Ministry of Information and Communication & 10 others Ex Parte Adrian Kamotho Njenga [2015] eKLR**, in support of the legal principle that any act done in contravention of statute is a nullity and incurably bad.

26. On his claim that the executors of the transfer documents did not have authority to do so, the Petitioner submits that the documents show that Mr. Omwera and Mr. Roba Duba signed the transfer documents in their capacities as the mayor and town clerk of the City Council of Nairobi, yet at the time of the execution, they had no such authority as the Council was transitioning to a devolved unit. Further, that Mr. Roba Duba was at the time a Member of Parliament for Moyale and was by operation of Article 77 of the Constitution barred from engaging in any other gainful employment including being the town clerk of the City Council of Nairobi. Also, that the City Council of Nairobi was effectively defunct at the time of the execution of the said documents.

27. The Petitioner submits that the Auditor General in his report for the year ended June 2016 noted that Mariakani Estate was not among the estates identified for a swap by the special finance committee; that the members who supported or opposed the transfer were not recorded in the minutes; that there was no audit of the indebtedness of the City Council of Nairobi; and that the memorandum of registration of transfer dated 18th March, 2013 indicated the transferor of the property as the City Council of Nairobi which was non–existent in law at the time.

28. On the claim that there was no compliance with the Public Finance Management Act, 2012, the Petitioner submits that Section 102 which requires counties to comply with the principles of public finance under Chapter 12 of the Constitution was not adhered to as the 4th Respondent's debt to the 3rd Respondent was never audited.

29. On the second issue as to whether the transfer violated the Constitution, the Petitioner asserts that it did stating that the principle of public participation as enunciated in Articles 10(2) 61 and 115(2) of the Constitution was never complied with. The decision in **Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR** is cited in support of the assertion that county governments ought to involve the public in their decision-making processes. It is the Petitioner's submission that the fact that official communication was made through a letter dated 12th January, 2018, five years after the fact, confirms that the public was not involved in the transaction.

30. On the third and final issue as to whether the transfer infringes on his rights, the Petitioner submits that it does infringe on his right to affordable housing as guaranteed by Article 43(1)(b) of the Constitution. He asserts that the duty to provide accessible, affordable and adequate housing to reasonable standards of sanitation has been bestowed upon devolved units such as the 4th Respondent under the Fourth

Schedule of the Constitution. According to him, the transfer of the estate to the 3rd Respondent, a private entity puts his right to housing at risk. He therefore prays that the petition be allowed.

31. Through their submissions dated 28th June, 2019, the interested parties reiterate the submissions of the Petitioner.

32. The 1st, 2nd and 4th respondents filed submissions dated 26th March, 2019. On the claim that Mariakani Estate was not mentioned in the minutes of the special finance committee meeting of 10th August, 2012, it is submitted that the transfer of Mariakani Estate was necessitated by the need to prevent further accrual of interest by the Council. Further, that it was the only estate owned by the Council, which had a ready title available for transfer.

33. It is also submitted that the Council obtained consent to transfer the property from the then Ministry of Local Government as supported by a letter dated 1st November, 2012. Additionally, that the properties listed during the meeting of 10th August, 2012 was merely meant for illustrative purposes and the agreement reached was a policy commitment accepting the transfer of property in principle rather than acceptance of specific properties.

34. On the alleged non-existence of the City Council of Nairobi at the time of the alleged transfer, it is submitted that the action of transferring the property had already been ratified by the two parties involved and only the final act of registering the property in the name of the 3rd Respondent remained. Further, that the consent for the transfer had been obtained from the then Ministry of Local Government through the letter dated 1st November, 2012.

35. An order issued on 22nd July, 2016 by Gitumbi, J is also cited as having validated the transfer of the property to the 3rd Respondent.

36. It is therefore the 1st, 2nd and 4th respondents' submission that the moratorium on transfer of property during the transition period does not apply. It is stated that in any case Section 35 of the Transition to Devolved Government Act provides exception to the moratorium. Also that consent for the transfer had indeed been obtained from the Ministry of Local Government.

37. On the issue of public participation, it is conceded that the residents of Mariakani Estate or their association, Mariakani Estate Welfare Association, were indeed not involved in the matter. It is, however, contended there have been engagements after the transaction as evidenced by a letter from the 3rd Respondent to the tenants dated 10th January, 2019.

38. The allegation that the 4th Respondent was still collecting rent from the tenants is denied. It is submitted that the order issued on 22nd July, 2016 by Gitumbi, J had clearly directed that the rent be paid to the 3rd Respondent.

39. As regards the fear by the Petitioner that tenants may be evicted or the rent hiked, it is urged that the 3rd Respondent has already provided an assurance that would not happen. Further, that the order of 22nd July, 2016 provides for the establishment of Mariakani Estate Welfare Association and directs that the present tenants remain in the estate and that in the event of sale of the property, those tenants be given first priority.

40. It is the 1st, 2nd and 4th respondents' case that the matter is *sub judice* as there is in existence Nairobi Judicial Review Miscellaneous Application No. 76 of 2016 in respect of the issues raised herein. The decision in **Republic v Chairman District Alcoholic Drinks Regulations Committee & 4 others & Ex parte Jetlef Heier & another [2013]eKLR** is cited in support of the proposition that the court has inherent jurisdiction to prevent an abuse of its process. The court is therefore urged to dismiss the petition.

41. The first issue identified for the determination of the court by the 3rd Respondent through the submissions dated 15th November, 2019 is whether the transfer of the property to the 3rd Respondent was irregular. It is the 3rd Respondent's submission that the deal was not irregular and all the procedures were followed. It is pointed out that the 4th Respondent was and is still indebted to the 3rd Respondent for statutory deductions from employees' salaries. Further, that after negotiations were held the necessary consents were obtained and the transaction cannot therefore be termed irregular.

42. According to the 3rd Respondent there was no need to involve the Petitioner and the interested parties as they were only tenants living in the suit property and that there is no legal requirement for the involvement of a tenant in negotiations concerning the management of a landlord's property.

43. On the second issue of alleged infringement of the Petitioner's constitutional rights, the 3rd Respondent contends that no right has been infringed. It is submitted that the mere fact that the property has been transferred to a third party should not make the Petitioner and the interested parties to feel threatened. Reliance is placed on the decision in **Jimmy Odari & 7 others v Minister for Local Government & 3 others [2017] eKLR** in support of the assertion.

44. On the fears expressed by the Petitioner that he may be evicted or rent increased, it is urged that such fears can be properly taken care of by law and as of now they are just mere speculations. It is pointed out that although the transfer occurred in 2013, it was only in January, 2019, after the determination in Nairobi ELC Case No. 218 of 2015 Mariakani Welfare Association v Nairobi County Government & another, that the 3rd Respondent directed the tenants to start paying rent to it. The Petitioner, it is submitted is yet to pay Kshs.720,000 and has therefore not approached the court with clear hands.

45. On the Petitioner's allegation of discrimination, the 3rd Respondent contends that the 4th Respondent had the right to manage its properties as desired. The claim by the Petitioner that there is no explanation as to how and why their estate was selected for the swap deal is

dismissed by the 3rd Respondent as being far-fetched.

46. The third issue submitted upon by the 3rd Respondent is that the orders sought in the application for conservatory orders dated 22nd May, 2018 are not capable of being granted or enforced as they seek to stop what has already happened. Further, that declaring the transfer null and void as sought in the petition is not sufficient as the enforcement of the order is not explained.

47. The 3rd Respondent submits that the petition is *res sub judice* and *res judicata*. On this fourth issue, the 3rd Respondent contends that the petition seek orders similar to those sought in Nairobi ELC No. 218 of 2015. It is the 3rd Respondent's case that the matter before the Environment & Land Court is in respect of Mariakani Estate No. 209/6612 and involves the same parties as the applicant therein is the 1st Interested Party herein while the 3rd and 4th respondents herein are the 1st Interested Party and the 1st Respondent respectively in that matter.

48. It is the 3rd Respondent's case that there exists a consent in Nairobi ELC Case No. 218 of 2015, attached to the 3rd Respondent's replying affidavit as Exhibit DK3, in which the 1st Interested Party herein acknowledges that the suit property is validly registered in the name of the 3rd Respondent. The consent, it is stated, also provides that the members of the 1st Interested Party herein would continue residing in the houses as valid tenants from the date of the consent.

49. Sections 6 and 7 of the Civil Procedure Act, Cap 21 and the decision in **Re Estate of MNJ (Deceased) [2018] eKLR** are cited as expressing the law on the principles of *res sub judice* and *res judicata.* The court is therefore urged not to issue any orders in this matter for to do so might cause confusion and conflict in court orders thereby exposing the judicial system to public ridicule. On that note the court is urged to dismiss the petition.

50. From the pleadings and submissions, the issues for the determination of this court are the constitutionality of the swap deal between the 3rd Respondent and the 4th Respondent and whether the petition is *sub judice* and *res judicata*.

51. The starting point would be to determine whether the matter is *sub judice* and or *res judicata*. An affirmative finding in respect of any or both of these legal principles will deprive this court of jurisdiction to explore the substantive issues raised in the petition.

52. In **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR**, the Court of Appeal observed that:-

> **"The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it-not even by consent of the parties-because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."**

53. On the other hand, if this court determines that there existed another suit dealing with the same issues and between the same parties pending before a competent court at the time of the filing of this petition, then this court is required by Section 6 of the Civil Procedure Act to stay this petition.

54. Section 6 of the Civil Procedure Act, Cap. 21 provides for the principle of *sub judice* as follows:-

> **"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**
>
> ***Explanation*.**
>
> **—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."**

55. Section 7 of the same Act legislates the doctrine of *res judicata* as follows:-

> ***Res judicata***
>
> **"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.**
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> ***Explanation*. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**
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> ***Explanation*.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**
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> ***Explanation*. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or**

admitted, expressly or impliedly, by the other.

***Explanation*.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

***Explanation*. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

***Explanation*. (6)—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under"**

56. I have perused the pleadings that were initially filed at the Judicial Review Division in Nairobi ELC No. 218 of 2015 Mariakani Welfare Estate Association v County Government of Nairobi & 6 others. The thrust of the plaintiff's case therein is that the procedure used to transfer Mariakani Estate to LAPFUND, the 3rd Respondent herein (and the 1st Interested Party in that case), was irregular, unlawful, null and void in that the transfer was signed on 18th March, 2013 long after the City Council of Nairobi had ceased to exist as a legal entity and had been replaced by the County Government of Nairobi City. Other grounds in support of the plaintiff's case is that those who signed the transfer instruments had no authority to do so; and that the tenants of the estate were never involved in the transaction. The ELC case was filed on 12th March, 2015. The instant petition was filed on 22nd May, 2018. In the terms of Section 6 of the Civil Procedure Act, this petition should be stayed.

57. In **Munawar Shuttle v County Government of Kilifi & 2 others [2018] eKLR**, I stated that:-

"47. The purpose of Section 6 is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter. It is meant to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same dispute. When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed. The conditions to be met by a party who seeks to stay suit (*res sub judice*) under Section 6 of the CPA is that there must be two suits or more. One suit should have been instituted previously and the other instituted subsequently. Both suits should be pending before courts of competent jurisdiction and must be between the same parties or their representatives. The subject matter of the suits should be same."

58. The facts of the case before this court meet the threshold for staying a suit for contravening Section 6 of the Civil Procedure Act, Cap. 21. This suit should therefore be stayed pending the hearing and determination of the case before the Environment and Land Court.

59. The respondents have gone ahead to put forward the argument that the case before the Environment and Land Court has already been determined and this matter is therefore res judicata. In order for the defence of *res judicata* to hold, it must be shown that there is a previous suit in which the matter was in issue; that the parties were the same or litigating under the same title; that a competent court heard the matter in issue; and that the issue has been raised once again in the new suit-see **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** and **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR.**

60. I have already held that the issues raised herein are the issues that were raised in the Environment & Land Court matter. The question is whether that matter has been determined. The answer is in the affirmative. By the time the Petitioner instituted this matter, that suit had been determined by the consent entered before Gitumbi, J in the following terms:-

1. THAT the Applicant, Mariakani Estate Welfare Association acknowledges that the suit property LR No. 209/6612 comprising 240 housing units otherwise known as Mariakani Estate is hereby validly registered in the Name of LAPFUND, the Interested Party herein.

2. THAT Lapfund shall henceforth continue to manage the Estate and receive rents from the valid tenants of the Estate.

3. THAT Mariakani Estate Welfare Association (MEWA) acknowledges the Transfer dated 18th March 2013 as having legal validity.

4. THAT the tenants of Mariakani Estate who are members of Mariakani Welfare Association to continue their stay as valid tenants from the date of this Consent.

5. THAT Lapfund (The 1st Interested Party) as Legal Owner of LR No. 209/6612 shall henceforth enter into legal agreements/Leases with the Tenants who are members of Mariakani Welfare Association (MEWA). The Tenants shall be afforded the first option to purchase in the event of a sale.

6. THAT the County Government of Nairobi shall upon the execution of this Agreement cease to have any lien on LR No. 209/6612 or to collect Rent or proceeds from the sales of the housing units.

7. THAT the Rent due for the first 12 months from the Tenants shall be paid directly to an Escrow A/C in the joint names of the Legal Representatives of Mewa and Lapfund.

8. THAT there be liberty to apply."

61. An attempt to set aside the consent failed. Indeed B. M. Eboso, J in his ruling dated 13th December, 2018 dismissing the application to set aside the consent recorded before Gitumbi, J, re-affirmed that the dispute had been finalized when he held that:-

> **"20. The application by the County Government similarly suffers the same deficiency. I have carefully examined the statement of account which contains the unremitted billions owed by the County Government to the Provident Fund; the debt swap agreements; the letter dated 1/10/2012 from the Town Clerk of City Council of Nairobi to the Chairman of Transitional Authority conveying the Council's resolution to swap the debts; Council's Resolutions; approval of debt swap by the Permanent Secretary of the parent Ministry; the letter dated 3/12/2014 from the County Government to the Provident Fund confirming the value of the Estate; and the affidavit of the acting County Secretary opposing the first application and stating that there was no fraud, collusion or any agreement contrary to policy in the recording of the consent.**
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> **21. What emerges from the subsequent affidavit of Peter Kariuki is that the subsequent political administration of the County Government wishes to disengage from the commitments made by their political predessors. That in my view cannot be a ground for setting aside a consent order properly recorded. For the court to interfere with the consent order, the County Government must satisfy the jurisprudential criteria outlined above. Regrettably, it has not satisfied that criteria.**
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> **22. It is noted that the debt swap happened in August 2012 and the transfer in favour of the Provident Fund was effected in early 2013. The County Government has not brought any suit to challenge the debt swap. Similarly, it does not contest the fact that it owed and still owes the Provident Fund billions in unremitted pension money. In my view, the application by the County Government is not *bona fide* and is devoid of merit. The application is a ploy by the County Government to run away from its statutory obligation to pay pension deductions."**

62. One may say that the Petitioner was not a party to the matter before the Environment and Land Court. However, the truth of the matter is that he was a party to that case. As a resident of Mariakani Estate, he is a member of the 1st Interested Party herein. The 1st Interested Party was the plaintiff in the E & LC case.

63. The defence of *res judicata* is thus appropriate in the circumstances of this case. Once it is established that a matter is *res judicata*, the court has no business enquiring into the merits of the substantive issues raised in the matter. To do so will amount to reviewing a valid decision made by a court of competent and coordinate jurisdiction. The Petition is therefore dismissed.

64. This case is a good example of the term *"abuse of the court process."* The interested parties applied to join this case on 22nd January, 2019 almost one month after they lost their application before B. M. Eboso, J to set aside the consent order recorded before Gitumbi, J. They were hoping to get through these proceedings that which they could not get in the Environment and Land Court. The Petitioner must have also known the existence of the case before the Environment & Land Court but failed to disclose the same when he filed this petition. In the circumstances, the Petitioner and the interested parties will jointly and severally meet the costs of the respondents in respect of these proceedings.

Dated, signed and delivered through email at Nairobi this 30th day of April 2020.

W. Korir,

Judge of the High Court