



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 30 OF 2020

(FORMERLY NAIROBI ELC CASE NO. 364 OF 2019)

BETWEEN

NANCY WANJA GATABAKI,

JOSEPHINE BEATRICE GATHONI and

ESTHER SUSAN WANGARI GATABAKI

suing as ad litem representatives of

DR. SAMUEL MUNDATI GATABAKI (DECEASED).....1ST. PLAINTIFF

NANCY WANJA GATABAKI.....2ND PLAINTIFF

AND

MUGA DEVELOPERS LIMITED.....1ST DEFENDANT

PETER KIARIE MURAYA.....2ND DEFENDANT

SUE WACHEKE MURAYA.....3RD DEFENDANT

SURAYA PROPERTY GROUP LIMITED.....4TH DEFENDANT

SURAYA INVESTMENT FOURWAYS LIMITED.....5TH DEFENDANT

SURAYA SALES LIMITED.....6TH DEFENDANT

NEW ATTITUDE LIMITED.....7TH DEFENDANT

EQUITY BANK LIMITED.....8TH DEFENDANT

DIRECTOR OF SURVEYS.....9TH DEFENDANT

THE CHIEF LAND REGISTRAR.....10TH DEFENDANT

THE ATTORNEY GENERAL.....11TH DEFENDANT

RULING

Introduction and background

1. The Plaintiffs commenced this suit by a Plaint dated 4th October 2019. They later filed a Notice of Motion under certificate of urgency dated 27th March 2020 seeking an interlocutory injunction pending the hearing and determination of the suit restraining the Defendants from dealings, whether by sale, transfer or charging, or otherwise interfering with the property known as LR No. 5980 and LR No. 4508/1 or any fraudulent subdivisions, amalgamations therefrom under a purported LR No. 28223.
2. The Plaintiffs filed another application dated 28th February 2020 seeking to amend the Plaint to include the Receivers of the 1st Defendant appointed by the 8th Defendant. In response, the 8th Defendant filed an application dated 13th May 2020 seeking to strike out the suit on the grounds that it is res judicata, time barred and an abuse of the court process.
3. When this suit was originally filed in the Environment and Land Court (“ELC”), the 1st to 7th Defendants filed a Notice of Preliminary Objection dated 26th November 2019, the 8th Defendant filed a Notice of Preliminary Objection dated 28th November 2019 while the 12th Defendant filed its Notice of Preliminary Objection dated 16th December 2019. The objections, in so far as they contested the jurisdiction of the ELC to adjudicate over this suit, were settled once the suit was transferred to this court. The objections also contested the suit on the basis that it is statute barred under the law of limitation, that it is res judicata and that it does not disclose a cause of action.
4. I directed that the Plaintiffs’ application for amendment, the 8th Defendant’s application to strike out the suit, the preliminary objections raised by the 1st to 7th Defendants and the 12th Defendant be heard together since they all raised the same issues.
5. In the course of these proceedings, the 1st Plaintiff passed away. The administrators ad litem obtained a grant and following the Notice of Motion dated 23rd July 2020, I allowed substitution of the 1st Plaintiff by the ad litem administrators.

Issues for determination

6. The parties filed written submissions in support of their respective positions which their counsel highlighted at a brief oral hearing. The issues for resolution are as follows:
 - (a) Whether the suit is res judicata.
 - (b) Whether the suit is time barred under the *Limitation of Actions Act (Chapter 22 of the Laws of Kenya)*.
 - (c) Whether the suit is an abuse of the court process.
 - (d) Whether the Plaintiffs should be allowed to amend their Plaint.
7. Before I deal with the issues I have set out, let me set out the basic facts which are not contested in so far as they relate to what was pleaded in this suit and the previous proceedings between the parties.

Plaintiffs’ Claim

8. The Plaintiffs’ case is set out in the Plaint dated 4th October 2019 and it is founded on the basis that they are the registered and beneficial owners of two parcels of land; LR No. 5980 and LR No. 4508/1 measuring about 200 acres and about 6.53 acres respectively and are located off Kiambu road within Nairobi City County (“the suit properties”).
9. In 2007, the Plaintiffs and 2nd and 3rd Defendants entered into a joint venture agreement dated 23rd May 2007 for the development of a housing scheme named, “Fourways Junction Estate” covering 105 acres within LR No. 5980 through the 1st Defendant which was incorporated as the joint venture company. According to the Plaintiffs, it was understood that the Plaintiffs’ contribution would provide 50% of the capital through the land while the 2nd and 3rd Defendants, through the 4th Defendant as the developer, would inject capital of equal value towards construction of the housing scheme.
10. The Plaintiffs admit that following disagreements between the parties to the joint venture, the parties engaged in litigation. The 2nd Plaintiff filed *Milimani HCCC No. 352 of 2011, Nancy Wanja Gatabaki v Muga Developers Limited, Suraya Property Group Limited, Suraya Investments Fourways Limited, Suraya Sales, Limited, Peter Kiarie Muraya, Sue Wacheke Muraya, Equity Bank Limited, I & M Bank Limited and Frangie Investments Limited* which was ultimately settled by a consent dated 6th September 2011 (“the Consent Order”). The 1st Plaintiff filed *Milimani HCCC No. 151 of 2017, Dr Samuel Mundati Gatabaki v Muga Developers Limited and Muga Developers Limited, Suraya Sales Limited, Suraya Property Group Limited and Equity Bank Limited* which is still pending hearing and determination.
11. The Plaintiffs claim that after the Consent Order, they discovered acts of fraud, deception and breach constituting a fresh cause of action. The Plaint, comprising 67 paragraphs, accused the 2nd and 3rd Defendants of acts of forgery and misrepresentation in the manner the joint venture agreement was entered and how the 1st Defendant was incorporated to the detriment of the Plaintiffs with the intent of diminishing

the Plaintiffs' share in the joint venture contrary to the agreements and altering the fundamental understanding of the parties. They further accused the 2nd and 3rd Defendants of misrepresenting to them that they had the financial capacity to undertake the housing project and that they charged the suit properties first to I & M Bank and later to the 8th Defendant, Equity Bank, without their consent and knowledge and with the intention of depriving them of the land.

12. The Plaintiffs seek several reliefs among them orders to annul the incorporation of the 1st Defendant, annul all transactions undertaken on the suit properties by the 2nd, 3rd and 4th Defendants, an order directing the Chief Land Registrar to annul all subdivisions, charges and dispositions in regard to the suit property, accounts, compensation and other consequential reliefs.

Whether the suit is res judicata

13. The parties are agreed on the principles to be satisfied if the objection based on the doctrine of res judicata is to succeed. The Defendants submitted that the previous suit, **HCCC No. 352 of 2011**, between the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th Defendants dealt with the subject matter of this suit and was determined by a court of competent jurisdiction through the Consent Order.

14. The principal of res judicata finds statutory basis in **section 7 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which provides as follows;

7. 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 the 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

15. Germane to this case is **Explanation 4 of section 7 of the Civil Procedure Act** which provides:

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

16. The Defendants submitted that all the issues of fraud, deceit and misrepresentation raised in relation to the execution of the joint venture, incorporation of the 1st Defendant, execution and implementation of the development agreements and transactions in the suit properties were all matters in issue in the previous suit and that the new issues related to the allegations of fraud in respect of the same subject matter could have been raised in the previous suit as envisaged by **Explanation No. 4**. In support of this position, counsel for the 8th Defendant cited **Mburu Kinyua v Gichini Tuti [1978 - 80] 1 KLR 780** where the Court of Appeal explained that:

Where a given matter becomes the subject of litigation in, and of 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 in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time.

17. Counsel for the 8th Defendant further submitted that the acts of fraud, deceit and misrepresentation which the Plaintiffs alleged were discovered in 2018 could have or ought to have been raised in the previous suit. For example, counsel referred to the Plaintiffs' allegation in the present suit that their signatures on the board resolution authorizing the 1st Defendant to take out the loan from the 8th Defendant were forged and submitted that since the 2nd Plaintiff was aware of the existence of charge over LR No. 28223/33 in the previous suit, the allegation of forged signatures ought to have been raised at that time. Counsel pointed out that the 2nd Plaintiff did not challenge the charge over LR No. 28223/33 made in favour of the 8th Defendant in the previous suit but instead negotiated settlement embodied in the Consent Order in which the 8th Defendants agreed not to exercise its statutory power of sale over 3.6 acres allocated to her. Lastly, counsel submitted the Plaintiffs' allegations that their signatures on the Memorandum of Objects and Articles of Association were forged goes to the validity of their shareholding in the 1st Defendant which issue should have been raised in the previous suits.

18. Counsel for the 8th Defendant rebuffed the 2nd Plaintiff's argument that this suit was not res judicata as it involved new parties and presented new and different causes of action. He submitted that the question for determination is not whether the subsequent cause of action is different but whether the allegations raised in the subsequent proceedings should have been raised in the previous suit. In this case, the 8th Defendant submitted that it has established an affirmative case for the suit to be struck out.

19. As regards the Plaintiffs' allegation that the charge over LR No. 28223/33 is invalid, the 8th Defendant submitted that the 2nd Plaintiff agreed not to challenge the charge in the Consent Order hence she could not turn around and challenge the same charge in the present suit. Counsel for the 8th Defendant submitted that the cause of action challenging the validity of the charge was extinguished once the order affirming validity of the charge was determined by the Consent Order therefore foreclosing any challenge to the charge.

20. The Plaintiffs took the position that their suit is not res judicata for several reasons. Counsel for the Plaintiffs submitted that the parties in the present case are different from those in the previous suit and the ingredients of fraud in the cases are different. Counsel added that in the previous suit, **HCCC No. 352 of 2011**, the court never had an opportunity to determine the suit on its merits. The Plaintiffs contended that the allegations of fraud only came to their notice after the previous suits were closed and upon extensive investigations. They maintained that some of the issues of fraud complained of came to light following a complaint by a neighbour to the National Land Commission in 2018, that

the Plaintiffs had failed to surrender a 20-acre utility plot. According to the Plaintiffs, further acts of fraud perpetrated by the 2nd and 3rd Defendants and their associated companies were discovered upon investigation carried out by a Land Fraud Investigator, Anthony Macharia Gathaate.

21. The Plaintiffs further contended that the National Land Commission also carried out its own investigations and reached a finding that there had been illegalities and irregularities in the entire process of subdivision and or amalgamation of the suit property through a fraudulent scheme leading to issuance of titles under LR No. 28223. The Plaintiffs submitted that facts constituting the fraud that were discovered much later were not available at the time the earlier suit was filed and could not have been discovered with due diligence as they had resided on the land since 1971 and had no notice of the fraud. Counsel for the Plaintiffs submitted that the investigations had uncovered massive fraud by the Defendants and it is on the interests of justice that these issues are ventilated fully.

22. Before I resolve the issue whether the present suit is res judicata, it is important to set out the facts and issues in the previous suit, **HCCC No. 352 of 2011**. The case, set out in the Plaint dated 10th August 2011, is grounded on the same joint venture agreement between the Plaintiffs and the 2nd and 3rd Defendants in this case. The Plaintiff in that case accused the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants of breaching the joint venture agreement and development related agreements under which the Plaintiffs would be paid for the full value of the land in consideration for the development. The Plaintiff accused the Defendants of fraudulently altering the shareholding of the 1st Defendant with the intention of diluting her shareholding in the joint venture and excluding her from the management.

23. In the previous suit, the Plaintiff further claimed that the Defendants were engaged in illegal transactions without her notice, authority and consent and without valid resolutions of the 1st Defendant. She alleged, inter alia, that the Defendants purported to transfer LR No. 5980/5/2 (LR No. 28223/2) measuring 200 acres from the Plaintiff to the 1st Defendant without consideration and then proceeded to charge it to I & M Bank without valid authority. She further accused the Defendants of illegally charging LR No. 28222/3 to the 8th Defendant without authority. She accused both banks of committing mortgage fraud against her by failing to recognise her as a shareholder of the 1st Defendant and therefore seek her consent and or involve her in any of the transactions. She also stated that she was not a beneficiary of the loan proceeds.

24. The thrust of that claim is that the 5th and 6th Defendants together with their associated companies, the 2nd, 3rd and 4th Defendants fomented a scheme to defraud her of her land. She explained that:

[29] It emerged that the Company Muga Developers, 1st Defendant, and 4th Defendant was created with the intent to defraud the Plaintiffs of their land, benefits and profits, as the other shareholders/Directors had no funds to invest in the Company as had been represented. The Plaintiffs aver that the representations made by the said 2nd Defendants, 5th and 6th Defendants Suraya Property Group Limited through its directors were fraudulent and calculated to deceive the Plaintiff.

25. The Plaintiff sought various reliefs including a permanent injunction to restrain the Defendants from transferring or in any way dealing with the LR No. 28223/2 (Original 5980), a declaration that the transfer of LR No. 28223/2 (Original 5980) to the 1st Defendant and subsequent registration is null and void, declaration that the mortgages/and/or charges dated 20th April 2010 from the 1st Defendant to Equity Bank is null and void and the court orders that the mortgage be set aside.

26. This suit was settled by the consent dated 6th September 2011 which stated as follows:

IT IS HEREBY ORDERED BY CONSENT

1. *That the suit be and is hereby marked as settled on the following terms.*

1. *The 2nd defendant shall pay the plaintiff the sum of Kshs. 725,619,000 in the manner set out below:*

a) *The sum of Kshs. 140,000,000 to be paid within 15 days from the date hereof.*

b) *The sum of Kshs. 262,219,000 to be paid within 6 months from the date hereof.*

c) *The balance of Kshs. 323,619,000 to be paid in the form of houses to be allocated to the plaintiff as follows:*

i. *24 Tulip 3 bedroom apartments valued at Kshs. 7,500,000 each.*

ii. *6 Daisy 2 bedroom apartments valued at Kshs. 4,900,000 each.*

iii. *12 Lilac 3 bedroom villas valued at Kshs. 9,500,000 each.*

iv. *All the above properties to be allocated and transferred to the plaintiff within 24 months from the date hereof without any liabilities and encumbrances at no costs.*

2. *The 2nd defendant shall allocate and transfer to the plaintiff land measuring 3.6 acres free from all encumbrances or costs within the next 24 months from the date hereof. The land to be allocated within the project area.*

3. *The plaintiff and the 2nd defendant shall pay the 7th and 8th defendants costs in the sum of Kshs. 15 million each making a total of*

Kshs. 30 million within the next 14 days from the date hereof. The said sum of to be paid through the firm of Miller & Co. Advocates for onward transmission to the advocates appearing herein.

4. The plaintiff and the defendant shall pay the firm of Iseme, Kamau & Maema Advocates, the sum of Kshs. 10 million within the next 14 days from the date hereof being the mediation costs.

5. The Winding up Cause No. 24 of 2011 be marked as withdrawn with costs of Kshs. 5 million to be paid to the Petitioner's advocates by the respondents in the cause within 14 days.

6. The plaintiff to resign as a director the 1st defendant within 14 days from the date hereof. The resignation to be immediately registered with the company registrar.

7. That Sagana Developers Limited shareholding with Muga Holdings Limited shall be 33.3% only.

8. That Sagana Developers Limited shall cease being a shareholder of the 1st defendant and shall transfer its shares from the first defendant to Dr. Samuel Gatabaki absolutely within 14 days from the date hereof.

9. The interim orders issued on 25th August 2011 be discharged forthwith.

10. That the plaintiff be discharged and indemnified by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 9th defendants of all obligations and liability arising from or in connection with the subject development and that she owes no liabilities as a result of the charge of the suit property. In the event that there is a default of the loan outstanding, Equity Bank shall not sell the properties there above allocated to the plaintiff.

11. That in the event of default of the terms set out in clauses No. 1 and 2 as payment to the plaintiff, the directors of the 1st to 6th defendants shall be personally liable.

12. That the charge in favour of Equity Bank save for the variations noted above continues to be a valid security and shall not be subject to challenge as a result of the guidelines and terms set out hereinabove. [Emphasis mine]

27. The Plaintiffs seem to suggest that the Consent Order is not a judgment or a determination of the suit on its merits. A consent order is an order whose terms are settled and agreed to by the parties and having been sanctioned by the court, the consent order has the effect of res judicata in respect of the matters dealt with (see for example **Accredo AG and 3 Others v Steffano Uccelli and Another MLD CA Civil Appeal No. 43 of 2018 [2019] eKLR** and **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited NRB CA Civil Appeal No. 107 of 2010 [2017] eKLR**).

28. It is evident from the outline of the previous suit, I have set out above, that the subject of the suit is the joint venture agreement between the 2nd and 3rd Defendants, the subsequent incorporation of 1st Defendant and transfer of the Plaintiffs' property to the Company for development of Fourways Junction Estate. The basic facts, if not the subject matter in the previous suit, remain unchanged. In the present suit, filed 8 years after the previous one was settled, the Plaintiffs advert to the same elaborate scheme allegedly perpetrated by the 2nd and 3rd Defendants that was alleged in the previous suit. The Plaintiffs in the present suit state as follows:

[34] *The Plaintiffs assert that the 2nd and 3rd Defendants fraudulently misrepresented their financial position at the negotiation of the Joint Venture Agreement with the intent to mislead the Plaintiffs that they had the financial ability to fund the housing project whereas they did not and manifestly intended all along to fraudulently use the Plaintiffs' titles as security against which to borrow money from banks.*

[35] *It has since been established that they never had the financial capacity or wherewithal to afford the amounts of money they claimed ready and willing to inject into the venture.*

[36] *The Plaintiffs further contend that what the 2nd and 3rd Defendants all along deceptively schemed was not to perform under a Joint Venture Agreement, but to unscrupulously cheat their way into the ownership of the Plaintiffs' properties with intent to charge the Plaintiffs land to the Investments and Mortgages (I&M) Bank Ltd for Kshs. 60,000,000/= and later on to the 8th Defendant Equity Bank Limited for Kshs. 1.5 billion.....*

29. What the Plaintiffs have now raised are issues of forgeries and criminal acts discovered after the Consent Order. It is on the basis of the new facts that the Plaintiffs seek relief in the present suit.

30. From the foregoing, I find that the subject matter of the former suit and the present suit is the same. Both suits involve the joint venture and all the subsequent transactions which the Plaintiffs now seek to avoid. The parties are same albeit in the present suit, the Plaintiffs have added the Government entities. In essence, the Plaintiffs accuse the Government entities of facilitating the fraud and illegalities in the transfer, subdivision and charging of the subject properties. The reliefs sought against the 9th, 10th, 11th and 12th Defendants are all consequential upon the main reliefs sought against the other Defendants. Fundamentally, the Plaintiffs seek the reversal of all transactions resulting in annulment of the joint venture agreement, incorporation of the 1st Defendant, transfer and subdivision of the subject property all of which will be implemented by the Government entities and revert the suit properties back to them.

31. The addition of parties does not weaken the application of the doctrine of res judicata. The courts have from time to time warned parties

against dressing up a settled case and bringing it up as a new matter with different parties and claiming that new facts have emerged as a result of investigations. In *Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2012* [2012] eKLR I stated that:

[57] The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata'

32. Applying the test whether the Plaintiffs in the second suit are trying to bring before the court in another way and in such form a new cause of action which has been resolved by a court of competent jurisdiction, it is evident that the Plaintiffs now seek to annul all transactions and revert the suit properties back to them. The addition of new parties or framing the cause of action to include facts discovered much later does not dislodge the res judicata drag net.

33. The cause of action against the 8th Defendant is that the title documents used to secure facilities granted to the 1st defendant were generated fraudulently and that the 8th Defendant participated in that fraud. The issue of the 8th Defendant's charge over LR. No. 28223/33 was specifically settled by the para. 12 of the consent where the Plaintiffs agreed that, "the Charge in favour of Equity Bank save for the variations noted above continues to be a valid security and shall not be subject to challenge as result of the guidelines and terms set out hereinabove". Nothing could have been clearer than the 1st Plaintiff admitting that they could not challenge the validity of the securities.

34. In summary, I find and hold that the Defendants have satisfied the essential ingredients of the application of the doctrine of res judicata. The issues being raised by the Plaintiffs in this case were substantially in issue in the former suit, **HCCC No. 352 of 2011** and ought to have been at the time. In any case, the allegations would have been unearthed had the Plaintiffs exercised due diligence since their case is that the transactions were tainted by fraud and illegality. The present suit is essentially between the same parties with the cosmetic addition of Government institutions now raising issues which were determined or ought to have been raised in the suit that was concluded by the Consent Order which settled all the matters that had arisen in respect to the joint venture, the shareholding in the 1st Defendant and the suit property. All the matters which the Plaintiffs allege would have been discovered by due diligence and ought to have been brought forward, since the Plaintiff was challenging the transactions at the time of the previous suit.

Whether the suit is time barred

35. The Defendants contention that the Plaintiffs' claim is time barred is made on the basis that their causes of action based on the torts of fraud, deceit, misrepresentation and accounts are statute barred as they ought to have been brought after the end of 3 years from the date on which the cause of action accrued in accordance with **section 4(3) and (4) of the Limitation of Actions Act** which provides as follows:

4 (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from that date.

(3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

36. The Defendants submitted that the causes of action accrued on or before 10th August 2011 when the 2nd Plaintiff swore her verifying affidavit in **HCCC No. 352 of 2011** affirming the facts set out in her Complaint. They contend that a cause of action premised on fraud should have been brought within a period of 3 years from 2011.

37. Counsel for the 8th Defendant further submitted that **section 26 of the Limitation of Actions Act**, provides that the period of limitation for fraud begins to run when the fraud is discovered or could with reasonable diligence have been discovered. Counsel referred to the decision of the Court of Appeal in *Margaret Wairimu Magugu v Karura Investment Limited and Others [2019] eKLR* where the court cited with approval, *Paragon Finance v D. D. Thackerar and Co. [1999] 1 All ER 400* where the Supreme Court of England stated;

The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could have discovered the fraud without exceptional measures which they could not reasonably have expected to take.

38. In answer to the claim that their suit is time barred, the Plaintiffs reiterated that the fraud was discovered much later following proceedings at the National Land Commission and intensive investigations by its land fraud investigator. They submit that their case is covered by **section 26 of the Limitations of Action Act** as there is no way they would have discovered the fraud as they had been occupying the land peacefully and there had been no adverse claim.

39. As I have stated elsewhere, the Plaintiffs were aware of the joint venture agreement, the Memorandum of Objects and Articles of Association of the 1st Defendant, the various transactions with the 2nd and 3rd Defendants in respect of the suit properties and the charge in favour of the 8th Defendant in respect of LR No. 28223/33 when the 2nd Plaintiff filed previous suit **HCCC No. 352 of 2011** and the 1st Plaintiff filed **HCCC No. 151 of 2007**. The 2nd Plaintiff cannot turn around and say that she did not sign the incorporation documents of the 1st Defendant or its board resolution that approved the borrowing from the 8th Defendant when in fact she proceeded her suit by the Consent Order. Whether she signed the documents or not is a matter of personal knowledge which she ought to have raised at the time she filed the

previous suit.

40. I find and hold the facts relating to accounts, fraud, misrepresentation, deceit and accounts alleged by the Plaintiffs in their Plaint could have been discovered with reasonable diligence within 3 years of 2011 as required by the **Limitation of Action Act**. This suit is therefore time barred and must now be struck out.

Abuse of the court process

41. The 8th Defendant has urged the court to strike out the suit on the ground that it is an abuse of the court process. It accuses the Plaintiffs of using the legal process for ulterior purposes. The 8th Defendant grounded its submission on the fact that **HCCC 352 of 2011** was settled by consent while **HCCC No. 151 of 2017** is still pending hearing and determination.

42. Counsel for the 8th Defendant submitted that in line with the Consent Order, the 2nd Plaintiff was paid a sum of Kshs. 725,619,000.00 in consideration of resigning as a director of the 1st Defendant and forbearing to challenge the charge over LR No. 28233/33 in favour of the 8th Defendant. As she derived a significant benefit from the Consent Order, counsel submitted that it is a manifest abuse of the court process to turn around and challenge the existence of the 1st Defendant and the charge over LR No. 28233/33.

43. As regards **HCCC No. 151 of 2017** which is still pending, the 8th Defendant pointed out that it is an abuse of the court process for him to claim 50 housing units based on the joint venture agreement and then turn around and attack the validity of the joint venture agreement in the same suit.

44. In response to the 8th Defendant's contention that the suit is an abuse of the court process, Counsel for the Plaintiffs submitted that the suit has been instituted fairly and with the sole intention of enforcing the Plaintiffs' rights to the suit property. They asked the court to consider that the issue of forgery of the joint venture agreement arose in March 2018 after which they addressed the Director of Criminal Investigations by a letter dated 7th June 2018. That the Director of Public Prosecution was involved in the matter when he requested for a report from the DCI on 13th April 2018. The Plaintiffs contend that all these facts and subsequent discoveries of forgeries by the 2nd and 3rd Defendants show that not only were new issues raised but also that the issues are substantial and triable. They urged the court not to strike out their claim in order to do justice to the Plaintiffs who have uncovered massive fraud.

45. The court has inherent jurisdiction to strike out a suit if it is an abuse of the court process. Instances or categories of abuse of court process are not closed as was explained by Kimaru J., in **Stephen Somek Takwenyi & Another v David Mbutia Githare & 2 Others NRB ML HCCC No. 363 of 2009 (UR)** cited in **Dr Kiama Wangai v John N. Mugambi and Another [2012] eKLR** as follows:

This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.

46. In this case, I am constrained to agree with counsel for the 8th Defendant that this suit is an abuse of the court process and also add what Lord Diplock stated in **Hunter v Chief Constable of West Midlands Police & Others [1982] AC 529** as follows:

The inherent power which any court of justice must possess to prevent misuse of procedure which, although not inconsistent with the literal procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.

47. The 2nd Plaintiff obtained substantial benefits from the Consent Order. She gave up her interest in the 1st Defendant and undertook not to challenge the charge in favor of the 8th Defendant. She should not be permitted to turn around and in effect unsettle the Consent Order. Likewise, the 1st Plaintiff's claim for 50 houses in the Fourways Junction Estate is still pending in this court. It is predicated on what he considers to be valid transactions. He cannot turn around and maintain another suit with an inconsistent cause of action challenging the very basis of his earlier claim. Allowing these claims to go forward would bring this court into disrepute.

Amendment of the Plaintiff

48. Having reached the conclusion that the Plaintiffs' claim is res judicata, time barred and an abuse of the court process, the application for amendment of the Plaint collapses for the very same reasons. The general principle is that the court will not strike out a suit, if the proposed amendments will breathe life into it. In this instance, the Plaintiffs seek to amend the Plaint in order to join receivers appointed by the 8th Defendant. Nothing is alleged or facts disclosed that would change the conclusions I have already reached. In short, the inclusion of receivers to the suit will not cure the deficiencies in the Plaintiffs' case.

Conclusion

49. Stripped of all legal and factual arguments and niceties, the reality of this matter is that the Plaintiffs entered into a joint venture agreement with the 2nd and 3rd Defendants and incorporated the 1st Defendant. The 1st Defendant then entered into several transactions involving the Plaintiffs' property which was transferred to the 1st Defendant including the charging LR No. 28223/33 to the 8th Defendant. All these transactions, which were necessary for the development of the Fourways Junction Estate, were consummated and blessed by the 2nd Plaintiff when she compromised **HCCC No. 352 of 2011**. Under the Consent Order she took substantial benefits, including land and money, for herself. On his part, the 1st Plaintiff, based on the same joint venture agreement has made his claim for houses in **HCCC No. 151 of 2017** which is still pending. All the issues in this case were or ought to have been litigated in the previous suits.

50. I have found that the Plaintiffs' suit is barred by the doctrine of res judicata, it is also time barred under the *Limitation of Actions Act* and is an abuse of the court process. It cannot be saved even by a generous application of **Article 159** of the Constitution which enjoins this court to do substantive justice as those objections go not only to the competence of the suit but also to the jurisdiction of the court to entertain the claim.

51. Consequently, I allow the 8th Defendant's application dated 13th May 2020, dismiss the Plaintiffs' application dated 28th February 2020. The 1st to 7th Defendant's preliminary objection dated 26th November 2019 also succeeds.

Disposition

52. The net result is that the Plaintiffs' suit be and is hereby struck out with costs to the Defendants. For avoidance of doubt all the interim orders in force are hereby discharged.

DATED and DELIVERED at NAIROBI this 30th day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Hon. Muite, SC with him Mr Gathemia, Mr Makori and Mr Kamau instructed by Gatheru Gathemia and Company Advocates for the Plaintiffs.

Mr Ouma instructed by Murgor and Murgor Advocates for the 1st to 7th Defendants.

Mr Kimani, SC with him Mr Ondieki instructed by Hamilton Harrison and Mathews Advocates for the 8th Defendant.

Mr Kamau, State Counsel instructed by the Office of the Attorney General for the 9th, 10th and 11th Defendants.

Mr Mare instructed by Miller and Company Advocates for the 12th Defendant.