IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 29 OF 2014

IN THE MATTER OF ARTICLE 10, 22, 23, 73, 165, 210 (1) AND 258 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMETAL FREEDOMS ARTICLE 19, 20, 27, 28, 29, 35, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

STEP UP HOLDINGS (K) LTD.....1ST PETITIONER

BERNARD GIKUNDI MWARANIA.....2ND PETITIONER

MARGARET KARIRWA MWONGERA.....3RD PETITIONER

VERSUS

SIMON NYUTU GICHARU..... 1ST RESPONDENT

MOUNT KENYA UNIVERSITY.....2ND RESPONDENT

MT. KENYA UNIVERSITY TRUST

REGISTERED TRUSTEE..... 3RD RESPONDENT

BANKING FRAUD INVESTIGATING UNIT.....4TH RESPONDENT

THE CENTRAL BANK OF KENYA..... 5TH RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS....6TH RESPONDENT

THE DIRECTOR GENERAL OF POLICE.....7TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....8TH RESPONDENT

THE HON. ATTORNEY GENERAL.....9TH RESPONDENT

THE CHIEF MAGISTRATE'S COURT, NAIROBI.....10TH RESPONDENT

THE KENYA REVENUE AUTHORITY.....11TH RESPONDENT

THE COMMISSIONER GENERAL, KRA..... 12TH RESPONDENT

FAMILY BANK LIMITED..... 13TH RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU.....14TH RESPONDENT

SAMUEL KARIUKI KANYORO.....15TH RESPONDENT

FELIX MALUKI.....16TH RESPONDENT

(Sued on their own behalf and as the chairman and secretary on

Behalf of the Milimani Residents (Nakuru) Welfare Association)

RULING

1. The 1st Petitioner is a Limited Liability Company limited by shares having its registered office at Nakuru within the Republic of Kenya. The 2nd Petitioner is a male adult resident in Nakuru County and a director of the 1st Petitioner. The 3rd Petitioner is a female adult resident in Nakuru and a director in the 1st petitioner.

2. The Petitioners filed the Petition dated 9th of April 2014, seeking a wide range of declaratory and other orders against the Respondents. The substratum of their case is a Memorandum of Understanding (MOU) they say the 1st Petitioner entered into with Mount Kenya University to run a Nakuru Campus of the university. The Petitioners state that they established the campus. They say that by the terms of the MOU, the financial obligation to the 2nd Respondent was limited strictly to payment and receipt of collaboration fees. This was apparently paid. According to the Petitioner, in March 2011, the two parties reached a verbal agreement to open a branch in Kericho town. However, the Petitioners claim that on or about 21st of April 2011, the 2nd Respondent caused the 1st Petitioner to close the Kericho centre. This, the Petitioners say, resulted in loss of Kshs 953,881. They further state that because of the actions by the respondents they incurred losses.

3. The Petitioners' claim is that the 1st, 2nd and 3rd Respondents schemed to take over the Mount Kenya University Campus from the 1st Petitioner illegally and in contravention of the MOU. As per the Petitioners, the "illegal take over" was executed on 26/09/2011 when the 1st, 2nd and 3rd Respondents relocated 3807 students and 295 members of staff of the 1st Petitioner from the 1st Petitioner's premises and control to premises at Resma Plaza in Nakuru town leased by the 1st, 2nd and 3rd Respondents.

4. The Petitioners maintain that following this "illegal take-over", the 1st, 2nd and 3rd Respondents enlisted the services of the other Respondents to violate the rights of the Petitioners, and, in particular, to deny them the access to and peaceful enjoyment of their property. The Respondents also, allegedly harassed, intimidated and acted oppressively towards the Petitioners. Following this, the Petitioners filed at least four suits against different sets of Respondents to ventilate their rights. The 13th Respondent also filed a suit against the 1st Petitioner related to this same controversy. The five suits which pre-date the present one are as follows:

a. ***Nakuru HCCC No. 306 of 2011***: This is a suit brought by the 1st Petitioner to challenge the freezing of its account with the 13th Respondent.

b. ***Nakuru Judicial Review No. 3 of 2012***: This is a suit filed by the 1st Petitioner seeking the quashing of an order obtained by the Banking Fraud Investigations Unit freezing the accounts of the 1st Petitioner.

c. ***Nakuru Judicial Review No. 59 of 2012***: This is a suit instituted by the 1st Petitioner seeking the quashing of a tax demand by the 11th Respondent.

d. ***Nakuru HCCC No. 201 of 2012***: This is a suit filed by the 13th Respondent against the 1st Petitioner seeking for orders freezing the accounts of the 1st Petitioner.

e. ***Nakuru HCCC No. 245 of 2011***: This is a suit filed by the 1st Petitioner against the 2nd Respondent. It seeks a declaration that the "take-over" of the Mount Kenya Nakuru Campus was illegal, in contravention of its property rights and in breach of the MOU. In the main, the suit seeks vacant possession of the facilities as well as damages for breach of contract.

5. The Petitioners readily admit that all these five suits as well as the present one are rooted in the MOU and its alleged breach by the 1st, 2nd and 3rd Respondents. Of the five suits which pre-dated the instant one, only one has been concluded and a final judgment issued. This is ***Judicial Review No. 59 of 2012***. In that case, the 1st Petitioner failed to get the orders the sought against the 11th Respondent; its application to have the tax demand notice by the 11th Respondent was dismissed. All the other four suits are pending before the High Court. In ***HCCC No. 245 of 2011***, the 1st, 2nd and 3rd Respondents brought an application to have the matter referred to arbitration pursuant to the MOU. The Court declined. The 1st, 2nd and 3rd Respondents appealed to the Court of Appeal and obtained an order for stay pending the hearing and determination of the appeal.

6. It is fair to say that the present suit aggregates all the defendants/Respondents in the previous five suits and, to a large extent, cumulates the grievances by the Petitioners against all the Respondents. It also contains what can be termed as new prayers for relief styled in the constitutional petition format. The suit contains a whooping twenty-nine prayers for relief. Additionally, one of the prayers has eleven sub-prayers for monetary relief. It is unnecessary to present all the thirty-something prayers for relief here.

7. In response to the present suit, four of the Respondents have filed Notices of Preliminary Objections raising various issues.

8. The 1st, 2nd and 3rd Respondents are all represented by the firm of Mirugi Kariuki & Co. Advocates. They filed a Notice of Preliminary Objection dated 9th of May 2014. It is in the following terms:

a. The entire petition is bad in law, grossly incompetent and vexatious.

b. The entire petition is an abuse of the process of the court.

c. The entire stratum of the suit is founded upon matters pending before the High Court and specifically the following cases.

i. Nakuru HCCC No. 245/2011 Step Up Holding Vs Mt. Kenya University.

ii. Nakuru HCCC No. 306 of 2011 Step Up holdings (K) Ltd Vs Family Bank Ltd.

iii. Nakuru H. C Judicial Review No. 3 of 2012 Step Up Holding Vs Director of Public Prosecution, Bank Fraud Unit and Mount Kenya University.

iv. Nakuru HCCC No. 201 of 2012 Family Bank Ltd Vs Step Up Holdings

v. ***Nakuru Judicial Review No. 59 of 2012 Republic V Kenya Revenue Authority ex parte Step Up Holdings (K) Ltd.***

d. The matters raised are therefore *sub judice* and intended to divert the course of justice.

e. The 1st, 2nd and 3rd Respondents argue that the Petitioners are guilty of non-disclosure of material facts primarily because they filed HCCC No. 245 of 2011 seeking specifically eviction of the 2nd Respondent from their premises and further pleaded they had no problem if the 2nd defendant took over staff and students of Mount Kenya University. The 1st, 2nd and 3rd Respondents shall rely on the ***Andria (vaseo) 1984 IQB 477*** and ***Republic Vs Kenningston income Commissioner exparte Princess Edmond Porignat 1971 IKB 486.***

f. The entire petition is calculated to circumvent the orders of stay of proceedings pending appeal granted in ***Nakuru HCCC No. 245 of 2011.***

g. The suit against the 1st Respondent is grossly incompetent and abuse of process of court. There is no and has never been any association, contract, undertaking or any other relationship whatsoever between the petitioners and the 1st Respondent. The suit against him is therefore vexatious, misconceived and only intended to embarrass the 1st Respondent.

h. The High Court has no jurisdiction to supervise proceedings pending before another Court which is of concurrent and co-ordinate jurisdiction. The current petition disguised as a constitutional petition is indeed an invitation to exercise supervisory jurisdiction over other High Courts.

9. The 5th respondent in their Notice of Preliminary Objection dated 18th of June 2014, applies to have its name struck out of the proceedings since there is no allegation or violation of any rights of the petitioner by the said respondent.

10. The 13th Respondent in its Notice of Preliminary Objection filed on the 6th of November 2014, raise the following grounds:

a. To hear and determine the issues raised in the petition would be tantamount to this court siting as a court of appeal exercising supervisory powers over the High Court, a jurisdiction not under the Constitution of Kenya

b. All the allegations of fact and law made by the petitioners herein against and in relation to the 13th Respondent revolve around the following cases pending for determination before this honourable court

i. Nakuru High Court Civil Case no. 306 of 2011

ii. Nakuru High court Civil Case No. 201 of 2012.

c. The jurisdiction vested in this honourable court by Articles 22, 23, 165 and 258 is inapplicable and does not lie against the 13th Respondent.

d. The petitioners are guilty of non-disclosure of material facts or have withheld the same, that is to say, the existence of valid and binding consent orders filed or recorded in ***Nakuru High court Civil Case No. 201 of 2012.***

e. The prayers ought do not lie and ae incompetent given the existence of the aforesaid consent Orders on the basis of the doctrine of *res judicata* and/ or precluded by record estoppel until full hearing and determination of ***Nakuru High court Civil Case No. 201 of 2012.***

f. The petition and application is incompetent and bad n law for hopelessly mixing numerous causes of action and improperly joining causes of action and parties which will defeat the constitutional promise of fair and expeditious administration of justice.

g. The petitioners already invoked, are the subject of or are free to invoke the various alternative remedies and reliefs that are available in law for the correction of the type of wrongs alleged against the 13th Respondent herein. The present petition is therefore not proper forum for the litigation of the sad wrong

h. The Petition as drawn and filed will lead to miscarriage or failure of justice since the issues raised in the same require *viva voce* hearing and the safeguards of discovery in a full trial and the examination of numerous witnesses and several documents all of which are inappropriate for a petition with the result that justice will be denied, delayed and made extremely expensive for the 13th respondent without assurance as to recovery of any costs

They pray that the petition be struck out *in limine* with cost to the 13th Respondent

11. The 14th Respondent in its Notice of Preliminary Objection which is undated and filed on the 4th of July 2014, raise the following grounds:

a. The matters impleaded by the petitioner are Res Judicata and this court has no jurisdiction to try them the same having been directly and substantially in issue in ***High Court Civil Case no 71 of 2011- Samuel K. Kanyoro & another v. Mt Kenya University College & 2 others*** whereupon Consent Order.

b. The petition seeks to circumvent the pleadings and consent recorded in ***High Court Civil Case no 71 of 2011- Samuel K. Kanyoro & another v. Mt Kenya University College & 2 others*** is a clear abuse of the process

c. In furtherance of the overriding objectives of the Civil Procedure Act and the rules thereto and for the timely disposal of the proceedings that this court looks at the decision made by the same High Court in ***High Court Civil Case no 71 of 2011- Samuel K. Kanyoro & another v. Mt Kenya University College & 2 others*** dismiss this suit as an abuse of the process of the court as the matter pleaded in this suit are panel beaten and recast issues that were previously determined.

12. The history of hearing the present Preliminary Objection has been quite attenuated. The Preliminary Objection was initially part-heard by the Learned Lady Justice Mshila. Thereafter, some controversy arose as to the actual directions given by the Learned Judge. This ultimately led to an application by the Petitioners for Lady Justice Mshila to recuse herself from the case. In a considered ruling dated 31/07/2015, the Learned Judge dismissed the Application. However, she was shortly thereafter transferred from the Court Station. Ultimately, it became incumbent upon me, having arrived at the Station in May, 2018, to take over the hearing of the Suit. With the concurrence of the parties, I gave directions that I will deliver a ruling on the Preliminary Objection only based on the Written Submissions of the parties and the other materials filed in Court – and not based on the oral arguments made before the Learned Justice Mshila.

13. All the parties have filed voluminous submissions. However, in my view, the various Preliminary Objections filed, can be categorized into three questions for determination:

a. Is the instant suit *sub judice* and/or *res judicata*?

b. Is the instant suit otherwise an abuse of the process of the Court?

c. Does entertaining the present suit amount to asking this Court to supervise other divisions of the High Court?

d. Is the suit otherwise fatally defective for misjoinder and/or for not being sufficiently precise in stating the constitutional claims?

14. For reasons that will become clear shortly, I have discussed these questions contemporaneously rather than distinctly demarcate them because they easily bleed into one another.

15. The parties do not really disagree on the technical requirements for the operation of the doctrines of *sub judice* and *res judicata*. The real issue is whether either doctrines applies to the facts of this case.

16. Section 7 of the Civil Procedure Act provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

17. This section, of course, codifies the doctrine of *res judicata* in Kenya. Our case law has now distilled the essential ingredients of the doctrine – see, for example, ***Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd)*** **& 2 others [2014] eKLR**; ***Kamunye & others v Pioneer General Assurance Society Ltd*** **[1971] E.A. 263 and** ***John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others*** **[2015] eKLR**. There are, restated, four ingredients:

a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?

b. Are the parties in the present suit the same as those who litigated the original claim?

c. Did the Court which determined the original claim have jurisdiction to determine the claim?

d. Did the original action receive a final judgment on the merits?

18. As aforesaid, only one of the other five suits, to wit ***Nakuru Judicial Review No. 59 of 2012 Republic V Kenya Revenue Authority ex parte Step Up Holdings (K) Ltd.*** has been determined on its merits. In the case, the *Ex Parte* Applicant sought the following orders against the Kenya Revenue Authority who are the 11th and 12th respondent:

a. ***That this honorable court be pleased to issue an order of Certiorari to remove into the High Court and quash the decision of the Kenya Revenue Authority dated 10th August, 2012 demanding that the subject pays Kshs. 25,690,397/= being alleged tax arrears, interest and penalties.***

b. ***That his honorable court be pleased to issue an order of prohibition to stop the Respondent from demanding from the subject Ksh 25,690,397/= alleged to be tax arrears, interest and penalties;***

19. The Court declined to issue both these orders and dismissed the suit. These same prayers have found their way into the present suit as prayers (q) and (r) in the Petition. There is no question these aspects of the suit are res judicata. Nothing more needs to be said about this.

20. What about the other cases which are yet to be heard and determined on their merits? The most important one is ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mt Kenya University***. This case is yet to be determined. As stated earlier, the Defendant in the case (the 2nd Respondent), applied to have the matter referred to arbitration arguing that the MOU provided for an arbitration clause. The Court overruled this objection and ruled that it had jurisdiction to entertain the suit. The 2nd Respondent appealed to the Court of Appeal and obtained an order for stay of the proceedings in the High Court. The stay orders are still in existence.

21. A close reading of the prayers in that suit against the present one reveals the following:

a. In ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mt Kenya University*** there is a prayer for "*A declaration that the takeover of Mt. Kenya University Nakuru Campus by the defendant is illegal and blatant violation of the plaintiff's proprietary rights.*" This is similar to the prayer in paragraph (h) of the instant suit.

b. In ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mt Kenya University*** there is a prayer for "*Declare the defendant to be in breach of the parties MOU and order the defendant pay the plaintiff damages for breach.*" This is similar to the prayer in Paragraph (n) (ii) in so far as it talks of loss of income.

c. In ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mt Kenya University*** there is a styled as "*Noting that the defendant is in the final stages of taking over the campus direct the defendant to pay the plaintiff Kshs 312, 409, 575 for the 2778 students studying at the campus as at September 2011.*" This is similar to the prayer in paragraph (n) (iii) in so far as it talks of the money relating to the students that the 1st petitioner had in the campus/ university

d. In ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mt Kenya University*** there is a prayer for "*The defendant to pay the plaintiff premium of Kshs 197,700,000 for the good will and positive image created by the plaintiff for the campus/ university in Nakuru and the region.*" This is similar to the prayer in paragraph (n) (i) in so far as it talks of the value in terms of good will and image of the campus created by the 1st Petitioner.

e. In ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mt Kenya University*** there is a prayer for "*Since the MOU had a life of 10 years and on which basis the plaintiff in the campus, the defendant to compensate the plaintiff for losses of opportunity for the remaining 7 years.*" This is similar to the prayer in paragraph (n) (ii) in so far as it talks of the remaining duration of the MOU.

f. In ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mt Kenya University*** there is a prayer that "*The defendant to compensate the plaintiff for losses incurred in the Kericho centre.*" This is similar to the prayer sought in paragraph (n) (iv) in so far as it talks of the losses incurred in the Kericho Centre.

22. From this analysis, it is readily obvious that substantially all the prayers in ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mt Kenya University*** (other one – a prayer for vacant possession of the subject premises) are also prayers in the instant suit. This makes these aspects of the case *sub judice* and raises the question whether these aspects of the case should be determined in the earlier filed suit.

23. There is also ***Nakuru HCCC No. 306 of 2011: Step-Up Holdings v Family Bank Ltd***. The core prayers in that suit are to seek the reopening of bank accounts frozen by the 13th Respondent and damages – special and general -- for the freezing which the 1st Petitioner deems illegal. These prayers are quite similar to prayers (h), (i) and (x) in the instant Petition. These three prayers, in essence, seek for a declaration that the freezing of the accounts or any other form of interference with the accounts belonging to the 1st Petitioner by the 13th Respondent were a violation of their right to property as guaranteed by the Constitution. The counterclaims by the 1st Petitioner who is the named defendant in ***Nakuru HCCC No. 201 of 2012: Family Bank v Bernard Gakundi Mwarania & 6*** Others further accentuate the underlying common foundation and similarity of the prayers related to the freezing of the account.

24. Finally, in ***Nakuru Judicial Review No. 3 of 2012: R v Banking Fraud Investigations Unit & 3 Others ex parte Step-Up Holdings (K)***

Ltd, the 1st Petitioner sought an order of certiorari quashing an order from the Milimani Chief Magistrate's Court freezing some accounts of the 1st Petitioner at the instance of the 4th Respondent. It also sought a prohibition against any decision by the Banking Fraud Investigations Unit to investigate further the accounts. These, in slightly different formats, are the self-same reliefs sought in prayers (o) and (p) of the present Petition.

25. What the above analysis unmistakably shows is the following:

a. Prayers (q) and (r) are eminently *res judicata*; and

b. Prayers (a); (h); (i); (l); (m); (n); (o); (p); and (x) are *sub judice*.

26. What about the other sixteen substantive prayers? Are they sufficient to parry away the claim that the whole of the present suit is either res judicata or sub judice? I am not persuaded so. This is because all the other prayers are actually derivate prayers for relief based on the foundational claims that are already canvassed in the existing suits. What this means is that all the other reliefs could have been prayed in the other suits where their core causes of actions arose. There was nothing that debarred the Petitioners from making the prayers in those suits. Couching the prayers in constitutional garb does not transglorify them into special category of claims which sit atop the hierarchy of causes of action. When claims have a constitutional hue derivatively from an underlying relationship or distinct cause of action, those claims should be brought as part of the essential cause of action and not strategically carved out to be sprung on hapless Respondents as a "purely" constitutional cause of action. This piecemeal approach to ventilating rights is not only inefficient because it bogs down the Courts with multiple cases from the same transactions but it is also an abuse of the process of the Court because it forces the same Respondents to mount defences to the same claims more than once.

27. In the present case, the state of affairs respecting ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mount Kenya University*** makes this a clearer case of abuse of the process of the Court. In that case there is a stay in place which will remain in place until an Appeal filed by the 3rd Respondents is argued and determined. Yet, the effect of the present suit, if it is to move forward will be to litigate and adjudicate the very issues which have been stayed in that other suit. Needless to say, this would be a back-door way to achieve that which is prohibited by the Court order in ***Nakuru HCCC No. 245 of 2011: Step-Up Holdings v Mount Kenya University.***

28. In a very real sense, therefore, what the Petitioners have done, as argued by the Respondents, is to consolidate and aggregate their existing suits filed in the High Court into one constitutional case. This invites the spectre adumbrated by the Respondents that the Petitioners are, in fact, asking this Court, sitting as a Constitutional Division, to "supervise" the other divisions of the High Court where the other suits are docketed. Needless to say, this would be improper. As stated above, the correct course of action is for the Petitioners to plead and try the derivative constitutional claims as part of the causes of actions they have urged in their earlier suits. The various Courts hearing those other suits have the jurisdiction to deal with any constitutional issues arising from those suits.

29. One may ask, fairly so, why not treat the present suit as a functional application to consolidate all the suits and permit it to proceed as a more efficient and efficacious way to contemporaneously deal with all the controversies among the parties? In my view, even if one were to charitably view this suit in that manner, it would still be inappropriate for at least three reasons. First, as aforesaid, there are some aspects of the presented suit which have already been adjudicated and determined. Second, the core controversies between the core litigants are so fact-intensive that a constitutional petition would be an inappropriate procedural vehicle for establishing the facts and their legal signification. Third, such consolidation would spawn rather than reduce the potential for confusion in trying to resolve the controversies among the parties. This is because, while the underlying cause of action is based on contract (between the 1st Petitioner and the 3rd Respondent), many of the other claims originate from independent actions taken by the Respondents only tangentially related to the original cause of action. For example, it would be unhelpful, to say the least, for the Petitioners' suit against the Banking Fraud Investigations Unit which seeks to quash a judicial decision freezing the Petitioners' accounts to be determined alongside the contractual claim between the 1st Petitioner and the 3rd Respondent. Not only are the factual predicates of the suits radically different; so are the bodies of law applicable to the two sets of controversies.

30. One last issue I should comment on is whether the suit is ripe for dismissal merely on the argument that there is a misjoinder of parties. Both the 1st Respondent and the 5th Respondent have argued that they should be struck out of the proceedings. For the 5th Respondent, the argument is that there is simply no allegation by the Petitioners against it at all. The 5th Respondent outlined the eight instances in which it has been mentioned in the very long Petition. It has demonstrated that in none of those instances is the 5th Respondent mentioned under an allegation that it had in any way violated the rights of the Petitioners. Indeed, this is made clear in that the 5th Respondent is not mentioned anywhere in the consequential paragraphs which set out the particulars of constitutional violations and/or discrimination as alleged by the Petitioners.

31. Consequently, it follows that there is really no case against the 5th Respondent. Its inclusion in the suit was gratuitous at best.

32. The 1st Respondent's position is a little different. His argument is that he should not be sued personally for actions admittedly taken by the corporate entity known as Mount Kenya University for which he was acting, to the knowledge of the Petitioners. The Petitioners have responded that in stating the alleged constitutional violations, they necessary implicate the 1st Respondent in his personal capacity – and that it is only upon determination of the case on its merits where it would be clear whether the 1st Respondent should be held liable in his personal capacity or not.

33. I would be willing, very tentatively, to accept this line of reasoning even while pointing out that it is really tenuous. When one looks at the bill of allegations made by the Petitioners, it is difficult to see the personal liability of the 1st Respondent rearing its head. In any event, this issue is moot given my ultimate disposal of the case.

34. **In the end, I find the various Preliminary Objections raised in the matter to be merited. For the reasons stated above, the suit is**

struck out in its entirety for being *res judicata, sub judice* and being otherwise an abuse of the process of the Court.

35. **The Respondents shall have the costs of the suit**.

36. Orders accordingly.

Dated and delivered at Nakuru this 30th day of May, 2019.

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JOEL NGUGI

JUDGE