



Paragon Electronics Limited & another v I&M Bank Limited (aka Investment And Mortgage Bank); Velos Enterprises Limited & 2 others (Interested Parties) (Environment & Land Case E315 of 2022) [2023] KEELC 20834 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E315 OF 2022
JO MBOYA, J
OCTOBER 16, 2023**

BETWEEN

PARAGON ELECTRONICS LIMITED 1ST PLAINTIFF

BULENT GULBAHAR 2ND PLAINTIFF

AND

I&M BANK LIMITED (AKA INVESTMENT AND MORTGAGE BANK) DEFENDANT

AND

VELOS ENTERPRISES LIMITED INTERESTED PARTY

NAIROBI CITY COUNTY GOVERNMENT INTERESTED PARTY

THE CHIEF LAND REGISTRAR MINISTRY OF LANDS INTERESTED PARTY

RULING

Introduction And Background:

1. The Plaintiffs’ herein filed and/or commenced the instant suit vide Plaint dated the 26th September 2022; and in respect of which same have sought for various reliefs, whose details are as hereunder;
 - i. A declaration that the Defendant, I&M Bank (formerly known as Investment and Mortgage Bank), violated its fiduciary duty, abused the trust, by knowingly assisting the 1st Interested Party in the fraudulently and illegal sub-division of the Property known as L.R. No 209/16027 and thereby causing it to cease to exist.
 - ii. A declaration that the Charge by the 1st Interested Party in favour of the Defendant over L.R. No 209/19116; including the 1st Plaintiff’s Property, in the amount of Kshs 301,000,000.00



(Kenya Shilling Three Hundred One Million), was unlawful and fraudulent and thus null and void; and the Interests and all benefits earned by the Defendant from the loan facility secured by the charge amounts to unjust enrichment.

- iii. An order directing the Defendant, 1st, 2nd and 3rd Interested Parties, at their absolute and sole costs, to take all necessary steps within 30 days to reinstate the property to its original state, being Land Reference No 209/16027, and to discharge the illegal charge in the amount of Kshs. 301,000,000.00 (Kenya Shilling Three Hundred One Million) and any other illegal and unlawful Encumbrances registered over the 1st Plaintiff's property.
 - iv. An order directing the Defendant to pay to the 1st Plaintiff the sum of Kshs. 4,500,000 Only, (Kenya Shillings Four million five hundred thousand) per month, on or before 5th of each Month, for being the Loss of use and enjoyment of the property as an Asset at a rate of 12% of the value of the property at Kshs. 450,000,000.00 Only, (Kenya Shillings Four Hundred Fifty Million) as long as the orders in (c) above is not complied with after 30 days of Judgment.
 - v. In the alternative to (c) and (d) above; an order directing the Defendant to pay the 1st Plaintiff the sum of Kshs. 450,000,000.00 Only, being the market value of the suit property as of January 2021, within 30 days of the Judgment and thereafter assume ownership of the suit property, being Apartment Block 1C, on LR No. 209/16027.
 - vi. An order directing the Defendant to pay the Plaintiff the sum of USD 1,286,070.43 Only, for having incurred interest and charges between 5 October 2016 and October 2021 on account of the Defendant's blatant refusal and or failure to discharge the 1st Plaintiff's property.
 - vii. An order directing the Defendant to pay the Plaintiff the sum of Kshs. 361,200,000.00 Only, (Kenya Shillings Three Hundred Sixty One Million) as restitution for illegal gains and unjust enrichment on account of the illegal and fraudulent charge of the sum Kshs. 301,000,000.00 Only, (Kenya Shilling Three Hundred One Million) over the 1st Plaintiffs property.
 - viii. Exemplary Damages against the Defendant proposed at Kshs. 100,000,000.00 Only, (Kenya Shillings One Hundred Million) on account of the Defendant's aggravated fraudulent conduct, including but not limited to abuse of trust, breach of fiduciary duty, intentional deception, false and material misrepresentation, concealment, non-disclosure of material facts; and contempt of Court.
 - ix. Interest on the sums in all the above sums at the rate of 25% being the current I&M Banks' own lending rate plus applied penalty rate until payment in full.
 - x. Costs of the suit on full indemnity basis
2. Following the filing of the instant suit, the 1st Interested Party filed and/or lodged an Application dated the 5th May 2023; wherein the said Interested Party has sought for the following reliefs;
 - i. The 1st Interested Party/Applicant be struck out from this suit.
 - ii. The costs of the Application be awarded to the 1st Interested Party/Applicant
 3. On the other hand, the 2nd Interested Party took out a Notice of Preliminary Objection dated the 8th December 2022; and in respect of which, same has contended as hereunder;
 - i. THAT this Honourable Court does not have Jurisdiction to entertain this matter.
 - ii. THAT this is a Commercial Dispute, within the Jurisdiction of the High Court; and as such the Environment and Land Court does not have Jurisdiction to hear and determine it.



4. Owing to the fact that both the Application and Preliminary Objection touched on the propriety and/or competence of the suit, in one way or the other, the Parties herein agreed to have both the Application and the preliminary objection to be canvassed and/or disposed of simultaneously.
5. Furthermore, the advocates for the respective Parties also covenanted to have both the Application and Preliminary objection to be canvassed by way of written submissions. Consequently and in this regard, the court proceeded to and set timelines for the filing and exchange of the written submissions by the Parties.

Parties' Submissions:

a. 1ST Interested Party's Submissions:

6. The 1st Interested Party filed written submissions dated the 15th August 2023; and in respect of which same has highlighted and canvassed two issues for consideration by the court.
7. First and foremost, Learned counsel for the 1st Interested Party has submitted that the Plaintiff's suit as against the 1st Interested Party does not disclose any reasonable cause of action or at all. In this regard, Learned counsel has contended that in the absence of a reasonable cause of action, the joinder of the 1st Interested Party has been taken in vacuum and hence the suit as against the 1st Interested Party ought to be struck out.
8. Secondly, Learned counsel for the 1st Interested Party has also submitted that the joinder of the 1st Interested Party was made and/or undertaken without an order of the court having been procured and obtained in the first instance. In this respect, Learned counsel for the 1st Interested Party has submitted that in the absence of an order for joinder, the suit as against the Interested Party is therefore incompetent and legally untenable.
9. In this regard, Learned counsel has cited and relied on various cases, inter-alia, Gladys Nduku Nthuki vs Letsego Kenya Ltd; Mueni Charles Maingi (Interested Party) (2022)eKLR, Turn Gas Distributors Ltd vs Saaid & Others (2014) EA 448 and Joseph Njau Kingori vs Robert Maina Chege & 3 Others (2002)eKLR, respectively.
10. Premised on the foregoing, Learned counsel for the 1st Interested Party has therefore implored the court to find and hold that the joinder of the 1st Interested Party is irregular and illegal and thus the name of the 1st Interested Party ought to be struck out from the proceedings.

b. The 2nd Interested Party's Submissions:

11. The 2nd Interested Party filed written submissions dated the 8th December 2022; and same has raised and canvassed one issue for due consideration by the court. For coherence, learned counsel for the 2nd Interested Party has contended that this Honorable court is devoid of the requisite Jurisdiction to entertain and adjudicate upon the subject suit.
12. Furthermore, Learned counsel has contended that the issues in dispute touches on a charge and subsequent discharge of charge registered over L.R No. 209/16027 and L.R No. 330/355, respectively in favor the Defendant.
13. Additionally, Learned counsel for the 2nd Interested Party has contended that the issues pertaining to charges and discharge of charge do not fall within the purview of "use" of land and hence any dispute that touches on and/or concerns registration of charges, validity thereof, as well as discharge of charge therefore do not belong to the Environment and Land court.



14. In support of the foregoing position, Learned counsel for the 2nd Interested Party has cited and relied on inter-alia, the case of Patrick Kang'ethe Njuguna & 4 Others versus Cooperative Bank Ltd (2017)eKLR; Thomas Mutuku Kasue versus Housing Finance Co Ltd (2023)eKLR; and Southern Star Housing Ltd versus Vanasio Ntwiga (2021)eKLR, respectively.
15. In view of the foregoing, Learned counsel for the 2nd Interested Party has therefore implored the Honourable court to find and hold that this court is divested of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute, which essentially touches on and concerns the issue of the charge; and discharge of charge pertaining to the suit Properties.

c. Plaintiff's Submissions:

16. The Plaintiff filed written submissions dated the 20th September 2023; and in respect of which same has raised and canvassed one issue, namely, whether the court is seized of the requisite Jurisdiction to entertain and/or adjudicate upon the subject matter.
17. Instructively, Learned counsel for the Plaintiff has submitted that the issue in dispute touches on and/or concerns the illegal and improper charge which has been created over and in respect of the suit property by the Defendant, albeit at the instance of the 1st Interested Party; and which charge has therefore denied and deprived the Plaintiffs' of their lawful rights to and in respect of the suit properties.
18. Furthermore, Learned counsel for the Plaintiffs' has submitted that the dispute beforehand does not strictly relate to enforcement of a charge or discharge of charge, but to the contrary, same relates to the protection of the Plaintiffs' rights to and in respect of the suit properties, which were fraudulently and illegally registered in the name of the 1st Interested Party.
19. At any rate, Learned counsel for the Plaintiffs' has also submitted that the Plaintiffs herein could not properly challenge the validity of the registration of a charge on her property in favor of Third Party at the High Court. For good measure, Learned counsel for the Plaintiffs' has contended that the challenge pertaining to the validity touching on the registration of the charge, could only be taken and canvassed before this court, namely, the Environment and Land Court.
20. Additionally, Learned counsel for the Plaintiffs' has submitted that the Honorable High Court has no Jurisdiction to determine whether the acts or omissions complained of have infringed upon the Plaintiffs' Rights to property as enshrined in *the Constitution*, 2010.
21. In view of the foregoing, Learned counsel for the Plaintiffs' has submitted that the dispute beforehand was duly and lawfully placed before the Environment and Land court, which is seized of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.
22. Lastly, Learned counsel has submitted that the issue pertaining to charges and discharge of charges, falls within the Jurisdiction and mandate of the Environment and Land court; and hence it is this court that has the requisite Jurisdiction to entertain the subject suit.
23. In support of the submission that it is this court that is seized of the requisite Jurisdiction to entertain the subject suit, Learned counsel for the Plaintiffs' has cited and relied on inter-alia the case of Lydia Nyambura Mbugua versus Diamond Trust Bank Ltd & Another (2018)eKLR; Alfonse Yankulige versus One Twiga Road Ltd & 2 Others (2019)eKLR; and Bank of Africa of Kenya Ltd vs John Ndungu Gachara (2021)eKLR, respectively.



24. In a nutshell, Learned counsel for the Plaintiffs' has therefore submitted that the Preliminary objection filed by and on behalf of the 2nd Interested Party, is therefore devoid and bereft of merits and hence ought to be dismissed.

d. The 3rd Interested Party's Submissions:

25. The 3rd Interested Party filed written submissions dated the 15th August 2023; and in respect of which, same has raised, highlighted and canvassed two (2) issues for consideration by the Honourable court.

26. Firstly, Learned counsel for the 3rd Interested Party has submitted that the 3rd Interested Party herein only provides offices and forum for registration and administration of certain Land transactions situate within her Jurisdiction. Furthermore, counsel has added that save for the facilitation which are provided for under the law, the 3rd Interested Party does not engage herself in the acts and/or omissions which have been alluded to and/or enumerated at the foot of the Plaintiff.

27. Secondly, Learned counsel for the 3rd Interested Party has contended that the Environment and Land court is not seized of the requisite Jurisdiction to adjudicate and entertain upon the subject dispute which is contended to be purely a Commercial dispute. To the contrary, Learned counsel has contended that the dispute beforehand ought to have been filed before the High Court for effective hearing and determination.

28. Lastly, Learned counsel for the 3rd Interested Party has submitted that the issues being raised at the foot of the Plaintiff beforehand have hitherto been heard and determined vide Nairobi HCC No. 285 of 2010; between Velos Enterprises Ltd versus Paragon Electronic Ltd. Consequently and in this regard, Learned counsel has invited the court to find and hold that the instant suit is prohibited by the Doctrine of Res-Judicata.

29. Arising from the foregoing, Learned counsel for the 3rd Interested Party has thereafter invited the Honourable court to find and hold that the entire suit beforehand ought to be struck out and/or in the alternative, to be dismissed with costs.

e. The Defendant's Submissions:

30. The Defendant herein filed written submissions dated the 21st July 2023; and in respect of which same has raised and canvassed two (2) issues for consideration by the court. Firstly, Learned counsel for the Defendant has submitted that the Application by and on behalf of the 1st Interested Party/Applicant and wherein same seeks to have her name expunged from the suit herein, is misconceived and otherwise legally untenable.

31. To the contrary, Learned counsel for the Defendant has submitted that the 1st Interested Party herein is privy and party to the issues touching on and/or concerning the creation of the charge over and in respect of the suit properties; and hence the presence of the 1st Interested Party is necessary to facilitate the effective and effectual determination of the issues in dispute.

32. Furthermore, Learned counsel for the Defendant has also submitted that there are various reliefs which have been sought at the foot of the Plaintiff, which reliefs, if granted, would essentially affect the rights of the Defendant herein, as well as the rights of the 1st Interested Party. In any event, counsel has added that the various reliefs sought cannot be properly adjudicated upon without the involvement and participation of the 1st Interested Party.

33. Secondly, Learned counsel for the Defendant has also submitted that the nature of the issues at the foot of the instant suit are such that the 1st Interested Party ought to be joined as a substantive Defendant;



and not as an Interested Party. In this regard, Learned counsel for the Defendant has therefore ventured forward and implored the court to Suo motto join the 1st Interested Party as a co-Defendant so as to enable the court to handle and determine the issues in dispute.

34. In support of the submissions that the court is seized of the requisite Jurisdiction to Suo-motto join the 1st Interested Party as a co-defendant, Learned counsel has cited and relied on the decision in the case of *Departed Asians Property Custodian Board versus Japher Brothers Ltd* (199) 1EA 55; *Civicon Ltd versus Kivuwatt Ltd & 2 Others* (2015)eKLR, respectively.
35. Lastly, Learned counsel for the Defendant has also submitted that the suit herein is also not barred and/or prohibited by dint of the Doctrine of Res-Judicata, insofar as the issues in dispute were never canvassed and/or adjudicated upon in the case of *Velos Enterprises Ltd versus Paragon Electronic* (2015)eKLR, which has been various cited and relied upon.
36. At any rate, Learned counsel has submitted that the said suit, namely, *Velos Enterprises Ltd vs Paragon Electronic* (2015)eKLR did not concern itself with the sub-division of the suit properties; and hence the plea of Res-Judicata is inapplicable and irrelevant.
37. Arising from the foregoing submissions, Learned counsel for the Defendant has thus invited the court to find and hold that the Application dated 5th May 2023; by the 1st Interested Party, is devoid of merits and thus ought to be dismissed with cost.
38. On the other hand and as concerns the Preliminary objection, Learned counsel for the Defendant has sought to ride on the back of the Interested Parties. For coherence, the counsel for the Defendant has contended that same shall rely on the Submissions by the Interested Parties.
39. Simply put, counsel for the Defendant did not file any submissions as pertains to the preliminary objection raised by and on behalf of the 2nd Interested Party.

Issues For Determination:

40. Having reviewed the Notice of Preliminary objection dated the 8th December 2022; and the Application dated the 5th May 2023; filed on behalf of the 1st Interested Party and upon taking into consideration the Responses thereto; and similarly upon consideration of the submissions filed on behalf of the Parties, the following issues do emerge and are thus worthy of determination;
 - i. Whether this court is seized of the requisite Jurisdiction to entertain and adjudicate upon the subject Dispute.
 - ii. Whether the instant suit is barred and/or prohibited by dint of the provisions of Section 34 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
 - iii. Whether the suit herein is statute barred by dint of the provisions of Section 4(1) of the Limitation of Action Act, Chapter 22, Laws of Kenya?
 - iv. Whether the instant suit constitutes and amount of the Due process of the court.
 - v. Whether the suit beforehand is prohibited by the Doctrine of Res-Judicata; and in particular, Section 7(4) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.



Analysis And Determination

Issue Number 1 Whether this court is seized of the requisite Jurisdiction to Entertain and adjudicate upon the subject dispute.

41. The dispute at the foot of the instant suit touches on and/or concerns the charge which had hitherto been registered over and in respect of Block 1C on L.R No 209/16027 and L.R No. 330/355, respectively, (hereinafter referred to as the suit property). Instructively, the charge over the suit property had been registered in favor of the Defendant herein albeit at the instance and prompting of the 1st Plaintiff.
42. Furthermore, it has been contended by the Plaintiffs' that subsequent to the registration of the charge over the suit properties, the Plaintiffs' herein entered into a Deed of Compromise and Settlement with the Defendant, whereupon the Defendant undertook to effectively discharge the charge over the suit properties and execute a discharge of charge in favor of the Plaintiffs, albeit upon payment of the debt at the foot of the charge.
43. Other than the foregoing, the Plaintiffs have also contended that on or about the 1st July 2015, the Plaintiffs' herein fully repaid and/or liquidated the entire debt which had hitherto been agreed upon at the foot of the Deed of compromise and settlement entered into and executed in the year 2012. In this regard, the Plaintiffs have further averred that upon the settlement of the debts due in favor of the Defendant, it was incumbent upon the Defendant to comply with the Deed of Compromise and settlement; and thereafter, execute and deliver all the requisite documents to discharge the charge over the Plaintiffs' property.
44. Be that as it may, the Plaintiffs' have ventured forward and contended that despite liquidating and settling the entire debt, which was owing and payable to the Defendant, the Defendant herein failed to comply with the terms of the Deed of Compromise and settlement. For coherence, the Plaintiffs' contend that the Defendant failed to discharge the charge hitherto registered over and in respect of the suit property.
45. Other than the foregoing, the Plaintiffs' contended that arising from the failure by the Defendant to execute the discharge of charge over the suit property; and in particular, to comply with the Deed of Compromise and settlement, the Plaintiffs' were constrained to and indeed filed a suit vide Nairobi HCC No. 8 of 2016.
46. Furthermore, the Plaintiffs' have stated that the said suit Nairobi HCC No. 8 of 2016; was thereafter heard and disposed of vide a Ruling rendered on the 27th September 2016, whereupon the court found in favor of the Plaintiffs herein. For good measure, the Plaintiffs' have contended that the court directed the Defendant to facilitate the execution of the discharge of charge and to release the title documents over and in respect of the suit properties.
47. Additionally, the Plaintiffs' have further stated that despite the explicit terms of the Ruling and/or decision of the court, the Defendant failed and/or neglected to comply with the terms of the Deed of Compromise and Settlement; and in particular, failed to discharge the charge over and in respect of the suit properties. Instructively, it has been contended that the failure and/or refusal has continued to date.
48. Arising from the failure to comply with the Deed of Compromise and settlement; and in particular, to discharge the charge of the suit property, the Plaintiffs' herein have now contended that the failure



to comply with the court order has occasioned unto them grave injustice and suffering, insofar as same have been denied and/or deprived of the enjoyment attendant to the suit Properties.

49. Pertinently, it is the Plaintiffs' position that as a result of the failure by the Defendant to discharge the properties as ordered by the High court on the 27th September 2016, it is therefore apparent that the status of the property is so obfuscated to the extent that the recovery thereof is now practically impossible. In this respect, it has been averred that the Plaintiffs' are now seeking the alternative remedy of compensation insofar as the suit properties have remained (sic) unlawfully encumbered.
50. Suffice it to point out that it was important to supply and/or provide the foregoing background, so as to appreciate the substratum nay crux of the dispute, which has been placed before the Honourable court for purposes of adjudication and/or determination.
51. Clearly and without belaboring the point, it is evident that the crux of the dispute beforehand relates to inter-alia, the propriety/ validity of the charge that was registered over the suit properties by the Defendant; the failure to comply with the terms of the Deed of compromise and settlement, breach of lawful court order; and finally refusal to discharge over the suit properties.
52. From the foregoing, there is no gainsaying that the suit before this court essentially gravitates and revolves around the charge and discharge of the charge which were registered over the suit properties by the Defendant herein. Consequently, the question that does arise is whether the issue of the charge and the discharge of charge, which color the instant suit fall within the Jurisdiction of this court, namely, the Environment and Land Court or otherwise.
53. Whereas the Plaintiff herein has contended that the Environment and Land court is seized and/ or possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute, it is instructive to take cognizance of the decision in the case of Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 others [2017] eKLR, where the court held thus;

“ 41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

54. Furthermore, whilst discussing whether a charge entails the “Use” of land, the Court of Appeal proceeded to and stated as hereunder;

“ 35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.

36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the [Land Act](#)). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's



worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.

37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use.

The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.

38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.

39. Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of Section 13 (2) (d) of the ELC Act. The said section provides that;

2. In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;...

55. This court is aware of several schools of thought, which contend that the provisions of Section 13(2) of the *Environment and Land Court Act* vests the Jurisdiction to deal with contracts pertaining to disposition of interests in land in the Environment and Land court. Furthermore, this court is also privy to the raging discourse as to whether an instrument granting any enforceable interests in land includes a charge or otherwise.

56. Nevertheless, despite the raging debate as pertains to whether issues pertaining to charges, mortgages and contracts affecting disposition of Interest in land ought to be entertained by the Environment and Land Court, there is no gainsaying that the decisions of the Court of Appeal are binding on this court, unless there is a decision of the Supreme Court of Kenya to the contrary.

57. Suffice it to point out that the Doctrine of stare decisis calls upon the lower cadres of courts to be bound by the decision of the Higher courts, in this case, the decision of the Court of Appeal. See the holding of



the Supreme Court in the case of *Evans Odhiambo Kidero vs Fedinant Waititu* (2014)eKLR, *Geoffrey Makana Asanyo & 3 Others* (2020)eKLR and *Dodhia vs National & Greenlays Bank Ltd* (1970)EA.

58. Having pointed out the significance of the Doctrine of stare decisis, I have no difficulty in finding and holding that the Environment and Land court is not seized of the requisite Jurisdiction to entertain and adjudicate upon the dispute pertaining to the charge and discharge over the suit property, which colors the claim by and on behalf of the Plaintiffs.
59. Further and in addition, it is instructive to observe that where a court is not seized of the requisite Jurisdiction to entertain and adjudicate upon a particular dispute, it behooves the court to decline to take further proceedings and essentially to down her tools. See *Owners of Motor Vessel Lilian S vs Caltex Oil Kenya Ltd* (1989)eKLR.
60. In addition, where a court without Jurisdiction proceeds to entertain proceedings and thereafter makes an order albeit without Jurisdiction, the resultant proceedings and the consequential orders would be a nullity ab initio.
61. To this end, it is instructive to adopt and reiterate the ratio decidendi in the case of *Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service* [2019] eKLR, where the Court of Appeal stated thus;

- “ 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.”

62. Arising from the foregoing discourse, my answer to Issue Number one (1) is to the effect that the Environment and Land Court is divested and devoid of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.

Issue Number 2 Whether the instant suit is barred and/or prohibited by dint of the provisions of Section 34 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

63. Other than the question of Jurisdiction, which have been discussed in the preceding paragraphs, there is also the issue as to whether the subject suit constitutes an endeavor to execute and/or enforce compliance with the orders which were issued vide Nairobi HCC No. 8 of 2016.
64. Instructively, the Plaintiffs’ herein admit and concede that the issues of compliance with the terms of the Deed of Compromise and Settlement; and by extension the discharge of charge registered over the suit properties, was the subject of the previous suit, namely, Nairobi HCC No. 8 of 2016.



65. Additionally, it is not lost on this court that the said suit was heard and determined culminating into a decision, which was rendered on the 27th September 2016, and wherein, inter-alia, the court directed discharge of charge over and in respect of the suit properties.
66. On the other hand, it is also important to underscore that despite the order and or decision of the court issued vide Nairobi HCC No. 8 of 2016, the Defendant herein failed, neglected and/or refused to comply with the terms and tenor of the order of the court. Consequently, the Plaintiffs' herein were constrained to and indeed took out contempt proceedings against the Defendant.
67. Notably, the contempt proceedings which were filed and taken out by the Plaintiffs' were duly heard and concluded, culminating into an order by the court whereupon the Defendant was found to be guilty of contempt; and was granted seven (7) days, within which to purge the contempt by, inter-alia, discharging the charge over and in respect of the suit properties.
68. Nevertheless, the Plaintiffs' herein have contended that the Defendant herein has not been able to purge the contempt; and in particular, same has since failed to discharge the charge over the suit properties and thereby hand over the requisite title documents to the Plaintiffs.
69. Owing to the foregoing, the Plaintiffs' herein are now seeking that the court be pleased to make various orders pertaining to and arising from the Defendant's refusal and/or failure to discharge the 1st Plaintiff's properties.
70. On the other hand, the Plaintiffs' herein are also seeking compensation on account of the failure by the Defendant to effect the discharge of the illegal and unlawful encumbrance over the Plaintiffs' properties.
71. Without belaboring the point, the nature of the reliefs which the Plaintiffs' herein are seeking and in particular, as far as the suit properties are concerned, are actually geared towards settlement, satisfaction and discharge of the decree that was issue vide Nairobi HCC No. 8 of 2016.
72. Consequently and in the circumstance, the question that the court must grapple with is; whether this reliefs can certainly be canvassed and ventilated in a separate and distinct suit or better still, whether same are covered by the provisions of Section 34 of the *Civil Procedure Act*, Chapter 21 laws of Kenya.
73. In my humble view, the issues pertaining to execution, satisfaction, enforcement and discharge of a decree issued in a separate suit, in this case, Nairobi HCC No. 8 of 2016; can only be dealt with in the said suit and not in a separate and distinct suit.
74. To my mind, the issues raised at the foot of the instant suit, are issues that belong to the previous suit and are thus prohibited by the provisions of Section 34 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
75. For ease of reference, the provisions of Section 34 of the *Civil Procedure Act*, provides as hereunder;
 34. Questions to be determined by court executing decree
 - (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
 - (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.



- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

76. In any event, the import, tenor and scope of the said provisions was elaborated upon by the Court of Appeal in the case *Kuronya Auctioneers versus Maurice O. Odhoch & another* [2003] eKLR, where the Court of Appeal held thus;

Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment — debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree. The first ground of appeal therefore fails.

77. In a nutshell, I come to the conclusion that the issues raised at the foot of the instant suit, are issues which belong to Nairobi HCC No. 8 of 2016, where the question of compliance with the Deed of Compromise and Settlement and in particular, the discharge of charge of the suit properties was duly adjudicated upon.

Issue Number 3 Whether the suit herein is statute barred by dint of the provisions of Section 4(1) of the Limitation of Action Act, Chapter 22, Laws of Kenya.

78. From the body of the Plaint, it is evident that the Plaintiffs' complied with the terms with the Deed of compromise and settlement on or about the 1st July 2015. Furthermore, the 1st Plaintiff thereafter generated a Letter dated the 20th July 2015, requesting the Defendant to comply with the terms of the Deed of Compromise and settlement; and in particular, to execution and delivery of the completion documents, including the discharge of charge.
79. Nevertheless, the Plaintiffs' have contended that despite the request to the Defendant to comply with the terms of the Deed of Compromise and Settlement, the Defendant failed and/or neglected. For coherence, the Plaintiffs have ventured forward and stated that as a result of the breach of the terms of the Deed of Compromise and settlement, same were constrained to and indeed filed Nairobi HCC No. 8 of 2016.
80. Evidently, there is no gainsaying that the breach of the contract pertaining to and concerning the failure to discharge the charge over the suit properties arose and/or occurred on or about the 20th July 2015. In any event, the details pertaining to the breaches have been elaborated upon in the body of the Plaint filed before the Court.
81. Furthermore, the Plaintiffs' herein remained aware and cognizant of the breach up to and including the 17th January 2016, when same filed the previous suit, namely, Nairobi HCC No. 8 of 2016. In this regard, it is crystal clear that the Plaintiffs' herein were alive to the occurrence of the cause of action and thus same were called upon to file and/or mount their entire suit, if any, against the Defendant and such other necessary Parties.



82. Be that as it may, the Plaintiffs' herein were contented to and indeed filed one limb of their claim, but left out the aspects pertaining to the illegitimate interests, unjust enrichment and/or incidental damages, arising from the failure to comply with the terms of the Deed of Compromise and Settlement.
83. At this juncture, the question that comes to the fore is whether the issues which now forms the substratum of this suit, were well within the knowledge of the Plaintiffs as at the 20th July 2015; or better still, on the 17th January 2016 and if so, whether same ought to have impleaded the current cause of action, as part of the previous suit.
84. To my mind, the Plaintiffs' herein were privy to and or knowledgeable of the information pertaining to and concerning the claims beforehand. Consequently, it behooved the Plaintiffs' to file the suit vide breach of contract and or statutory duty, at the very earliest, but in any event, within the prescribed statutory timelines.
85. In my humble view, the claims pertaining to breach of the Deed of Compromise and settlement, as well as the failure to execute the discharge of charge, which now anchor/ premise the numerous claims adverted to at the foot of the subject suit, ought to have been addressed in accordance with the provisions of Section 4(1) of The Limitation of Actions Act.
86. Arising from the foregoing observation, I come to the conclusion that the Plaintiffs' suit which essentially gravitates around breach of the Deed of Compromise and Settlement (and which to my mind) espouses a cause of action in contract, was statute barred as at the 26th September 2022; when the current suit was filed.
87. As pertains to the legal implications and consequence(s) of a suit filed outside the statutory timelines, it suffices to adopt and reiterate the ratio decidendi in the case of Gathoni versus Kenya Co-operative Creameries Ltd[1982] eKLR, where the Court of Appeal stated thus;
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.
88. Simply put, by the time the Plaintiffs' herein were moving the court vide the instant suit to seek for the various reliefs pertaining to and arising from the actions and omissions by the Defendant, which ostensibly attach to the breach of the Deed of Compromise and Settlement, the statutory timeline provided for under the law had long lapsed and thus the suit was rendered sterile, redundant and/or otiose.

Issue Number 4 Whether the instant suit constitutes and amount to abuse of the Due process of the court.

89. It is common ground that as a result of the failure by the Defendant to comply with and/or adhere to terms of the Deed of Compromise and Settlement that was entered into, the Plaintiffs' herein proceeded to and filed Nairobi HCC No. 8 f 2016, which was subsequently heard and determined vide the Ruling of the High court rendered on the 27th September 2016.



90. Furthermore, it is also not lost on the court that upon the delivery of the Ruling in respect of Nairobi HCC No. 8 of 2016; the Defendant herein was obligated to inter-alia, to process, execute and deliver all the requisite documents to facilitate the discharge of charge pertaining to the suit properties.
91. However, despite the explicit terms of the court order, the Defendant herein failed and thereafter the Plaintiffs proceeded to and took out contempt proceedings which was heard and disposed of vide the Ruling rendered on 16th November 2021. For coherence, the court found and held that the Defendant herein was guilty of contempt and same was thereafter granted 7 days within which to purge the contempt.
92. Instructively, the Plaintiffs' have also contended that arising from the ruling and decision of the court rendered on the 16th November 2021, the Defendant herein proceeded to and availed to the Plaintiffs assorted documents towards the discharge of charge of the suit properties. Nevertheless, it has been contended that upon the lodgment, the discharge of charge which was processed and handed over to the Plaintiffs' was rejected by the Chief Land Registrar.
93. Whereas the discharge of charge which was prepared and handed over to the Plaintiffs' may have been rejected by the Chief Land Registrar; however, the position remains that the Plaintiffs' herein have a lawful and legitimate Judgment, which has not been set aside, varied and/or reviewed.
94. Arising from the foregoing, there is no gainsaying that the Plaintiffs' herein can very well revert to and seek to execute/ enforce the terms of the decree flowing from the decision made on the 27th September 2016.
95. Notwithstanding the foregoing, the Plaintiffs' herein have since filed and/or commenced the instant suit and same are now seeking orders which are diametrically opposed to and at variance with the terms of the Decree which was issued vide Nairobi HCC No. 8 of 2016.
96. To be able to understand the interface between the current suit and the reliefs sought vis a vis the orders that were granted vide Nairobi HCC No. 8 of 2016, it is imperative to juxtapose the contention that because it would not be practically viable for the Plaintiff to recover the suit properties, the Plaintiffs herein are seeking compensation in lieu of the suit properties which (sic) remain unlawful encumbered by the Defendant.
97. To my mind, the Plaintiffs' herein already have a decree directing the Defendant to execute the requisite discharge of charge and avail all the attendant documents to facilitate the discharge of charge; but at the same time and during the subsistence of the said decree, same are now seeking compensation in respect of the suit property.
98. Notably, the situation that does arise creates an impression that the Plaintiffs' herein whilst holding on to the decree in HCC No. 8 of 2016; are at the same time seeking yet another decree, albeit arising from the same cause of action.
99. Surely, the Plaintiffs' herein are approbating and reprobating at the same time; and what comes to the fore is a scenario where the Plaintiffs' are certainly filing a multiplicity of suits, with a likelihood of attracting two or more decisions, which may ultimately be contradictory and in conflict with each other.
100. In my humble view, the filing of the instant suit by the Plaintiffs during the life time and existence of the decree issued in Nairobi HCC No. 8 of 2016; creates an incidence of abuse and/or misuse of the process of the court.



101. Consequently and without belaboring the point, I come to the conclusion that the filing of the instant suit, whose purpose is to procure and obtain a decree that is contradictory to the one that was issued in Nairobi HCC No. 8 of 2016, falls within the cluster/ cadre of what constitutes an abuse of the Due process of the court and hence the entire suit is wrought with mala fides.
102. To buttress the foregoing position , it is appropriate to take cognizance of the decision in the case of Muchanga Investments Ltd Versus Safaris Unlimited (africa) Ltd & 2 others [2009] eKLR, where the Court of Appeal observed and held thus;

“In *Beinosi V Wyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of *Attahiro V Bagudo* 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *Karibu-whytie J Sc In Sarak V Kotoye* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- (a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
- (d) (sic meaning not clear))



- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.

103. Additionally, the concept of abuse of the Due process of the court was also amplified by the court in the case of Satya Bhamu Gandhi versus Director of Public Prosecutions & 3 others [2018] eKLR, where the court held thus;

“22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]

23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also



involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

24. In the words of Oputa J.SC (as he then was)[15] abuse of judicial process is:-

“A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”

25. Justice Niki Tobi JSC observed:-[16]

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”

104. In a nutshell, it is difficult to understand and comprehend the true motive behind the filing of the instant suit by the Plaintiffs, whereas same already have a lawful and legitimate decree in their favor directing the Defendant to facilitate the discharge of charge obtaining over and in respect of the suit properties.
105. Clearly, one would have expected the Plaintiff herein to move on and actualize the decree vide Nairobi HCC No. 8 of 2016, through the known legal means and not to hold same in abeyance and commence a fresh suit, whose purpose is to achieve a diametrically opposed outcome.
106. Consequently and in the circumstances, the conduct of the Plaintiffs' herein, namely, filing the current suit, whilst holding onto the other decree, certainly constitutes an abuse of the Due process of the court.

Issue Number 5 Whether the suit beforehand is prohibited by the doctrine of res-judicata and in particular Section 7(4) of the Civil Procedure Act, Chapter 21 Laws of Kenya.

107. Finally, it is also appropriate to advert to and address the question pertaining to the relevance and application of the Doctrine of Res-judicata. In this respect, the provisions of Section 7(4) of the Civil Procedure Act, Chapter 21 Laws of Kenya becomes relevant and applicable.
108. To start with, the substratum of the suit beforehand touches on and concerns the failure, neglect and/or refusal by the Defendant to comply with the Deed of Compromise and Settlement that was entered into between herself and the Plaintiffs, respectively.
109. On the other hand, it is also important to point out that the failure to comply with the Deed of Compromise and Settlement and thereby execute the discharge of charge over the suit properties, was indeed the basis of the suit, namely, Nairobi HCC No. 8 of 2016.
110. Other than the foregoing, it is also instructive to observe that the subject suit also touches on and/or arises from the same transaction. Simply put, the subject suit emanates from the inability and/or refusal of the Defendant to discharge the charge over the suit properties.
111. In the premises, the question that does arise is whether the issues that inform the current suit were available to the Plaintiffs' during and at the time when same filed and/or lodged the previous suit; and if so, whether the issues beforehand ought to have been impleaded in the previous suit.



112. In my humble view, given the proximity in the causes of action and the reliefs claimed, the issues beforehand ought to have formed part and parcel of the previous suit and the court that dealt with the previous suit, namely, the High Court was seized of the requisite Jurisdiction to entertain and adjudicate same.
113. Owing to the foregoing, it is my finding and holding that the issues that ground the current suit, ought to have been made grounds of attack and/or defense, whichever is appropriate, during the prosecution of the previous suit, which was essentially between the same parties herein, save for the interested parties who have since been added to the current suit.
114. Nevertheless, it is equally important to underscore that the joinder of additional parties in a subsequent suit, which touches on and/or concerns the same subject dispute, which had hitherto been litigated between the primary Parties, does not ipso facto take out a particular dispute from the snares of the doctrine of Res-Judicata.
115. To highlight the significance of the doctrine of Res-Judicata, I am minded to adopt and reiterate the holding of the Court of Appeal in the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR, where the Court observed and stated as hereunder;

“To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer’s accounts, has been or could have been raised before the High Court in the previous suits.

116. In respect of the holding that the joinder of additional Parties to a dispute, which has hitherto been determined, does not take out the dispute from the purview of the Doctrine of Res-Judicata, it is instructive to adopt and reiterate the holding in the case of E.T. v Attorney General & another [2012] eKLR, where the court held thus;

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’

58. In my view the addition of the Attorney General and the exclusion of the petitioner’s mother, who was present in the first suit are merely cosmetic changes which do not affect my



conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the Agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as party to evade the general principle.

117. From the foregoing position, there is no gainsaying that the issues being re-agitated by the Plaintiffs herein, fell within the cluster and thus ought to have been canvassed in the previous suit. Further and in any event, it is evident that the court in the previous suit dealt with and addressed the question of the discharge of charge over and in respect of the suit properties.
118. Other than the foregoing, it is also imperative to state that every litigant, the Plaintiffs' not excepted, are called upon to implead the entirety of their case and thus avert a scenario of litigation by instalments, which equally contributes to the unnecessary backlog in the Judiciary.
119. Nevertheless, where a litigant, the Plaintiffs not excepted, fail(s) to implead the entirety of her case before the court, then same is deemed to have relinquished the limb and/or aspect that was not pleaded.
120. Consequently and in such a situation, such a litigant is not at liberty to revert to court and seek to explore the limb nay, aspect of the claim, (sic) which had been omitted and/or left out.
121. To this end, I can do no better than to cite and adopt the explicit provisions of Order 3 Rule 4 of the Civil Procedure Rules, which stipulates and provides as hereunder;
Suit to include the whole claim [Order 3, rule 4.]
 - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.
 - (2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.
 - (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.
122. Clearly, the Plaintiffs' ought to have been impleaded the entirety of their case, if at all, during the filing of the previous suit, namely, Nairobi HCC No. 8 of 2016, whose decree remains alive and in existence to date.

FINAL DISPOSITION:

123. Having reviewed the entirety of the issues that were highlighted in the body of the Ruling, it must have become crystal clear that the suit by and on behalf of the Plaintiffs herein, is evidently misconceived and otherwise legally untenable.
124. Other than the foregoing, it also bears repeating that the crux/ substratum of the suit herein relates to the issues of the Charge and Discharge of the Charge, which was registered over and in respect of the suit properties; and which properties remain (sic) encumbered to date, despite the lawful decree of the court.
125. In a nutshell, this court comes to the conclusion that the entire suit was mounted and/or lodged before a court divested of the requisite Jurisdiction. Consequently and on the basis of want of Jurisdiction; as well as the incidental issues enumerated herein before, the suit herein be and is hereby struck out.



126. As concerns the costs, same be and are hereby awarded to the Interested Parties, who are the proponents of the Application dated the 5th May 2023; and the Preliminary objection dated the 8th December 2022.
127. For the sake of completeness, no costs are awarded to the Defendant, insofar as same opposed the Application by the First Interested Party, but remained mute on the Preliminary objection.
128. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms. Khadijah Said h/b for Mr. Ahmmednassir Abdullahi SC for the Plaintiffs.

Mr. Muthee for the Defendant.

Ms. Claire Mwangi h/d for Mr. George Oraro SC for the 1st Interested Party.

Ms. Serah Deloras h/b for Mr. Akide SC for the 3rd Interested Party.

N/A for the 2ND Interested Party.

