Lakeview Development Limited v Belgo Holdings Limited & another (Environment & Land Case E064 of 2020) [2023] KEELC 21665 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21665 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E064 OF 2020

JO MBOYA, J

NOVEMBER 21, 2023

BETWEEN

LAKEVIEW DEVELOPMENT LIMITED ..... PLAINTIFF

AND

BELGO HOLDINGS LIMITED ..... 1ST DEFENDANT

LAND REGISTRAR ..... 2ND DEFENDANT

RULING

Introduction and Background

1. The Ruling herein relates to Four [4] separate and distinct Notices of Preliminary objections filed by and on behalf of (sic) the Plaintiff and the 1st Defendant, respectively, pertaining to and/or concerning two sets of Applications filed by (sic) the Plaintiff and the intended Co-Plaintiff/Applicant, respectively.

2. Given the number of the Notices of Preliminary objections that relates to the instant Ruling, it is imperative and appropriate to reproduce the grounds alluded to at the foot of each of Preliminary objection.

3. In respect of Preliminary Objection dated the 9th October 2023; and filed by the Plaintiff as pertains to the Application dated the 26th September 2023; by the firm of M/s Ann Wamithi & Company Advocates on behalf of the intended Co-Plaintiff/Applicant; the Plaintiff alluded to the following grounds;

    i. The Environment and Land Court lacks Jurisdiction to determine the Application, which involve disputes concerning Shareholding and Directorship and the Applications are invitation to do so. Article 162(2) (b) of *the Constitution* of Kenya 2010; limits the Jurisdiction to hear

and determine disputes relating to the Environment and the use and occupation of and title to land.

ii. The Shareholders/Directors' dispute is before High Court Commercial and Tax Division in HCCOMM E488 0f 2022; Gad Zeevi versus Akber Abdulla Kassam Esmail and James Abiam Mugoya Isabirye (E488/2022) and the matter is therefore Sub Judice.

iii. Any dispute regarding Shareholding in the Plaintiff and especially with regard to the status of Akber Abdulla Kassam Esmail is Res Judicata by a Ruling dated the 26th July 2023, Majanja J; in HCCCOM No. E488/2022 held that none of shareholding and directorship issues in the injunction Application could be determined at an Interlocutory Stage.

iv. On withdrawal of the suit, the court ceased to have Jurisdiction over the suit. The court became Functus Officio upon the filing of the Notice of Withdrawal which was confirmed by the order of 3rd October 2023 . (See SMT. Rais Sultan Begam Vs Abdul Qadir & Others Cited In Priscilla Nyambura Njue Vs Geovhem Middle East Ltd And Kenya Bareau Of Standards (2021)eKLR.

v. The Withdrawal of a suit is its end and no right is conferred upon the Plaintiff to revoke or rescind the withdrawal (See In Priscilla Nyambura Njue Vs Geovhem Middle East Ltd and Kenya Bareau of Standards (2021)eKLR.

vi. A suit which has been withdrawn pursuant to Order 25 of the Civil Procedure Rules cannot be reinstated. The law under this order does not envisage a litigant to seek an order of reinstatement. See Antony Kayaya Juma Vs Humprey Ekesa Khaunya and the District Land Registrar Busia (2004)eKLR.

vii. A person who was not a Party at the time of Withdrawal of the suit cannot move the court for reinstatement

viii. There can no be Joinder of Party in the circumstances prevailing herein.

ix. A company is a separate legal entity from its Shareholders and a member is not entitled to join in action against Third Parties.

4. In respect of the second Preliminary Objection similarly dated the 9th October 2023; and which has similarly been filed by (Sic) the Plaintiff, but which relates to the application dated the 26th September 2023; filed by M/s Echesa & Bwire Advocates LLP; the Plaintiff has alluded to the following grounds;

i. The Environment and Land court lacks Jurisdiction to determine the Application, which involve Disputes concerning Shareholding and Directorship and the Applications are invitation to do so. Article 162(2) (b) of *the Constitution* of Kenya 2010 limits the Jurisdiction to hear and determine disputes relating to the Environment and the use and occupation of and title to land.

ii. The Shareholders/Directors' dispute is before High Court Commercial and Tax division in HCCOMM E488 0f 2022 Gad Zeevi v Akber Abdulla Kassam Esmail and James Abiam Mugoya Isabirye (E488/2022) and the matter is therefore Sub Judice.

iii. Any dispute regarding shareholding in the Plaintiff and especially with regard to the status of Akber Abdulla Kassam Esmail is Res Judicata by a ruling dated the 26th July 2023, Majanja J in HCCCOM E488/2022 held that none of shareholding and directorship issues in the injunction application could be determined at an interlocutory stage.

iv. On withdrawal of the suit the court ceased to have jurisdiction over the suit. The court became Functus Officio upon the filling of the Notice of Withdrawal which was confirmed by the order of 3rd October 2023 (See SMT Rais Sultan Begam vs Abdul Qadir & Others Cited In Priscilla Nyambura Njue Vs Geovhem Middle East Ltd And Kenya Bareau of Standards (2021)eKLR.

v. The withdrawal of a suit is item end and no right is conferred upon the Plaintiff to revoke or rescind the withdrawal (See In Priscilla Nyambura Njue Vs Geovhem Middle East Ltd and Kenya Bareau of Standards (2021)eKLR.

vi. A suit which has been withdrawn pursuant to Order 25 of the Civil Procedure Rules cannot be reinstated. The law under this order does not envisage a litigant to seek an order of reinstatement. See Antony Kayaya Juma Vs Humprey Ekesa Khaunya and the District Land Registrar Busia (2004)eKLR.

vii. A person who was not a party at the time of withdrawal of the suit cannot move the court for reinstatement

5. The 1st Defendant herein has similarly filed two sets of Preliminary Objections; and both the objections are dated the 9th October 2023. As pertains to the first set of Preliminary Objection dated the 26th September 2023; and filed by (sic) the Plaintiff/ Applicant, the 1st Defendant has outlined the following grounds;

i. This Honorable court became Functus Officio when a Notice of Withdrawal was field on the 25th September 2023; by the Plaintiff and an order made on the 27th September 2023 accepting and adopting the notice of withdrawal of the suit under Order 25 Rule 1 of the Civil Procedure Rules, 2010 as such the only remedy available to the Applicant would be either review or appeal.

ii. The law prescribes the provisions of Section 238 and 239 of the *Companies Act*, 2015; which provides the procedure to which a member of a company seeks the audience of the Honorable court in respect of a cause of action vested in a Company.

iii. This Honorable court under Section 13 of the *Environment and Land Court Act* 2011 is not vested with the Jurisdiction to deal with matters touching on company law, holding of Annual General Meetings by shareholders and resolution passed thereat.

iv. Alternatively, the said Application is Sub-Judice pending the hearing and determination of HCCCOM No. E488 of 2022; filed in the High Court of Kenya by Gad Zeevi against Akber Esmail.

v. That in HCC No. E488 of 2022 there is a ruling delivered by Majanja J, where the matters raised by the application supported by Gad Zeevi and James Mugoya Isabyrie cannot be determined at an interlocutory stage and the issues being raised are res-judicata.

vi. The said Application should be dismissed in Limine as it is not filed in accordance with the above specified provisions of the law.

6. The second set of Preliminary objection dated the 9th October 2023; but same is in respect of Application filed by the intended Co-Plaintiff/Applicant. As pertains to this Preliminary Objection, the 1st Defendant has adverted to the following grounds.

i. The Application brought under Section 862 and 158 (7) (b) of the *Companies Act*, 2015, is contrary to the provisions of Section 238 and 239 of the *Companies Act* 2015 which provides

the procedure to which a member of a company can seek an audience before the honorable court in respect of a cause of action vested in a company.

ii. This Honorable Court under Section 13 of the *Environment and Land Court Act* 2011 is not vested with the Jurisdiction to deal with matters touching on company law, holding on Annual General Meetings by shareholders and resolution passed thereat.

iii. This Honorable Court became Functus Officio when a Notice of withdrawal was filed on the 25th September 2023; and an order made on the 27th September 2023 accepting and adopting the Notice of withdrawal of the suit under Order 25 Rule 1 of the Civil Procedure Rules as such only remedy available to the Applicant would be either review or appeal.

iv. The said Application should be dismissed in Limine as it is not filed in accordance with the above specified provisions of the law.

7. The matter herein came up of the 12th October 2023; whereupon the advocates for the respective Parties covenanted to canvass and dispose of all the four [4] sets of Preliminary Objections simultaneously. Furthermore, the advocates for the respective Parties also agreed to file and exchange written submissions pertaining to and concerning the named preliminary objections.

8. Pursuant to the agreement amongst the respective Parties, the Honourable court proceeded to and proclaimed various directions, inter-alia, setting the timeline for the filing and exchange of the written submissions and clarified that the Parties were at liberty to file elaborate the written submission, insofar as there shall be no highlighting of the Written Submissions once filed.

9. Pertinently, the advocates for the Parties thereafter complied and adhered to the directions of the court. For coherence, Learned counsel for (sic) the Plaintiff filed two sets of written submissions, namely, the Written submissions dated the 16th October 2023 and the Rejoinder Written submissions dated the 6th November 2023.

10. On the other hand, the 1st Defendant filed five [5] sets of Written submissions two of which are dated the 16th October 2023; the other set is dated the 28th October 2023; whilst the last sets, which are two [2] in number, are dated the 3rd November 2023, respectively.

11. On behalf of the Applicant the Written submissions are dated the 23rd October 2023; and same runs into 37 pages, excluding the List of authorities, the latter which runs into 339 pages.

12. Moreover, the 2nd Defendant, namely, the Chief Land Registrar through the Honourable Attorney General; filed written submissions dated the 27th October 2023. Suffice it to point out, that the Written submissions by the Second Defendant are equally elaborate, just as the ones filed by the rest of the Parties.

13. Lastly, the intended co-Plaintiff/Applicant filed written submissions dated the 23rd October 2023; and wherein same has raised and canvassed a total of six [6] issues, for due consideration by the Honourable Court.

14. Invariably, all the Written submissions, (whose details have been alluded to in the preceding paragraphs), forms part of the record of the Honourable court.

Submissions by the Parties':

a. Plaintiff's Submissions:

15. The Plaintiff herein has filed two [2] sets of written submissions, namely, the submission dated the 16th October 2023 and the Rejoinder submissions dated the 6th November 2023, respectively. At the foot of the maiden submissions, the Plaintiff has highlighted, amplified and canvased six [6] pertinent issues for consideration by the Honourable court.

16. Firstly, Learned counsel for the Plaintiff has submitted that the two [2] applications which have been filed and placed before the court touch on and concern whether the Plaintiff's directors who instructed the law firm of M/s Hamilton Harrison & Mathews Advocates, are the bona fide Directors. In this regard, Learned counsel for the Plaintiff has invited the court to take cognizance of grounds A to D alluded to at the foot of the application mounted by the Applicant on the other hand grounds A to E of the Application mounted by the intended Co-Plaintiff/Applicant.

17. Furthermore, Learned counsel for the Plaintiff has submitted that the issues raised at the foot of the two [2] Applications touch on and/or concern who are the legitimate directors of the Plaintiff company and whether one Akber Esmail, over-stepped his capacity as a shareholder in the Plaintiff company.

18. Having alluded to the forgoing issues, Learned counsel for the Plaintiff has therefore contended that the issues in question touched on and concerned shareholding and directorship in the Plaintiff company; which issues can only be determined at the High Court and not otherwise.

19. Simply put, Learned counsel for the Plaintiff has implored the court to find and hold that this Honourable court is divested of the requisite Jurisdiction to handle and maintain the instant Application.

20. To vindicate the submissions pertaining to and or concerning the import and tenor of Jurisdiction, Learned counsel for the Plaintiff has cited and relied on the holding by the Supreme Court of Kenya in the case of Samuel Kamau Macharaia & Another versus Kenya Commercial Bank & Another (2012)eKLR.

21. Secondly, Learned counsel for the Plaintiff has submitted that the current Application(s), which have been field by the Applicant and the intended Co-Plaintiff/Applicant, respectively, are barred and/or prohibited by the Doctrine of Res-sub-judice and by extension, the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

22. It was the submissions of Learned counsel for the Plaintiff that there is in existence HCCCOM Civil Suit No. E448 of 2022; between Gad Zeevi vsersus Akber Abdulla Kassam Esmail and James Abiam Mugoya Isabirye, respectively, which is still pending hearing and determination of similar issues, as the ones raised and adverted to herein.

23. Additional Learned counsel for the Plaintiff has submitted that the said suit, which is pending before the High Court; Commercial and Admiralty and Tax divisions touches on and concerns shareholding and directorship in the Plaintiff company.

24. On the other hand, Learned counsel for the Plaintiff has submitted that insofar as the issue(s) of shareholding and directorship of the company, are pending before the High Court, this court is thus prohibited from handling and/ or adjudicating on similar Issues.

25. Further and in any event, Learned counsel has submitted that entertaining and adjudicating upon the same Issues, which are pending before the High Court may culminate into a decision that is contrary and contradictory to the decision of Honourable High Court.

26. Instructively, Learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that thee issues before the Court are Sub-judice; and thus same ought not to be entertained by this Court.

27. In support of the submissions that the two applications are Sub-judice, Learned counsel for the Plaintiff has invoked and cited the holding of the Supreme Court of Kenya in the case of Kenya National Commission of Human Rights versus The Attorney General; IEBC & 16th Others (16 Others) Interested parties (2020)eKLR.

28. Thirdly, Learned counsel for the Plaintiff has submitted that Hon Justice Majanja, Judge, rendered a ruling on the 26th July 2023, in respect of an application made by one Gad Zeevi in High Court Commercial in E488 of 2022; which Application touches on and concerns the same issues which are being ventilated at the foot of the two [2] applications.

29. Further and in addition, Learned counsel for the Plaintiff has ventured forward and submitted that the ruling by Hon Justice Majanja, Judge; dealt with the issues pertaining to the management and affairs of the Plaintiff company.

30. According to counsel for the Plaintiff,, the Application beforehand, are now seeking to bring to the fore issues/matters which were dealt with by Hon. Justice Majanja, Judge; and issues that could very well have been dealt with Justice Majanja.

31. Consequently and in this regard, Learned counsel for the Plaintiff has therefore invited the Honourable court to find and held that the two Applications are prohibited by the Doctrine of Res-judicata and by extension Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

32. To buttress the submissions pertaining to and concerning the issue of Res-Judicata, Learned counsel for the Plaintiff has cited and relied on, inter-alia, the holding in the case of E.T versus The Attorney General and J.N .K (2012)eKLR; and George Kihara Mbiu versus Margaret Njeri Mbiu and 15 Others (2018)eKLR, respectively.

33. Fourthly, Learned counsel for the Plaintiff has submitted that the orders sought at the foot of the two [2] Applications, namely, reinstatement of the suit, which was withdrawn herein, is legally untenable and thus not available.

34. Furthermore, Learned counsel for the Plaintiff has submitted that pursuant to and under the provisions of Order 25 Rule 1 of the Civil Procedure Rules, 2010; once a suit is withdrawn, such a suit cannot be the subject of reinstatement, either as sought or at all.

35. At any rate, Learned counsel for the Plaintiff has also submitted that whereas the provisions of Order 25 Rule 1 of the Civil Procedure Rules, 2010; allows the Plaintiff to withdraw the suit, there is no corresponding provisions to anchor reinstatement/revocation of the withdrawal.

36. In short, Learned counsel for the Plaintiff has thus submitted that the prayer for reinstatement of the suit, is therefore not available or at all, insofar as there is no express provision in law, that allows for the re-instatement of a Withdrawn suit.

37. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on inter-alia Precilla Nyambura Njue vs Geochem Middle East Ltd & Kenya Bureau of Standard (2021)Eklr; and S M T Raisa Sultana Begam & Others vs Abdul Qadir & Others AIR 1966 ALL 318, respectively.

38. Lastly, Learned counsel for the Plaintiff has submitted that once a suit is withdrawn, same ceases to exists in the eyes of the law. Additionally, Learned counsel for the Plaintiff has also submitted that upon the withdrawal of the suit, no joinder can be made or at all, insofar as there is no existing suit upon which the request for joinder can anchored and/or predicated.

39. Consequently and in the premises, Learned counsel for the Plaintiff has therefore submitted that the Application for the intended Co-Plaintiff/Applicant, which essentially seeks for joinder is therefore misconceived and lacks merits.

40. As pertains to the Rejoinder submissions, Learned counsel for the Plaintiff has raised five [5] issues. Firstly, Learned counsel for the Plaintiff has contended that because the Parties beforehand have filed a plethora of submissions and documents, it is imperative that the court be pleased to allow the advocates to highlight the submissions, so as to enable the court to fully appreciate the core issues under contest.

41. Furthermore, Learned counsel has ventured forward and stated that highlighting of the submissions constitutes an integral facet of the Right to Fair Hearing, which is critical in the current Constitutional dispensation.

42. In support of the contention that the advocates for the Parties ought to be allowed to highlight and elaborate the Written submissions filed; Learned counsel for the Plaintiff has cited and quoted the holding the case of Pinnacle Projects Ltd versus Presbyterian Church of E A, Ngong Parish & Another (2019)eKLR.

43. The second issue that has been highlighted vide the Rejoinder submissions, is to the effect that the Applicant to the Application dated the 26rd September 2023, namely, the Applicant, has presented no Evidence in support of his Application. Further and in any event, Learned Counsel has again re-visited the contention that it would be appropriate to allow counsel an opportunity to highlight the Written submissions so as to point out to the Honourable court the correct position as pertains to the issues in dispute.

44. Other than the foregoing, Learned counsel has contended that where an application is not supported by evidence, as in the case herein, such Application ought to be struck out in Limine.

45. In support of the contention that the Application is for striking out on account of lack of Evidence, Learned counsel has cited and relied on holding in the case of Communication of Kenya vs & 5 Others vs Royal Media Services Ltd & 5 Others (2014)eKLR.

46. The Third [3] issue raised in the Rejoinder submissions relates to the question of Jurisdiction of the Environment and Land court to handle and/or entertain a dispute touching on and/or concerning Shareholding and Directorship in the Plaintiff company.

47. Invariably, Learned counsel for the plaintiff has submitted that even though the Environment and Land court is a court with status of the High Court, however, status alone does not arrogate unto the Environment and Land court the Jurisdiction to deal with and/or handle disputes which exclusively belong to the High Court.

48. In support of the submissions anchored on lack of Jurisdiction, Learned counsel has cited inter-alia the decision in Samuel Kamau Macharia & Another vs Kenya Commercial Bank & Others (2012)eKLR and Republic & Karisa Chengo & Others (2017)eKLR, respectively.

49. Additionally, Learned counsel for the Plaintiff has also contended that this court cannot purport to arrogate unto itself Jurisdiction to entertain the two [2] Applications, allegedly on the basis of what is stated to be the pre-dominant issue(s) in dispute.

50. In this respect, Learned counsel for the Plaintiff has cited and relied on the decision of the Court of Appeal in the case of Kibos Distillers Ltd & 4 Others versus Benson Ambuti Adega & 3 Others (2020)eKLR.

51. The Fourth issue that has been amplified by Learned counsel for the Plaintiff in the Rejoinder submissions touches on and concerns the question of Sub-Judice. In this respect, Learned Counsel has contended that the issues at the foot of the two applications beforehand are already pending before the Honourable High Court, which is a court of competent Jurisdiction to adjudicate upon the issues under reference.

52. Furthermore, Learned counsel has ventured forward and contended that in discerning whether a matter is barred by the Doctrine of Sub-judice, it behooves the court to take into account the substance of the claim and not the prayers sought.

53. In support of the contention that the issues at the foot of the two [2] applications are truly barred by the Doctrine of Sub-judice, Learned counsel for the Plaintiff has cited and relied on inter-alia Thika Min Hydro Co Ltd versus Josephat Karu Ndwiga (2013)eKLR; and Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Ex-parte Law Society of Kenya (2020)eKLR.

54. Lastly, Learned counsel for the Plaintiff has re-visited the import, tenor and effect of a withdrawal of a suit; and has thereafter proceeded to and contended that the withdrawal of a suit brings the suit to an End.

55. On the other hand, Learned counsel has also contended that once a suit has been withdrawn, there is no corresponding provision under the law that allows for reinstatement of such a Suit.

56. Consequently and in this respect, Learned counsel for the Plaintiff has implored the Honourable Court to find and hold that the same (court) is therefore Functus officio.

a. 1st Defendant's Submissions:

57. The 1st Defendant herein has filed two [2] sets of written submissions, (read maiden submissions) as pertains to the two sets of applications pending before the Honourable court.

58. In respect of the Application dated the 26TH September 2023; and which has been filed by the intended Co-Plaintiff/Applicant, Learned counsel for the 1st Defendant has raised and canvassed eight [8] pertinent issues for consideration by the Honourable court.

59. Firstly, it is the submissions of counsel for the 1st Defendant that to the extent that the intended Co-Plaintiff/Applicant, was not a Party to the suit, at the time when the suit was withdrawn, same therefore has no Locus standi to seek for the setting aside of the Notice of Withdrawal of the suit or at all.

60. Furthermore, Learned counsel for the 1st Defendant has ventured forward and contended that the intended Co-Plaintiff/Applicant is therefore divested of the requisite locus standi to mount the application seeking to set aside the Notice of withdrawal of the suit; and the consequential endorsement of the same by the Honourable court.

61. Secondly, Learned counsel for the 1st Defendant has submitted that even though the shareholding of the intended Co-Plaintiff/Applicant in the Plaintiff company is contested, it is common ground that

a shareholder of a company is separate and distinct Entity; and hence a shareholder cannot interfere with the litigation filed by the company or at all.

62. In support of the contention that the intended Co-Plaintiff/Applicant is not vested with any right to interfere with, inter-alia, the application by the company, Learned counsel for the 1st Defendant has cited the case of (sic) Solomon vs Solomon (but which ought to be Salmond vs Salmond (1897) AC 2022) and not otherwise.

63. Thirdly, Learned counsel for the 1st Defendant has also submitted that the claim by and on behalf of the intended Co-Plaintiff/Applicant that same has a legitimate complaint as a shareholder, does not vest in the intended Co-Plaintiff/Applicant, the right to apply to set aside the decision of this Honourable court made on the 27th September 2023; or better still, to set aside the Notice of the withdrawal of the suit.

64. Fourthly, Learned counsel for the 1st Defendant has also submitted that this Honorable court is devoid and/or divested of the requisite Jurisdiction to entertain the subject Application by the intended Co-Plaintiff/Applicant, insofar as the issues raised at the foot of the said Application touched on and/or concerned matters that can only be entertained and adjudicated upon by the High Court by dint of the Provisions of Sections 238 and 239 of the *Companies Act*, 2015.

65. Fifthly, Learned counsel for the 1st Defendant has submitted that the issues that anchor the Application by and on behalf of the Co-Plaintiff/Applicant; are issues which are live before the High Court vide HCCCOM E488 0f 2022; between Gad Zeevi versus Akber Esmail and James Abiam Mugoya Isabyrie, respectively.

66. To the extent that the issues being adverted to and being raised before this court are live before the High Court, Learned counsel for the 1st Defendant has therefore contended that the Application by the intended Co-Plaintiff/Applicant; is barred by the Doctrine of Sub-Judice and by extension, the provision of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

67. In support of the contenting of the issues raised at the foot of the Application by the intended Co-Plaintiff/Applicant are sub-judice, Learned counsel for the 1st Defendant has cited, inter-alia, the case of Backlays Bank of Kenya Ltd vs Elizabeth Agidza (2012)eKLR, Thika Min Hydro Company Ltd vs Josephat Kaaru Ndwiga (20130eKLR, Kenya National Commission on Human Rights vs The Attorney General (2020)eKLR, respectively.

68. Sixthly, Learned counsel for the 1st Defendant has also contended that the issues being raised by the intended Co-Plaintiff/Applicant are barred and prohibited by the Doctrine of Res-Judicata and by extension, Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

69. As pertains to Res-Judicata, Learned counsel for the 1st Defendant has submitted that Hon. Justice Majanja, Judge; rendered a ruling on the 26th July 2023, as pertains to the issues, which the intended Co-Plaintiff/Applicant has placed before this Honourable court.

70. The other issues which have also been canvassed and highlighted by Learned Counsel for the 1st Defendant relates to the concept of Functus officio. In this respect, Learned counsel for the 1st Defendant has submitted that upon the adoption and endorsement of the Notice of withdrawal, same became an order of the court, which marked the entire suit as disposed of.

71. Furthermore, Learned counsel for the 1st Defendant has ventured forward and submitted that the adoption of the withdrawal by the court was taken in the presence of the advocates of the Parties; and hence same was made, inter-partes, and not otherwise.

72. Other than the foregoing, Learned counsel has submitted that having adopted and endorsed the Notice of withdrawal; and thereafter making the suit as withdrawn, the Honourable court was rendered functus officio.

73. In support of the contention that the court herein is functus officio, Learned counsel for the 1st Defendant has cited and relied on, inter-alia, the decision of the Supreme Court of Kenya in Raila Odinga vs IEBC & Others (2013)eKLR; and Jarsi Evening Post Ltd versus AL Thani (2002) JLR 542, respectively.

74. On the other hand, Learned counsel for the 1st Defendant has also submitted that insofar as the intended Co-Plaintiff/Applicant has invoked the provisions of Section 158(7) (b) and 862 of the *Companies Act*, 2015, such Jurisdiction only inheres on the High Court and not in the Environment and Land court.

75. Remarkably, Learned counsel for the 1st Defendant has thereafter contended that this Honorable Court has no Jurisdiction to entertain the Application raised by and on behalf of the intended Co-Plaintiff/Applicant, or otherwise.

76. In respect of the Application dated the 26th September 2023; and filed by the firm of M/s Echesa & Bwire Advocates LLP, Learned counsel has highlighted and canvassed five [5] pertinent issues for consideration by the Honourable court.

77. First and foremost, Learned counsel for the 1st Defendant has submitted that though the instant Application is purported to be anchored on the Affidavit of Gad Zeevi and James Mugoya Isabirye, the two [2] affidavits have neither been served on counsel for the 1st Defendant or at all.

78. Similarly, Learned counsel for the 1st Defendant has ventured forward and contended that the two sets of affidavits alluded to have also not found nor are same available on the E-portal of the Honourable court.

79. Consequently and on the basis of the contention that counsel has neither been served with the two named affidavits nor are the affidavits traceable of the E-portal of the court, Learned Counsel has invited the court to find and hold that the instant Application is not premised on any Evidence or admissible evidence or at all.

80. Consequently and in the premises, Learned counsel has implored the Honourable court to find and hold that the Application ought to be dismissed in Limine.

81. Secondly, Learned counsel for the 1st Defendant has also submitted that the issues which have been raised and highlighted at the foot of the Application dated the 26th September 2023; are the same issues which were raised and canvassed vide High Court Commercial Case Number E488 of 2022, which was filed on the 8th December 2022.

82. To the extent that the issues had been raised and canvased before the Honourable High Court, Learned counsel for the 1st Defendant has therefore submitted that the issues under reference and the grounds thereunder are barred by the Doctrine of Res-sub-judice; and by extension, the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

83. Furthermore, Learned counsel for the 1st Defendant has also submitted that even though Hon. Justice Majanja Judge, did not make final and effective determination on the various issues which were raised before him, the Court nevertheless, ventured forward and held that the issues in question could be determined via a Plenary hearing and thus the Parties were directed to ready themselves for trial.

84. Be that as it may, Learned Counsel has reiterated that insofar as the issues being adverted to and canvassed before this court are live in the High Court case, it is imperative that the suit herein be stayed. Further and in any event, counsel has further submitted that the court can even invoke her Inherent Jurisdiction to stay the instant suit.

85. In support of the submissions that the instant Application is prohibited by the Doctrine res-sub-judice, Learned counsel for the 1st Defendant has cited and relied on various decisions, inter-alia Backlays Bank of Kenya Ltd vs Elizabeth Agidza (2012)eKLR, Thika Min Hydro Company Ltd vs Josephat Kaaru Ndwiga (20130eKLR, Kenya National Commission on Human Rights vs The Attorney General (2020)eKLR,

86. The Third issue that has been canvassed by Learned counsel for the 1st Defendant relates to the concept of Functus officio. In this regard, Learned counsel for the 1st Defendant has submitted that the Plaintiff herein proceeded to and filed a Notice of withdrawal of the suit, which was thereafter adopted and endorsed by the court.

87. Additionally, Learned counsel for the 1st Defendant has submitted that upon the adoption and endorsement of the withdrawal of the suit, the entire suit was terminated and hence there is no more suit before the court.

88. Further and in addition, Learned counsel for the 1st Defendant has submitted that upon the adoption of the Notice of withdrawal, the Honorable court thus became Functus officio; and hence cannot be called upon to re-visit the suit, either in the manner intended by the Applicant or otherwise.

89. In support of the submissions that the Honourable court is functus officio, Learned counsel for the 1st Defendant has cited and relied on inter-alia Raila Odinga vs IEBC & Others (2013)eKLR and Jarsi Evening Post Ltd vs AL Thani (2002) JLR 542, respectively.

90. Fourthly, Learned counsel for the 1st Defendant has also submitted that the issues which have been raised and highlighted at the foot of the instant Application touched on and concerned the validity of the resolutions passed at the Annual General Meeting of the Plaintiff company and which General Meeting was called by a shareholder of the said company.

91. To the extent that the issue beforehand touches on and concerns the Management and affairs of the Plaintiff company, Learned counsel for the 1st Defendant has thus submitted that the Honourable court is divested of the requisite Jurisdiction to entertain and adjudicate upon such an issue which falls within Article 162(2)(b) of *the Constitution*, 2010.

92. Lastly, Learned counsel has terminated his submissions as hereunder;

> "The 2nd defendant will seek the indulgence of this Honorable court to grant Leave to the 2nd Defendant to highlight the aforementioned submissions"

93. Instructively, what I discern from the foregoing submissions, is that Learned counsel for the 1st Defendant is making a plea interestingly and curiously on behalf of the 2nd Defendant, namely, The Chief Land Registrar; who is being represented by the Honourable Attorney General and not otherwise.

94. Other than the two[2] sets of maiden submissions that were filed by and on behalf of the 1st Defendant, Learned counsel for the 2nd Defendant has also filed three [3] sets of Rejoinder submissions, which similarly merits mention and due amplification.

95. In respect of the submissions filed by the Applicant, Learned counsel for the 1st Defendant has submitted that the contention that no resolution was filed by the Plaintiff to authorize the firm of M/s Hamilton Harrison and Mathews Advocates, to withdraw the suit is misconceive and otherwise legally untenable.

96. Furthermore, Learned counsel has ventured forward and submitted that the necessity to file Board resolutions by and on behalf of a Company is no longer a good law. In this regard, Learned Counsel has contended that the submissions by the Applicant is therefore misconceived.

97. In support of the foregoing submissions, Learned counsel for the 1st Defendant has cited and relied on the holding by the Court of Appeal in the case of Arthi Highway Developers Ltd versus West End Butchery Limited & 6 Others (2015)eKLR.

98. Secondly, Learned counsel for the 1st Defendant has also submitted that whilst considering a Preliminary objection, the Honourable court is not barred and/or deterred from considering and taking into account facts, if same (facts) are not in dispute. In this regard, Learned counsel has further submitted that insofar as certain facts are not in dispute, the court therefore ought to venture forward and consider, inter-alia, the pleadings filed vide HCCOM E488 of 2022.

99. Furthermore, Learned Counsel added that the Court shall also be at liberty to examine and take into account, the Replying affidavit of Akber Esmail filed in response to the Originating summons vide HCCOM E488 of 2022; and the Exhibits attached thereto; the application dated the 4th December 2022; which was filed vide HCCOM E488 of 2022, as well as the minutes of the Annual General Meeting of the Plaintiff (sic) held on the 19th December 2022.

100. Further and in addition, Learned counsel for the 1st Defendant has also submitted that in the absence of evidence and/or admissible evidence to support the instant application, the submissions by and on behalf of the Applicant under the heading of D, have been mounted in vacuum and thus constitute what counsel for the 1st Defendant refers to as "HOT AIR".

101. In support of the foregoing submissions, Learned counsel has cited and relied on the holding of the Court of Appeal in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi (2014)eKLR.

102. Thirdly, Learned counsel for the 1st Defendant has also submitted that the issues being raised by the Applicant herein are the same issues which were raised by the Applicant in the High court case culminating into the Ruling rendered on the 26th July 2023; by Hon. Justice Majanja Judge. Consequently and in this regard, Learned counsel has contended that the issues herein are thus sub-judice.

103. In support of the contention that the Application by the Applicant is prohibited by the Doctrine of res-sub-judice, Learned counsel for the 1st Defendant has invited the Honourable Court to take cognizance of and to apply the ratio decidendi in the case of Kenya National Commission on Human Rights vs The Attorney General; IEBC & 16 Others (Interested Party) (2020)eKLR.

104. Fourthly, Learned counsel for the 1st Defendant has also submitted that insofar as Gad Zeevi is stated to have ceased to be a Director of the Plaintiff company, same is therefor divested of the requisite capacity to challenge the actions taken by and on behalf of the Plaintiff company, inter-alia, the steps which were taken at the Annual General Meeting of the Plaintiff company.

105. Fifthly, Learned counsel for the 1st Defendant has submitted that upon the adoption of the Notice of withdrawal of the suit, the court became functus officio and hence the Honourable court cannot be invited to re-visit the same matter.

106. Sixthly, Learned counsel for the 1st Defendant has submitted that the issue of illegality which has been alluded to by the Applicant herein, does not arise, insofar as the court considered the propriety of the Notice of withdrawal of the suit prior to and before same was adopted and endorsed. Consequently, Learned counsel has contended that the allegation of illegality do not arise or at all.

107. Pertinently, at the foot of paragraphs 11, 12(1) and (2) of the Rejoinder Submissions under reference, Learned counsel for the 1ST Defendant has contended and stated as hereunder; [verbatim]:

> Paragraph 12
>
> In the light of the documentation now before this honorable court on hearing of applications namely, about 65 pages of submissions, more than 50 authorities cited by the parties (and more than 500 pages), it is imperative and in the interest of justice that the 2nd Defendant be permitted to highlights its submissions.
>
> Paragraph 12(1)
>
> To deny this opportunity to the 2nd Defendant would be in breach of the rules of natural justice and a denial of its constitutional rights to a fair hearing.
>
> Paragraph 12(2)
>
> The 2nd Defendant accordingly applies to this honorable court to allocate time for such highlighting to be done.

108. Despite the foregoing, there is no gainsaying the 2nd Defendant is the Chief Land Registrar, who is represented by the Hon. Attorney General, and for good measure, the Hon. Attorney General has not donated his Constitutional mandate to the 1st Defendant or Legal counsel to mount the submissions which have been reproduced in the preceding paragraphs.

109. In respect of the Application by the intended Co-Plaintiff/Applicant, Learned counsel for the 1st Defendant has filed Rejoinder submissions dated the 3rd November 2023; and wherein same has adverted to and highlighted six [6] issues for consideration by the Honourable Court.

110. First and foremost, Learned counsel for the 1st Defendant has contended that the Application by the intended Co-Plaintiff/Applicant, which seeks joinder is contrary to and in contravention of Order 1 Rule 10 of the Civil Procedure Rules, 2010.

111. Secondly, Learned counsel for the 1st Defendant has contended that the intended Co-Plaintiff/Applicant has misinterpreted and misconceived the true import and tenor of the decision of the Supreme Court of Kenya in the case of Kenya National Commission on Human Rights versus The Attorney General; IEBC & 16 Others (Interested Parties) (2020)eKLR, wherein counsel for the intended Co-Plaintiff/Applicant has only cited a single paragraph, albeit out of context.

112. Owing to the contention that the intended Co-Plaintiff/Applicant has mis-interpreted the ratio decidendi in aforesaid case, Learned counsel has therefore taken it upon himself to reproduce assorted paragraphs which were alluded to by the Supreme Court of Kenya whilst dealing with the question of res-sub-judice.

113. Thirdly, Learned counsel for the 1st Defendant has also submitted that whilst entertaining and addressing the issue of sub-judice, the court is at liberty to venture forward and consider the pleadings, documents and even the ruling of the court, if any, made in the former suit, upon which the plea of sub-judice is anchored.

114. To this end, Learned counsel for the 1st Defendant has cited and relied in the holding in the case of Republic vs Paul Kihara Kariuki, Attorney General & 2 Others (2020)eKLR, where Hon. Justice Mativo, Judge (as he then was) is said to highlight the necessity to (sic) look at the pleadings and other documents filed in the previous case and to compare same with the pleadings/documents in the second case.

115. Fourthly, Learned counsel for the 1st Defendant has submitted that Hon. Justice Majanja, J; made a ruling on the 26th July 2023; and wherein the court dealt with similar issues like the ones being raised by the intended Co-Plaintiff/Applicant before this Honourable court.

116. Furthermore, Learned counsel has ventured forward and stated that the suit before the High Court is pending hearing and the decision before the High Court will be binding on both Gad Zeevi and James Mugoya Isabirye; who are Parties thereto. Consequently, counsel has added that the issues beforehand are barred/ prohibited by the Doctrine of Res-judicata.

117. Fifthly, Learned counsel for the 1st Defendant has contended that whilst dealing with a Preliminary objections, like the ones ventilated by the 1st Defendant, the Honourable court is at liberty to look at, examine and take into account documents and evidence, inter-alia, those filed in other suits, allegedly by the same Parties.

118. Additionally, Learned counsel has also contended that the Honourable court is also at liberty to refer to and take cognizance of the pleadings and documents filed by and on behalf of the Party raising the preliminary objection. Invariably, Learned counsel for the 1st Defendant has thereafter invited the court to take cognizance of a plethora of pleadings and documents filed by the 1st Defendant in the High Court case, namely, HCCOM E488 of 2022.

119. Sixthly, Learned counsel has also contended that the Honorable court has no Jurisdiction to entertain and adjudicate upon the issues raised at the foot of the Application by and on behalf of the Intended Co-Plaintiff/Applicant, insofar as such issues touch on and concern the management and affairs of the company which falls under the Jurisdiction of the High Court and not otherwise.

120. Seventhly, Learned counsel for the 1st Defendant has also submitted that the question of filing a board resolution giving rise to the instruction in favor of M/s Hamilton Harrison and Mathews Advocates; to take up the conduct of the suit and thereafter to withdraw same is no longer necessary and/or relevant.

121. Furthermore, Learned counsel for the 1st Defendant has submitted that the position regarding the filing of a board resolution(s), is no longer good law and hence the submissions by Learned counsel by the intended Co-Plaintiff/Applicant, is not only misconceived but legally untenable.

122. Suffice it to point out that Learned counsel for the 1st Defendant has thereafter proceeded to and cited the holding of the Court of Appeal in the case of Arthi Highway Developers Ltd versus West End Butchery Limited and 6 Others (2015)eKLR.

123. Other than the foregoing, Learned counsel for the 1st Defendant has also repeated the contention that upon the adoption of the Notice of withdrawal of suit and the consequential extraction of the formal order on the 3rd October 2023; the Honorable court became functus officio.

124. Lastly, Learned counsel for the 1st Defendant herein has thereafter adverted to the plea that there is need to afford (sic) the 2nd Defendant an opportunity to highlighting the Written submissions and that a failure to do so would be tantamount to a Violation of the Constitutional Right to Fair Hearing.

125. For ease of reference, it is worthy to reproduce the submissions by Learned counsel for the First Defendant at the foot of paragraphs 8.1, 8.2, 8.3, 8.4 and 8.5, respectively.

126. Same is reproduced as hereunder;

> Paragraph 8.0
>
> In the light of the documentation now before this honorable court on hearing of applications namely, about 65 pages of submissions, more than 60 authorities cited by the Parties (and more than 600 pages), it is imperative and in the interest of justice that the 2nd Defendant be permitted to highlights its submissions.
>
> Paragraph 8.1
>
> In the absence of being allowed to highlight it submissions, the 2nd Defendant will not be able to make a meaningful contribution and support of its cause.
>
> Paragraph 8.2
>
> To deny this opportunity to the 2nd Defendant would be in breach of the Rules of Natural Justice and a denial of its constitutional rights to a fair hearing.
>
> Paragraph 8.3
>
> The 2nd Defendant accordingly reapplies to this Honorable court to allocate time for such highlighting to be done. This request is a fresh application in the light of the position as of today, which is vastly different from the one when the initial orders were made.
>
> Paragraph 8.4
>
> The 2nd Defendant must be afforded a fair opportunity to answer and in absence being able to highlight its submissions it is impossible, with mass of documents placed before the court, to point out the core contentions for determination of its Preliminary objections.
>
> Paragraph 8.5
>
> Normally, court do allow highlighting of submissions and to refuse, would deny the 2nd Defendant what is and was its Legitimate expectation.

127. For the umpteenth time, it suffices to repeat that the 2nd Defendant has not abdicated her responsibility under *the constitution* and neither has same mandated Learned counsel for the 1st Defendant to make the submissions in terms of the excerpts which have been highlighted in the preceding paragraph.

128. In respect of the submissions by the Honorable Attorney General, Learned counsel for the 1st Defendant has filed Rejoinder submissions dated the 3rd November 2023; and in respect of which same has similarly highlighted and canvassed six [6] pertinent issues.

129. First and foremost, Learned counsel for the 1st Defendant has submitted that the Honorable Attorney General in his submissions has quoted and cited paragraph 67 of the Ruling of the case Kenya National Commission on Human Rights vs the Attorney General; IEBC & 16 Others (Interested Parties) (2020)eKLR; albeit out of context. Consequently and in this regard, Learned counsel has

thereafter taken it upon himself to highlight assorted paragraphs which same contends will put the ratio decidendi on the Supreme Court into perspective.

130. Secondly, Learned counsel for the 1st Defendant has similarly contended that whilst canvasing a Preliminary objection anchored on (sic) the plea of sub-judice, the Honourable Court is at liberty to venture forward and look at the pleadings and other documents in the previous case and to compare same with the documents/ pleadings in the second case.

131. Furthermore, Learned counsel has thereafter ventured forward and cited the holding in the case of Republic vs Paul Kihara Kariuki, Attorney General & 2 Others (2020)eKLR, where it is contended that Hon. Justice Mativo J (as he then was) indeed ventured forward and considered the pleadings and documents filed in the previous case and thereafter compared same with the pleadings in the second case, while dealing with a Preliminary Objection on the Issue of res-sub-judice.

132. Thirdly, Learned counsel for the 1st Defendant also submitted that on the basis of the decision by the Supreme Court in the case of Kenya National Commission on Human Rights (supra) and Republic vs Paul Kihara Kariuki (supra), respectively, this court is obligated to take into account (sic) the facts that are not in dispute, inter-alia, pleadings, documents, orders and affidavits which were filed elsewhere inter-alia, vide HCCCOM E488 of 2022.

133. Fourthly, Learned counsel for the 1st Defendant has also submitted that the issues which have been alluded to at the foot of the two [2] applications and which are now being supported by the Honorable Attorney general, are issues which falls within the Jurisdiction of the High Court and not otherwise.

134. Fifthly, Learned counsel for the 1st Defendant has also submitted that the Notice of withdrawal of the suit was duly adopted and endorsed by the court in the presence of the advocates for the respective Parties; and to the extent that same was duly adopted, the court is now Functus officio. Consequently and in this regard, Counsel has invited the court to take cognizance of the import and tenor of the concept of Functus officio.

135. Finally, Learned counsel for the 1st Defendant has yet again contended that taking into account the volume of documentation, namely, the volume of submissions, number of authorities cited and the pages thereto, it is imperative that the 2nd Defendant be afforded an opportunity to highlight his written submissions.

136. Barring repetition, is suffices yet again to reproduce the submissions verbatim.

137. Same are reproduced as hereunder;

> Paragraph 5.0
>
> In the light of the documentation now before this honorable court on hearing of applications namely, about 65 pages of submissions, more than 60 authorities cited by the parties (and more than 600 pages), it is imperative and in the Interest of Justice that the 2nd Defendant be permitted to highlights its submissions.
>
> Paragraph 5.1
>
> In the absence of being allowed to highlight it submissions, the 2nd Defendant will not be able to make a meaningful contribution and support of its cause
>
> Paragraph 5.2
>
> To deny this opportunity to the 2nd Defendant would be in breach of the rules of natural justice and a denial of its Constitutional Rights to a Fair Hearing.

Paragraph 5.3

The 2nd Defendant accordingly reapplies to this honorable court to allocate time for such highlighting to be done. This request is a fresh application in the light of the position as of today, which is vastly different from the one when the initial orders were made.

Paragraph 5.4

The 2nd Defendant must be afforded a fair opportunity to answer and in absence being able to highlight its submissions it is impossible, with mass of documents placed before the court, to point out the core contentions for determination of its preliminary objections.

Paragraph 5.5

Normally, court do allow highlighting of submissions and to refuse, would deny the 2nd Defendant what is and was its legitimate expectation.

138. Notably and for good measure, the 2nd Defendant, who is represented by the Honourable Attorney General, has not mounted the request that are attributed unto her (2nd Defendant) in the manner adverted to or otherwise.

i. APPLICANT'S SUBMISSIONS:

139. The Applicant filed elaborate submissions dated the 23rd October 2023; and in respect of which same has raised, highlighted and canvassed six [6] issues for consideration by the Honourable court.

140. Firstly, Learned counsel for the Applicant has submitted that the Application before the court raises a plethora of issues, inter-alia whether or not the Plaintiff company duly and lawfully instructed the firm of M/s Hamilton Harrison and Mathews Advocates; to file a Notice of change and thereafter to proceed and withdraw the suit or otherwise.

141. Furthermore, Learned counsel for the Applicant has ventured forward and submitted that it is common ground that a company can only act through authorized agents, namely, Directors, who are obligated to pass a resolution which then binds the company and not otherwise.

142. Additionally, Learned counsel has contended that the determination of whether or not the Notice of change of advocate; and the Notice of withdrawal of suit, were duly authorized by the Plaintiff company is a fundamental issues which would require to be addressed and/or interrogated by the Honourable Court.

143. Other than the foregoing, Learned counsel for the Applicant has also submitted that it would therefore be incumbent upon this Honourable court to judicially investigate the validity of the Notice of change of advocate; and the Notice of withdrawal which was filed by M/s Hamilton Harrison and Mathews Advocates; before coming to a conclusion as to the validity or propriety thereof.

144. In support of the foregoing submission, Learned counsel for the Applicant has cited and relied on inter-alia the holding in the case of Philomena Ndanga Karanja & 2 Others vs Edward Kamau Maina (2015)eKLR, Post Bank Credit Ltd vs Nyamangu Holdings Ltd (2015)eKLR, East African Portland Cement Ltd vs Capital Market Authority & 4 Others (2014)eKLR and Affordable Homes Africa Ltd vs Ian Anderson & 2 Others Nairobi HCC No. 524 of 2004 (UR), respectively.

145. Similarly, Learned counsel for the Applicant has also cited and quoted Halsbury Laws of England; Volume 7 paragraph 767, which underscores that a Company can only act and make decisions through the Board of Directors or such other organ of the Company mandated to do so.

146. Secondly, Learned counsel for the Applicant has also submitted that where a particular suit raises cross-cutting/hybrid issue which spread across the Jurisdiction of various court, then it behooves the court to examine the pleadings and to discern the pre-dominant issue in the matter.

147. Further and in addition, Learned counsel for the Applicant has submitted that upon discerning the pre-dominant issue, the Honourable court would be in a position to ascertain whether same is seized of the requisite Jurisdiction to adjudicate on the matter.

148. Be that as it may, Learned counsel for the Applicant has submitted that in respect of the instant matter, the pre-dominant issues touches on and concern land, and hence this Honourable court is conferred with Jurisdiction by dint of Article 162(2)(b) of *the Constitution* 2010; as read together with Section 17(3) of the *Environment and Land Court Act*, 2011.

149. As fa as the application of the pre-dominant tests is concerned, Learned counsel for the Applicant has cited and relied on, inter-alia, the case of United States International University vs Attorney General (2012)eKLR, Daniel N Mogeni vs Kenyatta University & 3 Others (2013)eKLR, David Ramogi & 4 Others vs the Cabinet Secretary, Ministry of Energy and Petrolium & 7 Others (2017)eKLR, Naomi Namazuri Zani & 2 Others vs Letters Development Ltd & Another (2021)eKLR, Mohamed Ali Baadi & Others vs Attorney General & 11 Others (2018)eKLR, Patrick Musimba vs National Land Commission & 4 Others (2015)eKLR, Leisure Lodges Ltd vs The Commissioner of Land & 767 Others and Tasmark Ltd vs Roberto Marci & 2 Others (2013)eKLR, respectively.

150. In a nutshell, Learned counsel for the Applicant has contended that the Application beforehand falls within the Jurisdiction of the Honourable court and hence the court ought to entertain and adjudicate upon the application.

151. Thirdly, Learned counsel for the Applicant has submitted that the (sic) Plaintiff and the 1st Defendant, respectively, have failed to demonstrate that the current Application is sub-judice, either as claimed or at all.

152. As pertains to the contention that the application beforehand is sub-judice, Learned counsel for the Applicant has submitted that the determination of whether or not the Doctrine of res-sub-judice does apply, will entail the examination and consideration of the pleadings, documents and affidavits if any filed in (sic) the former suit, which cannot be undertaken whilst adjudicating upon a Preliminary objection.

153. On the other hand, Learned counsel for the Applicant has also submitted that it is inappropriate for the counsel for (sic) Plaintiff and the 1st Defendant to invoke and rely on facts which are contested and thereafter use same to anchor the Preliminary objection on the basis of res-sub-judice.

154. Further and at any rate, Learned counsel for the Applicant has contended that where one seeks to raise and canvass a Preliminary objection, then such preliminary objection, must be based on the assumption that the issues adverted to by the adverse party (in this case, the Applicant), are correct and not disputed.

155. Furthermore, Learned counsel has ventured forward and submitted that the moment the facts raised and adverted by the adverse Party are contested, like in the instant case, the Preliminary objection becomes misconceived, inapplicable and/or irrelevant.

156. In support of the foregoing contention, Learned counsel for the Applicant has cited and invoked the holding in the case of Mukisa Buscuit Company Ltd vs West End Distributors Ltd (1969)EA, Oraro vs Mbaja (2005)eKLR, John Musikali vs The Speaker County Assembly of Bungoma & 4

Others (2015)eKLR and David Mayara Njoki vs Afraha Educational Society & 3 Others (2000)eKLR, respectively.

157. On the other hand, Learned counsel for the Applicant has also submitted that (sic) the Plaintiff and the 1st Defendant, respectively, have failed to establish and prove the requisite ingredients that underpin the plea of Res-sub-judice.

158. To underscore the necessary ingredients that must be established and demonstrated before a plea of res-sub-judice can be adverted to and invoked, Learned counsel for the Applicant has cited and relied on, inter-alia, the holding in the case of Republic vs Registrar of Societies Ex-parte Moses Kirima & Others (2017)eKLR and the provisions of Section 6 of the *Civil Procedure Act*.

159. Fourthly, Learned counsel for the Applicant has submitted that the Ruling rendered by Hon. Justice Majanja, Judge; on the 26th July 2023; in HCCCOM (OS) E488 of 2022, does not provide a basis for the invocation and reliance on the Doctrine of Res-judicata.

160. In particular, Learned counsel for the Applicant has submitted that the decision alluded to in the preceding paragraph was an interlocutory decision whereby the court declined to grant mandatory orders in a matter filed by Gad Zeevi versus Akber Abdulla Kassam Esmail and James Abiam Mugoya Isabirye.

161. In any event, Learned counsel has submitted that the issues which are at the foot of HCCOM (OS) E488 of 2022; which have been alluded to by the Plaintiff and the 1st Defendant, respectively, are separate and distinct from the issues before this Honorable court.

162. On the other hand, Learned counsel for the Applicant has also submitted that the Parties in the matter before HCCCOM (OS) No. E488 of 2022; are also separate and distinct from the Parties in respect of the instant matter.

163. Based on the foregoing, Learned counsel for the Applicant has thus submitted that the plea of Res-judicata, which have been adverted to by and on behalf of (sic) the Plaintiff and the 1st Defendant, respectively, is neither applicable nor relevant to the instant Application.

164. In respect of the submissions touching on and concerns the ingredients underpinning the Doctrine of Res-judicata and whether same is applicable in respect of the instant matter, Learned counsel has cited and relied on, inter-alia, the holding in the case of Nathaniel Ngure Kihiu vs Housing Finance (2018)eKLR; Kenya Commercial Bank Ltd vs Benjo Amalgamated Ltd (2017)eKLR; Cosmas Mrobo Moka vs Cooporative Bank of Kenya Ltd (2018)eKLR and State of Maharastra & Another vs National Construction Company, Bombey; Supreme Court Civil Appeal No. 1497 of 1996, respectively.

165. Fifthly, Learned counsel for the Applicant has submitted that even though the Honourable Court adopted and endorsed the Notice of withdrawal of the suit on the 27th September 2023, the adoption of the Notice of withdrawal does not deprive this court of the requisite Jurisdiction to entertain an Application where the propriety, regularity and validity of the Notice of withdrawal is being challenged.

166. Furthermore, Learned counsel for the Applicant has submitted that where the Notice of withdrawal of suit is contended to have been generated and filed by a person without the requisite authority, then it is the Honourable court which adopted that notice of withdrawal, that has the Jurisdiction to deal with the application; and where appropriate, to expunge the impugned Notice of withdrawal.

167. Be that as it may, Learned counsel for the Applicant has submitted that the concept of Functus officio does not apply to and/or affect the current Application, either as contended (sic) the Plaintiff and the 1st Defendant, or at all.

168. In respect of the submissions touching on the relevance and applicability of the Doctrine Functus officio, Learned counsel for the Applicant has cited and relied on inter-alia the holding in the case of Telkom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 former employees of Telkom Kenya Ltd) (2014)eKLR, Mombasa Brics and Tiles Ltd & 5 Others vs Arvind Shah & 7 Others (2018)eKLR, Raila Odinga & 2 Others vs IEBC & 3 Others (2013)eKLR and Mohamed Dagane Fair vs Alphonse Mutuku Muli & Another (2020)eKLR, respectively.

169. Sixthly, Learned counsel for the Applicant has submitted that the Applicant herein has a right to Fair Hearing and Fair Administrative Action; and that where a suit is withdrawn by a person who had no mandate to effect such withdrawal, the court has the requisite Jurisdiction and authority to interrogate the circumstances leading to such withdrawal and thereafter, correcting an illegality, if any.

170. Furthermore, Learned counsel for the Applicant has submitted that the Right to Fair Hearing is a Fundamental Right and thus it behooves the Honourable court to ensure that the Applicant herein is afforded the requisite latitude to interrogate the efficacy and validity of the Notice of change of advocate; and the Notice of withdrawal of the suit and that same can only be undertaken by hearing the Applicant's application on merit and not otherwise.

171. Finally, Learned counsel for the Applicant has submitted that even though the provisions of Order 25 of the Civil Procedure Rules are salient on reinstatement of a suit that has been withdrawn, the silence of Order 25 of the Civil Procedure Rules, 2010; does not divest and/or deprive the Honorable court of the requisite Jurisdiction to decree reinstatement of a suit, where the circumstances warrants and necessitates such reinstatement.

172. At any rate, Learned counsel for the Applicant has further submitted that the current Application has been mounted under various provisions, inter-alia Section 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya; which underpins the Inherent and Intrinsic Jurisdiction of the court.

173. In support of the submissions that the court can invoke and apply the provisions of Section 3A Of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; to remedy a situation which is not explicitly provided for, Learned counsel for the Applicant has cited and relied on the holding in the case of David Manyara Njuki vs Afraha Educational Society & 3 Others (2000)eKLR. Similarly, Learned counsel has also cited Halsbury Law of England 4th Edition Volume 37 paragraph 14.

174. Other than the foregoing, Learned counsel for the Applicant has also submitted that the various decisions, namely, Pricilla Nyambua Njue vs Geochem Middle East Ltd and Kenya Beaurue of Standard (2021)eKLR and SMT Raisa Sultana Begam & Others vs Abdul Qadir & Others AIR (1966) ALL 318, which have been cited by (sic) the Plaintiff and the 1st Defendant respectively, are not applicable to the instant case and/or situation.

175. Instructively, Learned counsel for the Applicant has contended that a forecited decision(s) can only hold sway, if and only if, it is established that the suit was withdrawn by the correct and actual Plaintiff and not in a case where the validity of the Notice of withdrawal is challenged and/or impugned.

176. Arising from the foregoing, Learned counsel for the Applicant has thus invited the Honourable court to find and hold that the various Notices of Preliminary objection(s) , which have been filed and canvassed by (sic) the Plaintiff and the 1st Defendant, respectively, are not only premature and misconceived, but same are deficient and ought to be dismissed with costs on Indemnity basis.

2nd Defendant's Submissions:

177. The 2nd Defendant/Respondent filed written submissions dated the 27th October 2023; and in respect of which same has raised, highlighted and canvassed five [5] pertinent issues for consideration by the Honourable court.

178. Firstly, Learned counsel for the 2nd Defendant/Respondent has submitted that this Honorable court is seized and possessed of the requisite Jurisdiction to interrogate, assess and ascertain the illegality of the impugned Notice of change of advocates; and the attendant Notice of withdrawal of the suit, with a view to establishing whether same was filed by the Plaintiff.

179. Furthermore, Learned counsel has submitted that it is this very Honorable court which adopted the Notice of withdrawal of suit and therefore where the validity or propriety thereof is challenged; then it behooves the court to entertain the concerned application and thus the Jurisdiction inheres in this court.

180. In any event, Learned counsel has cited and relied on various decisions, inter-alia, the case of Samuel Kamau Macharia & 2 Others vs Kenya Commercial Bank & Others (2014)eKLR, Phoenix of East African Assurance Ltd vs S M Thiga T/a Newspaper Services (2019)eKLR and Kenya Ports Authority vs Modern Holdings EA Ltd (2017)eKLR, respectively.

181. Secondly, Learned counsel for the 2nd Defendant/Respondent has submitted that the decision in the case of Pricilla Nyambura Njue vs Geochem Middle East Ltd; Kenya Bureau of Standard (2021)eKLR, which has been cited and relied upon by (sic) the Plaintiff and the 1st Defendant, respectively, is not applicable to the current situation where the Plaintiff is contending that it is actually the 1st Defendant's Director and its Mnaging Director, who orchestrated the change of directorship in the Plaintiff company and therefore purported to withdraw the suit.

182. Suffice it to point out that Learned counsel for the 2nd Defendant/Respondent has therefore implored the Honourable court to distinguish the cited decision and to hold that the court is seized of Jurisdiction to interrogate the validity of withdrawal.

183. Thirdly, Learned counsel for the 2nd Defendant/Respondent has also submitted that the Applicant herein has a right to be heard on the various applications that has been filed and that the Right to be heard is Fundamental.

184. As pertains to the implications attendant to the Right to Hair hearing, Learned counsel for the 2nd Defendant/Respondent has cited and relied on the case of The Speaker, Kisumu Assembly and Others versus The Clerk, Kisumu County Assembly and Others (2015)eKLR.

185. Fourthly, Learned counsel for the 2nd Defendant has submitted that the twin applications before the Honourable court are not barred by the Doctrine of Res-Judicata and by extension, the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; insofar as the issues alluded to in the HCCCOM E488 of 2022; which have been referred to by (sic) the Plaintiff and the 1st Defendant herein, are no directly and/or substantial issues before the court herein.

186. To the extent that the issues pending before the High Court are separate and distinct from the issues herein, Learned counsel for the 2nd Defendant has contended that the plea of Res judicata which has been adverted to by and on behalf of the Plaintiff and the 1ST Defendant, respectively, is thus irrelevant and applicable.

187. To buttress the submissions that the plea of res-judicata is not applicable in respect of the instant matter, Learned counsel for the 2nd Defendant/Respondent has cited and relied on inter-alia the case Kamunye & Others vs The Pioneers General Assurance Society Ltd (1971)EA 263; E.T v Attorney General & Another (2012)eKLR and John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR, respectively.

188. Finally, Learned counsel for the 2nd Defendant/Respondent has also submitted that the plea of res-sub-judice which has been cited and relied upon by (sic) the Plaintiff and the 1st Defendant, is also irrelevant and in applicable in respect of the instant matter.

189. Furthermore, Learned counsel has submitted that even though the Plaintiff and the 1st Defendant, respectively, have invoked and relied on the concept of res-sub-judice; there is no material that has been placed before the Honorable court to warrant a finding and holding that the twin applications before the court are indeed prohibited by the doctrine of res-sub-judice.

190. As pertains to the ingredients that must b established before one can invoke and apply the Doctrine of res-sub-judice, Learned counsel for the 2nd Defendant has cited and relied in the holding in the case of Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Ex-parte Law Society of Kenya (2020), Okiya Omutata Okoiti & Another vs Ministry of Transport and Infrastructure & 4 Others (2016)eKLR and Kenya National Commission of Human Rights; IEBC (Interested Party) (2020)eKLR, respectively.

191. Additionally, Learned counsel for the 2nd Defendant/Respondent has also submitted that the Doctrine of res-sub-judice only applies on the latter suit and not otherwise. In this regard, Learned counsel has contended that if the Doctrine was to be invoked and applied, then it can only apply against the suit which was filed subsequently and in this case, Nairobi HCCCOM No. E488 of 2022 (OS).

192. In support of the foregoing submissions, Learned counsel for the 2nd Defendant has cited and quoted the decision in Justus Javan Ochieng versus Airtel Networks K Ltd & 2 Others (2021)eKLR.

193. In short, Learned counsel for the 2nd Defendant/Respondent has impressed upon the Honourable court find and hold that the Preliminary objection(s) which have been canvased by and on behalf of (sic) the Plaintiff and the 1st Defendant, are devoid and bereft of merits and same ought to be dismissed with Costs.

b. The Intended Co-plaintiff/applicant's Submissions:

194. The intended Co-Plaintiff/Applicant filed written submissions dated the 23rd October 2023; and in respect of which same has raised and amplified six [6] issues for determination by the Honourable court.

195. First and foremost, Learned counsel has contended that the Intended Co-Plaintiff/ Applicant has submitted that the subject suit touches on and concerns ownership and title to land and hence the dispute beforehand falls squarely within the Jurisdiction of the Environment and Land court.

196. Further and in addition, Learned counsel for the Intended Co-Plaintiff/Applicant has contended that the issues relating to directorship in the Plaintiff company which have been raised at the foot of the Application by and on behalf of the Intended Co-Plaintiff/Applicant are issues which are not strange to the matter before the Honorable court, insofar as the suit before the court was filed by a Limited liability company.

197. At any rate, Learned counsel has submitted that insofar as the suit was filed by a Limited liability company, one of the critical issue that underpin the suit touches on and concern the necessity of the Board resolutions, which would mandate the Deponent of the verifying affidavit to swear such an affidavit.

198. Additionally, Learned counsel has contended that where issues pertaining to illegal and unlawful acts touching on the withdrawal of the instant suit are concerned, then it is this Honorable court that is seized of Jurisdiction to entertain the application to that effect.

199. Secondly, Learned counsel for the Intended Co-Plaintiff/Applicant has contended that the issues at the foot of the Application by and on behalf of the Intended Co-Plaintiff/Applicant relates to the reinstatement of the suit and hence the Doctrine of Res-sub-judice does not apply, either in the manner contended or at all.

200. Additionally, Learned counsel has contended that the issues beforehand are separate and distinct from the issues pending before the High Court vide HCCCOM E488 of 2022.

201. In support of the submissions that the issues beforehand are separate and distinct from what is pending before the High Court and further that the Doctrine of res-sub-judice does not Apply to the instant matter, Learned counsel has cited and relied on, inter-alia, the case of Republic vs Paul Kihara Kariuki, Attorney General 2 Others Ex-Parte Law Society of Kenya (2020)eKLR and Cyrus Musembiu Irungu vs Martha Wanjiru Irungu & Another (2022)eKLR and Margret Wachu Karuri vs John Waweru Ribiru (2021)eKLR, respectively.

202. Thirdly, Learned for the Intended Co-Plaintiff/Applicant has also submitted that the subject Application is also not barred by the Doctrine of Res-judicata either as contended by (sic) the Plaintiff and the 1st Defendant or at all.

203. Consequently, Learned counsel has contended that neither the Plaintiff nor the 1st Defendant has established the requisite ingredients that underpin the Doctrine of Res-judicata or at all. Consequently and in the premises, Learned counsel has contended that the submissions touching on the applicability of the Doctrine of Res-judicata are there for misconceived and hence legally untenable.

204. In support of the submissions touching on the Doctrine of Res-Judicata, Learned counsel for the intended Co-Plaintiff/Applicant has cited and relied on the case of IEBC vs Maina Kiae & 5 Others (2017)eKLR.

205. Fourthly, Learned counsel for the intended Co-Plaintiff/Applicant has also submitted that the Honorable court is not Functus officio insofar as the subject application is concerned. In particular, Learned counsel has contended that the Honorable court is vested with the requisite mandate to re-visit the question of the Notice of change and the Notice of withdrawal and ascertain whether same were lawfully filed or otherwise.

206. To underscore the submissions touching on and concerning the applicability and relevance of the Doctrine of Functus officio, Learned counsel for the intended Co-Plaintiff/Applicant has cited and relied on inter-alia the case of Raila Odinga vs IEBC (2013)eKLR and Standard Chartered Financial Services Ltd & 2 Others vs Manchaster Outfitters (Suiting Division) now known King Woolen Mills Ltd & 2 Others (2016)eKLR, respectively.

207. Fifthly, Learned counsel has submitted that the Honorable court is seized and vested with the requisite discretion to decree the reinstatement of the suit at the instance of the Intended Co-Plaintiff/

Applicant. Furthermore, Learned counsel has submitted that the impugned withdrawal of the suit was undertaken without the requisite authority and/or authorization by the Plaintiff company.

208. On the other hand, Learned counsel has also submitted that the impugned withdrawal was also informed by non-disclosure of material facts and hence same is vitiated and thus amenable to be set aside.

209. In support of the contention that the withdrawal of the suit was undertaken without the requisite authorization of the Plaintiff company, Learned counsel for the Intended Co-Plaintiff/Applicant has cited and relied on the holding in the case of East African Portland Cement Ltd vs Capital markets Authority & 4 Others (2014)eKLR and Affordable Homes Africa Ltd vs Ian Henderson & 2 Others Nairobi HCC No. 524 of 2004 (UR), respectively.

210. Finally, Learned counsel for the Intended Co-Plaintiff/Applicant has submitted that the Preliminary objection(s) which have been canvased and raised by (sic) the Plaintiff and the 1st Defendant, respectively, are not only misconceived, but are predicated upon disputed facts, which the court would require to interrogate, prior to and before forming and opinion thereon.

211. Furthermore, Learned counsel has contended that a Preliminary objection can only be raised and canvased on the assumption that the facts pleaded by the adverse Party [namely, the Party against whom the Objection is taken], are correct and not otherwise.

212. Premised on the foregoing, Learned counsel for the Intended Co-Plaintiff/Applicant has submitted that the various Preliminary objection(s) filed by and on behalf of (sic) the Plaintiff and the 1st Defendant, respectively, are therefore legally untenable and same ought to be Dismissed.

Issues for Determination:

213. Having reviewed the four [4] sets of Preliminary objection filed by the (sic) the Plaintiff and the 1st Defendant, respectively, and upon evaluating the extensive written submissions filed by the respective Parties; the following issues do emerge and are thus worthy of consideration by the Honourable court;

    i. Whether the Honorable court is seized of the requisite Jurisdiction to entertain the and adjudicate upon the application(s) namely, dated the 26th September 2023, respectively.

    ii. Whether the failure to afford Counsel for the (sic) the Plaintiff and the 1st Defendant an opportunity to highlight constitute a violation to right to Fair Hearing, either as contended or at all.

    iii. Whether the intended Co-Plaintiff/Applicant has the requisite Locus standi to be joined as a Party in the instant suit.

    iv. Whether the Intended Co-Plaintiff/Applicant, who was not a party to the suit as at the time of withdrawal thereof can seek to set aside the orders which were made on the 27th September 2023.

    v. Whether the Application by and on behalf of the Applicant, is prohibited by the Doctrine of Res-sub-judice.

    vi. Whether the Application by the Applicant is barred by the Doctrine of Res-judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

    vii. Whether the court is Functus officio

Analysis and Determination

Issue Number 1; Whether the honorable court is seized of the requisite jurisdiction to entertain the and adjudicate upon the application(s) namely, dated the 26th September 2023, respectively.

214. Before venturing to address the issue highlighted hereinbefore, it is imperative to point out that the instant suit was filed by and on behalf of the Plaintiff and same touches on and/or concerns ownership of L.R No. 28586 (I.R No. 124735) and L.R No. 28587 (I.R No. 124736), respectively.

215. To the extent that the subject suit touched on and/or concerned the question of ownership and title to land, there is no gainsaying that at the onset, this Honorable court was seized and/or vested with the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.

216. Nevertheless, during the proceedings in respect of the instant matter, the Plaintiff herein is said to have instructed and/or engaged the law firm of M/s Hamilton Harrison & Mathews Advocates to file a Notice of Change of Advocates and thereafter to withdraw the suit as against the Defendants/ Respondents herein.

217. Suffice it to point out that the matter came up on the 27th September 2023, whereupon Learned counsel Mr. Kiragu Kimani SC intimated to the Honourable court that the Plaintiff had filed a Notice of withdrawal of he suit and thus implored the court to proceed and adopt the Notice of withdrawal of the suit.

218. Pursuant to and at the instance of (sic) counsel for the Plaintiff, the Honorable court proceeded to and adopted the Notice of withdrawal of the suit and thereafter marked the suit as duly withdrawn, albeit with no orders as to costs.

219. Be that as it may, upon the withdrawal of the suit, two application(s) dated the 26th September 2023, respectively, were filed challenging the propriety and validity of the Notice of change of advocates filed by M/s Hamilton Harrison and Mathews Advocates; as well as the Notice of withdrawal of the suit.

220. In response to the two application(s), Learned counsel for the (sic) the Plaintiff and the 1st Defendant, respectively, have contended that upon the withdrawal of the suit, the court has no Jurisdiction to entertain an application for reinstatement and/or to reinstate such a withdrawn suit.

221. To this end, Learned counsel for the (sic) the Plaintiff has cited and relied on inter-alia, the decisions in the case of Pricilla Nyambura Njue vs Geochem Middle East Ltd and Kenya Bureau of Standards (2021)eKLR and SMT. Raisa Sultana Begum & Others vs Abdul Qadir & Others AIR (1966) ALL 318, respectively, to point out that the provisions of Order 25 of the Civil Procedure Rules 2010 does not contain a leeway/ window for reinstatement of a withdrawn suit.

222. According to Learned counsel for the (sic) the Plaintiff and the 1st Defendant, the withdrawal of a suit brings the matter to an end and thereafter the court is divested of Jurisdiction to re-visit the withdrawn suit.

223. On the other hand, Learned counsel for the Applicant has submitted that the impugned withdrawal, which is the subject of the current applications, was orchestrated by strangers without the requisite mandate and/or authority to act on behalf of the Plaintiff company.

224. To this extent, Learned counsel for the Applicant has contended that the withdrawal of the suit, which is the subject of the current application, was therefore not undertaken by the Plaintiff and hence the act(s) complained of constitutes an illegality and are thud null and void.

225. Arising from the foregoing, Learned counsel for the Applicant has therefore submitted that the court is seized of the requisite Jurisdiction to discern and ascertain whether or not the withdrawal was sanctioned by the Plaintiff; and if not, to rescind the offensive Notice of withdrawal.

226. Consequently, it is the Applicant's submissions that the court is seized of Jurisdiction to re-visit the subject matter and in particular the question of withdrawal of the suit herein.

227. Having taken into account the rivaling submissions, I take the position that the mere fact that the provisions of Order 25 of the Civil Procedure Rules, 2010; does no contain a clause for reinstatement of a withdrawn suit, does not ipso facto denote that a court of law is divested of Jurisdiction to entertain an application for reinstatement and indeed to reinstate a suit, if and when peculiar circumstances are established, demonstrated and proved.

228. Furthermore, I also take the position that the absence of an express provision for reinstatement of a withdrawn suit, does not per se oust, limit and/or restrict the Inherent and Intrinsic Jurisdiction of this particular court to entertain an application for reinstatement.

229. To be able to understand the import, tenor and scope of the Inherent and intrinsic Jurisdiction of the Honorable court, it is imperative to take cognizance of the Provisions of Section 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

230. The named provisions are reproduced as hereunder;

> 3A. Saving of inherent powers of court.
>
> Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

231. My understanding of the provisions of Section 3A of the *Civil Procedure Act*; (supra) is to the effect that nothing contained in the body of the *Civil Procedure Act* and the Rules made thereunder, shall bar and/or prohibit this court in appropriate circumstances from making such orders as may be deemed just, expedient and mete, taking into the account the obtaining circumstances.

232. Furthermore, the scope extent and import of Inherent and Intrinsic Jurisdiction of the court was also amplified by the Supreme Court of Kenya in the case of Narok County Government versus Livingstone Kunini Ntutu (2018)eKLR, where the court stated and observed thus;

> [99] Further in Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR the Court of Appeal set out the principles to guide the Court in exercising inherent jurisdiction in these words;
>
> > "The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection..." (Emphasis added.)

[100] The conclusion drawn from the above citations is that this Court, indeed any other appellate Court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the Court to act to prevent abuse of Court process by one party so that fairness is maintained between all parties.

[101] The consequence of the foregoing is that, we find that this matter warrants this Court's consideration, and to what extent given its importance. The issue before us, we are certain, is also exceptional and would require that we invoke this Court's inherent jurisdiction to hear and determine the same in the context of the appeal before us. In this regard, we echo our pronouncement in the case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 others, [2017] eKLR where in considering the question whether this Court can review its own judgment, the Court said that in exceptional circumstances, and so as to meet the ends of justice, the Court may invoke its inherent jurisdiction to consider and review its own judgment. Hence, we invoke this Court's inherent jurisdiction to admit and consider this Appeal limited only to a consideration of the question;

233. In respect of the instant matter, there are allegations (sic) that the Notice of change of advocates filed by the firm of M/s Hamilton Harrison & Mathews Advocates; and the Notice of Withdrawal of the Suit, were procured on behalf of strangers, albeit without the requisite authorization of the Plaintiff company.

234. Whereas the foregoing contention remains an allegation (read, mere averment) until same is duly interrogated and investigated when the factual controversy presented by either Party shall be addressed, what comes to the fore, is that there is a situation that warrants investigation by the court with a view to ascertaining the validity of the withdrawal of the suit.

235. Instructively, if (I say if) the court were to find that the notice of withdrawal was filed without the requisite authorization of the Plaintiff company; then the court will have to engage with the question as to whether the suit was duly withdrawn or otherwise. Besides, the Court may also be called upon to make a determination of whether or not the documents, were nullities, or otherwise.

236. To my mind, this Honourable court is seized of the requisite Jurisdiction to entertain an application for reinstatement of a suit which has been withdrawn and where appropriate, to direct reinstatement, subject to proof of special and peculiar circumstances, if any.

237. Invariably, as pertains to whether this Honourable court can entertain an application for reinstatement of a withdrawn suit, I choose to side with the decision of the court in the case of David Manyara Njuki versus Afraha Educational Society & 3 Others (2000)eKLR, where the court stated thus;

> " On the courts assessment of the facts herein, it is clear that indeed Order 24 Rule 1(now Order 25 Rule 1) permits withdrawal of the suit, but it does not provide for reinstatement of the suit. The Plaintiff/Applicant has however cited Section 3A which is a saving Section and usually invoked when no other provisions caters for that particular situation. This application is therefore proper)".

238. On the contrary, I do not share the esteemed thinking/ reasoning of the Court [per Mativo, J; [as he then was], vide the case Pricilla Nyambura Njue vs Geochem Middle East Ltd & Kenya Bureau of Standards (2021)eKLR, where the Honorable Judge stated as hereunder;

> " Withdrawal of a suit it itself an end. The right of a Plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal".

239. In my humble view, two perspectives do arise from the holding of the court. Firstly, the holding in question does not take into account a scenario where there is a contest as to whether or not the person who approached the Court and withdraw the suit was indeed the actual Plaintiff or otherwise.

240. Secondly, I hold the opinion that the holding in question seems to suggest that where there is no express provision in the Rules; for the doing or taking of an act, then such an act, which has not been expressly provided for is deemed untenable and cannot be taken, irrespective of the Inherent, intrinsic and residual Jurisdiction of the Court.

241. Invariably, I am of the humble opinion that courts of law and of Equity; this Honorable court not excepted, are imbued and infused with intrinsic and residual Jurisdiction, which is intended to be exercised to avert grave injustice and to achieve the Ends of Justice, albeit in appropriate circumstances.

242. In a nutshell, it is my finding and holding that the fact that Order 25 of the Civil Procedure Rules 2010, does not contain an express provisions for reinstatement of a withdrawn suit, does not ipso facto divest the court of the inherent Jurisdiction to decree reinstatement, albeit in appropriate circumstance.

243. The second aspect to the argument touching on Jurisdiction related to the fact that the issues raised at the foot of the two [2] applications touch on and/or concern the shareholding and directorship of the Plaintiff company and thus the courts seized with the requisite Jurisdiction is the Honorable High Court by dint of the provisions of the *Companies Act*, 2015.

244. Be that as it may, I beg to point out and underscore that the central issue before this court does not touch on shareholding and directorship of the Plaintiff company, but on the reinstatement of the suit which had been filed by the Plaintiff company before the Environment and Land Court and not otherwise.

245. Further and in any event, it is imperative to underscore that insofar as the suit herein was filed by and on behalf of a Limited liability company, there are certain aspects of the company law that are relative and which this court must take into account. Instructively, this court is called upon to take into account compliance with the provisions of Order 4 Rule 1(2) and Order 9 Rule 2 paragraph (c) of The Civil Procedure Rules, 2010 with a view to ascertaining whether the actions by and on behalf of the company, are indeed sanctioned by the company or otherwise.

246. It is also not lost on this Honourable court that where a suit is filed by and on behalf of a company, certain resolutions are necessary and/or relevant and more particularly, where there is a contest as pertains to the person(s) with the requisite authority to act on behalf of such a company.

247. In my humble view, the question as to whether or not the actions complained of; by and on behalf of the Applicant were sanctioned by the Plaintiff company, can only be addressed and interrogated by looking at affidavit evidence presented by the rivaling Parties and not otherwise.

248. Furthermore, it does not mean that because the Environment and Land court examines the affidavits filed by the disputing Parties, who claim to be Directors, then the court will be encroaching upon the Jurisdiction of the High Court.

249. Notably, there is no gainsaying that the determination of the application by the Applicant, which questions the authority upon which the Notice of withdrawal of suit was made; can only be undertaken by this court and if the court is satisfied otherwise, then the court shall be disposed to make appropriate orders touching on and concerning the impugned Notice of withdrawal.

250. In support of the exposition of the Law that a company can only act through authorized agents and/or persons,[read, authorized Directors], it suffices to adopt and reiterate the holding in the case of East African Portland Cement Ltd vs Capital Markets Authority & 4 Others (2014)eKLR, where the court stated thus;

> " The upshot of this consideration is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the Plaintiff".

251. To my mind, the circumstances that surround the withdrawal of the suit, can only be investigated by the Environment and Land court, which is the court wherein the suit was filed before same was (sic) withdrawn on the basis of the impugned Notice of withdrawal.

252. Before departing from this issues, I beg to underscore that the dispute before the court herein is premised on a suit that was filed before the Environment and Land court and in any event, same touches on the question of ownership and title to land. Consequently and in this regard, it is the Environment and Land court that is seized of the requisite Jurisdiction to entertain and adjudicate upon all incidental issues and questions emanating from the subject suit and not otherwise.

253. Finally, it is common ground that the Jurisdiction of a court flows from *the constitution* and the constitutive charter or both. To this end, there is no gainsaying that from the onset the subject suit touched on issues that fell within the Jurisdiction of the Environment and Land court by dint of Article 162 (2) (b) of *The Constitution* 2010 and Section 13(3) and (7) of The *Environment and Land Court Act*, 2011.

254. Remarkably, the dictum of the Supreme Court of Kenya in the case Samuel Kamau Macharia versus Kenya Commercial Bank Ltd (2012)eKLR, is apt and succinct.

255. For coherence, the Supreme Court stated and held thus;

> (68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits.

It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

256. Arising from the foregoing, my answer to the question of Jurisdiction is to the effect that this Honorable court is seized of the requisite Jurisdiction to entertain and adjudicate upon the issues pertaining reinstatement of the suit; and to make appropriate orders, subject to proof of the allegations mounted, if at all.

Issue Number 2

Whether the failure to afford counsel for the (sic) the Plaintiff and the 1st Defendant an opportunity to highlight constitute a violation to Right to Fair Hearing, either as contended or at all.

257. Learned counsel for (sic) the Plaintiff has contended at the foot of the Rejoinder submissions dated the 6th November 2023; that owing to the volume of documentation, namely, the written submissions and the authorities filed and exchanged by the Parties, it is imperative that the Honourable court be pleased to review the directions given on the 12th October 2023; and to allow the Parties to highlight their submissions.

258. Furthermore, Learned counsel for the Plaintiff has also contended that a failure to allow Learned Counsel for the Plaintiff to highlight written submissions would constitute a violation the Right to Fair Hearing.

259. Similarly, Learned counsel for the 1st Defendant has also contended at the foot of the Rejoinder submissions dated the 3rd November 2023; that a failure to allow (sic) the 2nd Defendant to highlight her submissions would be tantamount to violating (sic) the 2nd Defendant's Constitutional Right to Fair Hearing.

260. Perhaps, it is imperative to reproduce verbatim the submissions mounted by the 1st Defendant in this respect.

261. Same are reproduced as hereunder;

> Paragraph 5.0
>
> In the light of the documentation now before this honorable court on hearing of applications namely, about 65 pages of submissions, more than 60 authorities cited by the parties (and more than 600 pages), it is imperative and in the interest of justice that the 2nd Defendant be permitted to highlights its submissions.
>
> Paragraph 5.1
>
> In the absence of being allowed to highlight it submissions, the 2nd Defendant will not be able to make a meaningful contribution and support of its cause
>
> Paragraph 5.2;
>
> To deny this opportunity to the 2nd Defendant would be in breach of the rules of natural justice and a denial of its constitutional rights to a fair hearing.
>
> Paragraph 5.3

> The 2nd Defendant accordingly reapplies to this honorable court to allocate time for such highlighting to be done. This request is a fresh application in the light of the position as of today, which is vastly different from the one when the initial orders were made.
>
> Paragraph 5.4
>
> The 2nd Defendant must be afforded a fair opportunity to answer and in absence being able to highlight its submissions it is impossible, with mass of documents placed before the court, to point out the core contentions for determination of its preliminary objections.
>
> Paragraph 5.5
>
> Normally, court do allow highlighting of submissions and to refuse, would deny the 2nd Defendant what is and was its legitimate expectation.

262. Curiously, the contention pertaining to and concerning the right to highlight the written submissions are made [sic] on behalf of the 2nd Defendant. Nevertheless, it suffices to point out that Learned counsel for the 1st Defendant, had no instructions to propagate such submissions on behalf of the 2nd Defendant, who is duly represented by the Honorable Attorney General.

263. Be that as it may, I beg to treat the foregoing submissions mutatis mutandis, as if same were being made on behalf of the 1st Defendant.

264. Notwithstanding the foregoing, what the Learned counsel for the Plaintiff and the 1st Defendant, respectively, are not appreciating is the fact that the Honourable court made very explicit orders and directions on the 12th October 2023, whereupon the Parties were ordered and directed to file Comprehensive and elaborate submissions, taking into account that there would be no highlighting.

265. Additionally, Learned counsel for the Plaintiff and the 1st Defendant, respectively, are also not pointing out that pursuant to the express orders and directions of the Honourable court made on the 12th October 2023, (sic) the Plaintiff filed two [2], sets of written submissions together with List and digest of authorities, which were extremely comprehensive.

266. On the other hand, it is not lost on this Honourable court, that Learned counsel for the 1st Defendant filed five [5] sets of written submissions, which were extremely elaborate together with bundles of authorities before the court.

267. Quiet clearly, both counsel for (sic) the Plaintiff and the 1st Defendant had the requisite opportunity, latitude and altitude to say all that same intended to state in cold/ black letter. Instructively, this court has painstakingly reproduced and rehashed the pertinent submissions that were filed on behalf of the Parties.

268. In my humble view, the right to Fair Hearing and the Due Process of the law takes various perspectives/ nuances, including but not limited to a Party filing written representation and/or submissions in respect of the issue under investigations. In this respect, the Learned counsel for the Plaintiff and the 1st Defendant, respectively, indeed enjoyed and appropriated the right to Fair Hearing on behalf of their respective clients and thereafter filed very elaborate/ Comprehensive submissions before the court.

269. Surely, the contention that the failure to afford Learned counsel for the Plaintiff and the 1st Defendant, respectively, an opportunity to highlight their written submissions has violated the Plaintiff and 1st Defendant's constitutional right to Fair Hearing, is actually misconceived and anchored on quick sand. Further and in addition, the Complaints under reference amounts to and constitutes a Red-herring.

270. To buttress the exposition that the Right to Fair hearing and the Due Process of the law takes different perspectives/ nuances; albeit with an unreducible minimum, it is worthy to take the ratio decidendi in the decision in the holding of case of Kisumu County Assembly vs The Clerk Kisumu County Assembly (2015)eKLR, where the Court of Appeal stated and held thus;

> 72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
>
> 73. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in Kanda v. Government of Malaya
>
> > "If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

271. In my humble albeit considered view, the Plaintiff and the 1st Defendant and their respective counsel, were afforded the requisite opportunity to canvass the various preliminary objections vide written submissions and thereafter, same indeed proceeded to and filed very elaborate/ Comprehensive submissions, capturing the issues which were alluded at the foot of the Preliminary objections.

272. Secondly, it is also not lost on the court that on the 12th October 2023; the court made express and explicit orders albeit in the presence of all the advocates herein. To be able to understand the nature and import of the orders that were made by the court, it is instructive to reproduce same verbatim.

273. For brevity, the orders are as hereunder;

i. The notice of preliminary objections filed by and on behalf of the Plaintiff/Respondent and on behalf of the 1st Defendant/Respondent, respectively, shall be heard on priority basis and in any event before the directions and hearing of the pending applications, if at all.

ii. Furthermore, the two sets of preliminary objections, details in terms of clause (i) hereof, shall be canvased by way of written submissions to be filed and exchanged by the parties.

iii. The Plaintiff/Respondent and the 1st Defendant/Respondent shall file their written submissions if any and the same to be filed and served within four (4) days hereof.

iv. Thereafter, the adverse parties, namely the Applicant and the Proposed Interested Party Applicant and the 2nd Defendant/Respondent shall file and serve their written submissions if

any, and same to be filed and served within four (4) days from the date of serve by the Plaintiff/ Respondent and the 1st Defendant/Respondent.

v. The parties are not limited to the number of pages as pertains to the submissions; however, there shall be no highlighting of the submissions once filed and served.

vi. The matter shall be mentioned on the 24th October 2023 to ascertain compliance with the directions of the court and thereafter to fix a date for ruling on the preliminary objections filed.

vii. Costs shall abide the outcome of the preliminary objection.

274. From the explicit terms of clause (v) of the orders of the court, all the Parties and their respective advocates fully understood that there was going to be no highlighting for purposes for proportionate, just and expeditious hearing and disposal of the named Preliminary objections.

275. In any event, it is worth stating that none of the advocates, who were present before the court, filed any application for Review and/or variation of the orders, [whose details have been alluded to in the preceding paragraph]. Consequently, the orders under reference remained on record and were thus binding not only on the parties but also on the court. [See the holding in the case Flora N. Wasike versus Desterion Wamboko (1988) eklr; on the import of Orders made in the process of Advocates for the Parties]

276. Lastly, it is also worthy to state that even though Parties and their legal counsel are entitled to audience before the Honourable court and to ventilate their respective clients cases, it cannot be taken that such advocates shall thereafter take control of the court and run the affairs of the court at their pleasure, without due regard to the provisions of Section 1A and 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.[Overriding Objectives of the Courts]

277. Before departing from this issues, it is appropriate to invite the attention of Learned Counsel for the Plaintiff and 1st Defendant and by extension of Parties who appeared before the court to the dictum of the case in Muchanga Investment Ltd vs Safaris Africa (Unlimited) Ltd (2009)eKLR, where the Court of Appeal stated and held thus;

> In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine.
>
> Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.

278. Quiet clearly, even though Parties and their legal counsel have a right to Fair Hearing, the enjoyment of the right to Fair Hearing does not denote that same must hold courts of law at ransom and thereby negate the Constitutional dictates underpinned vide Articles 10(2) and 159(2)(b) of *The Constitution* 2010.

Issue Number 3

Whether the intended Co-Plaintiff/Applicant has the requisite Locus standi to be joined as a Party in the instant suit.

279. The Intended Co-Plaintiff/Applicant has contended that same is a lawful and bona fide shareholder in the Plaintiff company and that by virtue of being a such shareholder, same therefore has a stake in respect of the subject matter and hence ought to be joined as a Co-Plaintiff.

280. If I hear the Intended Co-Plaintiff/Applicant well, same is contending that by the mere fact of being (sic) a shareholder in the Plaintiff company, same therefore is entitled to joined as Co-Plaintiff and thereafter be heard in the matter pertaining to and/or concerning (sic) ownership of the suit property.

281. Despite the contention by and on behalf of the intended Co-Plaintiff/Applicant, it is common knowledge that a shareholder and/or director of a company are separate and distinct entities from the company. In this regard, where the dispute touches on and concerns the interest of the company, it is only the company that can sue and/or be sued.

282. Put differently, no director or shareholder, can in his individual capacity or otherwise purport to mount and generate a suit which touches on and concerns the interest of the company unless the suit in question is a derivative suit, which is not the case beforehand.

283. To underscore the foregoing position of the law, it is appropriate to recall and reiterate the established/ hackneyed position vide the case of Salmond vs Salmond (1897) AC page 22, where the court stated and held thus;

> " The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them not are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act...When the memorandum is duly signed and registered though there be only seven shares taken, the subscribers are a body corporate "capable forthwith" to use the words of the enactments, "of assuming all the functions of an incorporated company"

284. Additionally, the legal position enunciated in the case of Salmond vs Salmond (supra) was repeated and reiterated in the case of Omondi vs National Bank Ltd (2001)eKLR, where the court held and stated thus;

> As regards whether the plaintiffs have locus standi to institute this suit, I am in complete agreement with the submissions made by the defendants' advocates that they do not. It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even when the directors happen to be the sole shareholders (see Salmon v a Salmon & Co Ltd [1897] AC 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors functus officio, it does not destroy the corporate existence and personality of the company. That appointment makes the directors unable to act in the name of the company but, as I understand the law, it does not make them in their capacity as members equally disabled. On that view, it was open to the two plaintiffs in the name of the company, but only in the name of the company, to institute the present proceedings which relate to alleged wrongs against the company qua company. But they definitely lacked legal competence to institute the suit in their own names

in their capacities as directors and shareholders of LVF. I would on this ground alone, order the suit struck out with costs to the defendants.

285. To my mind, the Intended Co-Plaintiff/Applicant herein whether as a shareholder or director, has no stake and/or interests in a dispute that touches on and concerns ownership of the suit properties, which are (sic), contended to have belonged to the Plaintiff or at all.

286. In any event, the mere fact that the Intended Co-Plaintiff/Applicant is a shareholder of the Plaintiff company (which position is disputed) does not ipso facto vests and/or confer in the intended Co-Plaintiff/Applicant the requisite Locus standi to be joined into the suit or at all.

287. Furthermore, there is no gainsaying that without the requisite Locus standi, the intended joinder, which was being sought by and at the instance of the Intended Co-Plaintiff/Applicant, becomes moot and in any event misconceived.

288. Suffices it to adopt and reiterate the dictum of the court in the case of In Alfred Njau & Others v City Council of Nairobi [1982-88] IKAR 229, where the court stated and held as hereunder;

> " Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ..."
>
> The court proceeded to state:
>
> "To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

289. Quiet clearly and to my mind, the Intended Co-Plaintiff/Applicant, has no demonstrable interests in the suit and by extension the suit properties, to warrant his intended inclusion in the suit, either as claimed or at all.

290. Simply put, the Intended Co-Plaintiff/Applicant is divested of the requisite Locus standi, without which, the Intended Co-Plaintiff/Applicant cannot be heard, even on whether or not same has a case worth listening to.

Issue Number 4

Whether the Intended Co-Plaintiff/Applicant, who was not a Party to the suit as at the time of withdrawal thereof can seek to set aside the orders which were made on the 27th September 2023.

291. Before venturing to discuss the issue herein, it is worthy to note that the instant suit was filed and/or lodged by the Plaintiff herein as against the two Defendants and not otherwise. For coherence, the Intended Co-Plaintiff/Applicant was not a Party in any manner whatsoever.

292. Furthermore, it is also common ground that by the time the instant suit was marked as withdrawn following the adoption and endorsement of the Notice of withdrawal on the 27th September 2023, the Intended Co-Plaintiff/Applicant had not been joined into the proceedings or otherwise.

293. Arising from the foregoing, there is therefore no gainsaying that the by the time the suit was being withdrawn, the Intended Co-Plaintiff/Applicant was not a Party to the suit and thus was neither privy to nor affected by the orders of the Honourable court made on the 27th September 2023.

294. Be that as it may, the Intended Co-Plaintiff/Applicant has now filed the instant application and same is seeking to be admitted as a Co-Plaintiff and simultaneously to have the orders of withdrawal of the suit set aside and/or vacated.

295. From the face of the application by and on behalf of the Intended Co-Plaintiff/Applicant, two[2] issues therefore arise and which merits mention and discussion. Firstly, there is the question whether the Intended Co-Plaintiff/Applicant can be joined in a suit that is non-existent, taking into account that the instant suit stands withdrawn pursuant to the orders made on the 27th September 2023.

296. To my mind, a Party, the Intended Co-Plaintiff/Applicant not excepted is at liberty to file or mount a suitable application for joinder in whatsoever capacity, provided however that there is an existing suit, to which the joinder can be made and not otherwise.

297. Additionally, there is no gainsaying that the purpose of the joinder, whether as a Co-Plaintiff, Co-Defendant, Interested Party or necessary party, can only be done and/or undertaken with a view to enabling the court to effectively and effectually determine all the issues in controversy. Instructively, the theme for the Intended joinder is therefore to facilitate determination of some outstanding issues.

298. To be able to appreciate the import and purposes of joinder, it is appropriate to reproduce the provisions of Order 1 Rules 10(2) of the Civil Procedure Rules, 2010, which underpins the law as pertains to Joinder of Parties.

299. Same are reproduced as hereunder;

> 10. Substitution and addition of parties [Order 1, rule 10.]
>
> (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
>
> (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

300. Suffice it to observe that the Application for joinder can only be made at any stage of the proceedings; which denotes that there must be in subsistence proceedings and not otherwise. Invariably, the proceedings in a suit are brought to a close upon entry of Judgment or in this case, following the withdrawal of the suit.

301. On the other hand, the issues in controversy between the Parties and for which the intended joinder is meant to help resolve are also brought to a close and terminated, either upon endorsement of Judgment or withdrawal of the suit. Henceforth, one cannot legally speak of any substantive issue in dispute worthy of determination, to warrant joinder.

302. In a nutshell, it is my humble view that the current Application which is seeking joinder of the Intended Co-Plaintiff/Applicant, when there is no subsisting suit, is not only misconceived, but same is legally untenable and thus bad in law.

303. To buttress the exposition of the law alluded to in the preceding paragraphs, it is appropriate to take cognizance of the ratio decidendi in the case of Pravin Bowry versus John Ward & another [2015] eKLR, where the Court of Appeal held thus;

> Order I rule 10 of the Civil Procedure Rules provides for substitution and addition of parties to suits. Under rule 2 thereof the court may at any stage of proceedings either upon or without the application of either party and on such terms that may appear to the court to be just order that the name of any party improperly joined whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to be added. Rule 4 provides for the manner in which the plaint is to be amended where a defendant has been added to the suit.

304. Similarly, the timeline for such an application and the purpose of joinder of a Party was also adverted to and illuminated by the Court of Appeal in the case of Civicon Limited v. Kivuwatt Limited & 2 others [2015] eKLR (Civil Appeal No. 45 of 2014) identified that the provisions of Order I of the Civil Procedure Rules call for the exercise of discretion and had this to say of the same:

> " Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined."
>
> .....
>
> From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial."

305. Remarkably, what flows from the ratio decidendi elaborated upon the decision (supra) is to the effect that the application for joinder can only be made or mounted at any stage of the proceedings, albeit during the subsistence of the suit and not otherwise.

306. Additionally, the incidental issue that is also discernable from the elaborate exposition of the law by the Honorable Court of Appeal is that the joinder must be intended to facilitate the determination or resolution of an issue in controversy between the Parties.

307. The second aspect that arise relates to whether the Intended Co-Plaintiff/Applicant, who was not a Party to the suit, can apply to set aside the orders adopting the withdrawal of the suit and seeking for reinstatement thereof.

308. I beg to point out that the orders which were made on the 27th September 2023, were only binding on the Parties to the suit and thus it is the Parties to the suit, and not otherwise. Consequently, it is the said Parties who can apply to set aside the said orders and by extension seek reinstatement of the suit.

309. In this respect, I hold the opinion that the Intended Co-Plaintiff/Applicant, who was not a Party to the suit, is not seized of the requisite mandate to approach the court and seek, inter-alia, reinstatement of a suit, wherein same was not a Party in the first instance.

310. In view of the foregoing, it must have became crystal clear that the Application by the Intended Co-Plaintiff/Applicant; seeking to be joined as a Co-Plaintiff and also seeking for orders for reinstatement of the suit, is indeed stillborn and otherwise an abuse of the Due process of the court.

Issue Number 5

Whether the Application by and on behalf of the Applicant, is prohibited by the Doctrine of Res Sub-Judice.

311. The Learned counsel for (sic) the Plaintiff and the 1st Defendant, respectively, filed elaborate submissions contending that the application before the court and which are dated the 26th September 2023, respectively, are sub-judice insofar as the issues alluded to at the foot of the named applications was pending hearing and determination before the high court vide HCCOM No. E488 of 2022.

312. Additionally, it is worth recalling that the submissions touching on and concerning the relevance and applicability of the doctrine of res-sub-judice, were premised on a Preliminary objection and not on a formal application, as envisaged by dint of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

313. Pertinently, it is important to point out and underscore that where the contention based on res-sub-judice is mounted on the basis of a formal application attached with a supporting affidavit, then the court is obligated to examine the pleadings, documents and (sic) the proceedings filed in respect of the former case and to contrast same with the pleadings and documents, if any, in the second case. Quiet clearly, the court confronted with an application is at liberty to interrogate the evidence and documents.

314. Conversely, a court faced with a Preliminary objection adverting to and concerning sub-judice, like in the instant case, has a very limited scope and territory. For good measure, a court faced with preliminary objection is not at liberty to look at the affidavit filed by the person raising the Preliminary objection and the Exhibits attached thereto.

315. To my mind, to do so would be seeking to predicate a preliminary objection on evidential matters, which would require due investigations and interrogation, obviously in the usual manner. Such and endeavor is not acceptable, or at all.

316. Further and in any event, the law as pertains to the raising of Preliminary objections is well settled and certainly, well beaten. Suffice it to underscore that are a legion of decisions/ caselaw to this effect.

317. To start with, there is the dictum in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696; where at page 700 paragraphs D-F; Law JA [as he then was] had this to say:

> ....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

318. Furthermore, our Supreme Court, has also had an occasion to speak to the law pertaining to the raising of preliminary objections. In this respect, two decisions suffice to illustrate and elaborate the point.

319. Firstly, there is the decision in Hassan Ali Joho & Another vs Suleiman Saaid Shaban & 2 Others (2014)eKLR, where the Supreme Court stated thus;

> (31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:
>
> > "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

320. The other decision where the supreme court of Kenya had occasion to underscore the law on raising of preliminary objection and the ingredients attendant thereto is the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR, where the court held and stated thus;

> (14) As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, in the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:
>
> > "To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:
> >
> > 'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side

are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."

(15) The Joho decision has been subsequently cited by this Court in Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR; and in Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

> "Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR).

321. Having evaluated and taken into account the erudite learning discernable from the various decisions, which the court has alluded to in the preceding paragraphs, it is imperative to state that a court confronted with a preliminary objection must only look at the pleadings and documents filed by the adverse Party, (namely, the party against whom the preliminary objection is raised) and thereafter proceed on the basis that the factual position adverted to in the pleadings and documents by the adverse Party are assumed to be correct.

322. Suffices it to underscore that the moment the person raising and canvassing the preliminary objection disputes the veracity and/or correctness of the facts by the adverse Party, then a preliminary objection cannot be raised unless it is one that is purely based on a point of law; which is not the case herein.

323. Additionally, having taken into account the golden thread that runs across the various decisions handed down by the Supreme Court of Kenya in respect of what constitutes a preliminary objection and how a preliminary objection can be canvassed, I am afraid that the invitation by Learned counsel for the 1st Defendant that I should venture to take into account various facts, pleadings and documents which were filed before the High court vide HCCOM No. E488 of 2022, is erroneous and not informed by the settled position of the law.

324. In my humble view, I must decline the invitation to walk into the controversial facts, which have not been settled and in any event, which the Honorable court [read, High Court] stated shall require due investigations in a plenary hearing.

325. Secondly, it is also important to point out that the application before this court relates to reinstatement of (sic) a suit filed before the Environment and Land court, which was marked as withdrawn following the adoption and endorsement of the Notice of withdrawal on the 27th September 2023.

326. To the extent that the suit which was withdrawn was filed before the Environment and Land court, no other court save for the Environment and Land court can entertain such an application for reinstatement, unless there is an Appeal to the Honorable Court of Appeal, which will then be exercising an appellate mandate.

327. Notably, it is also worthy to point out that for the Doctrine of res-sub-judice to apply, it must be shown and demonstrated that there is a similar application for reinstatement of the instant suit, which has since been filed before the High Court and which is pending hearing and determination.

328. However, it is worth noting that insofar as the matter herein touched and concerned ownership and title to land; no application for reinstatement of a suit which was filed before the Environment and Land court, can legally be filed before the High Court. See Article 162(2)(b) as read together with Article 165(3) (5) of *the Constitution* 2010.

329. On the other hand, I must point out that none of the advocates for (sic) the Plaintiff and the 1st Defendant, respectively, pointed out to this court about the existence of an application the reinstatement of this particular suit, which has since been filed before the Honorable High Court or at all.

330. Surely, before one can invoke and canvass the doctrine of res-sub-judice, it behooves such a person to demonstrate that there is indeed a similar suit (read application), like in this case, for setting aside and expunging the Notice of change of advocate as well as the Notice of withdrawal of suit; and similarly to demonstrate that the Parties thereto are the same as the ones in respect of the subsequent suit/matter.

331. Without belaboring the key ingredients that underpin the doctrine of res-sub-judice, it suffices to cite and reiterate the succinct exposition of the law by the Supreme Court of Kenya in the case of Kenya National Commission on Human Rights vs The Attorney General; IEBC & 16 Others (Interested Parties) (2020)eKLR, where the court stated thus;

> (67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.
>
> A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

332. In short, I come to the conclusion that the plea of res-sub-judice which was raised and canvassed by (sic) the Plaintiff and the 1st Defendant, respectively, is legally untenable and does not apply to the instant suit and in particular the application dated the 26th September 2023; by the Applicant.

Issue Number 6

Whether the application by the Applicant is barred by the Doctrine of Res-Judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

333. Other than the plea of res-sub-judice, which has been discussed in the preceding paragraphs, (sic) the Plaintiff and the 1st Defendant, respectively, also adverted to and highlighted the Doctrine of Res-Judicata.

334. It was the contention by and on behalf of (sic) the Plaintiff and the 1st Defendant, respectively, that the two applications filed before the Honorable Court, are caught up by the doctrine of res-judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

335. Before venturing to dissect the submissions by the (sic) the Plaintiff and the 1st Defendant, respectively, it is worth recalling that what is before the court is an application to expunge the impugned Notice of change of advocates; Notice of withdrawal of suit and thereafter to reinstate the suit, which was marked withdrawn on the 27th September 2023.

336. Consequently and in my humble view, for one to successfully prosecute the plea of res-judicata, it must be demonstrated that a similar application has since been heard and determined by a court of competent jurisdiction and in a matter that involves the same Parties or their Legal representatives.

337. Back to the instant matter. I must underscore that neither counsel for the Plaintiff nor 1st Defendant pointed out to the court of the existence of a previous application touching on and concerning the question of expunging (sic) the Notice of change of advocates filed by M/s Hamilton Harrison and Mathews and the incidental notice of withdrawal of the suit herein.

338. At any rate, I am not alive to any such application, which has been filed and canvassed elsewhere, given the docket system adopted and being applied by the Environment and Land court at Milimani, where each Judge is assigned own cases and must therefore baby-sit same, unless otherwise directed.

339. Furthermore, it is imperative to state that a plea of res-judicata will also involve examination, consideration and interrogation of (sic) the pleadings, documents and decision of the previous court and comparison with the pleadings and issues raised in the second case, before the court can proclaim that indeed the Second case is barred by the doctrine of res-judicata.

340. Without belaboring the foregoing observation, it suffices to adopt and reiterate the succinct pronouncement by the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the court held thus;

> Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case¾to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.59.That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012) eKLR, thus: The courts must always be vigilant to guard 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 of 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....."

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a)There is a former Judgment or order which was final; b)The Judgment or order was on merit;c)The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and)There must be between the first and the second action identical parties, subject matter and cause of action.(See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR)

341. Arising from the ratio decidendi which have been cited in the preceding paragraphs, what comes to the fore is the fact that res-judicata cannot be agued and/or canvassed on the basis of preliminary objections insofar as the court is called upon to undertake due examination and interrogation of the pleadings, proceedings and judgment, if any, in the previous case and contrast them with the pleadings in the subsequent case, before making a determination.

342. To my mind, the nature of examination and interrogation that a court is called upon to undertake before making a proclamation as pertains to the plea of res-judicata, does not allow such a plea to be anchored on a Preliminary objection, unless the pleadings by the adverse Party admit the existence of such set of facts and a previous determination on similar issues, which is not the case in the matter before this court.

343. Lastly, it is also not lost on this Honourable court that the ruling by Hon. Justice Majanja J, rendered on the 26th July 2023 which anchors the plea of res-judicata, is similarly not on the question of the issues before this court.

344. To be able to understand the import of the ruling under reference, it is worthy to reproduce the pertinent facts alluded to thereunder. For good measure, same have been highlighted at the foot of paragraph 2.9 of the submissions by Learned counsel for the 1st Defendant dated 16th October 2023.

345. Same are reproduced as hereunder;

"No prima facie evidence has been adduced to demonstrate that Esmail acted beyond the powers and rights granted to him as a trustee shareholder in calling for the annual general meting of LDL. Since Zeevi has not established a prima facie case with a probability of success, the application for an interlocutory injunction must fail.

This is not a case that is clear cut thus warranting the intervention of mandatory orders. Zeevi must establish the nature and extent of the trust of shares in light of the defenses that has been raised by Esmail. I therefore decline the entreaty to grant a mandatory injunction"

346. Remarkably, it is so apparent that the Learned Judge of the High Court was dealing with an application for the grant of interlocutory orders of temporary and mandatory injunction in a suit filed by Gad Zeevi versus Akber Esmail & James Abiam Mugoya Isabirye.

347. In my humble albeit considered view, I do not understand how the named ruling by Hon. Justice Majanja, Judge; under reference can premise and/or anchor a plea or res-judicata or at all.

348. Similarly, I come to the conclusion that the plea of res-judicata is misconceived and was otherwise propagated to (sic) camouflage the trues issues in controversy in the matter beforehand.

Issue Number 7

Whether the court is Functus Officio.

349. It is instructive that the advocates for (sic) the Plaintiff and the 1st Defendant respectively, have also contended that upon the adoption and endorsement of the Notice of withdrawal, the entire suit came to an end and thus this court became Functus officio.

350. Nevertheless, it is impetrative to recall that the application before the court seeks to interrogate the propriety, validity and legality of (sic) the Notice of change of advocates filed by M/s Hamilton Harrison & Mathews and the consequential Notice of withdrawal of suit, which was ultimately adopted by the court.

351. In my humble view, the issues at the foot of the application before the court is not one that seeks to invite the court to have a second bite on the merits of the decision that was made by the court.

352. Simply put, the Honourable court is not being called upon to re-engage with the merits of the case, but to discern/ ascertain whether the process leading to the (sic) Withdrawal of the Suit was (sic) illegal and thus void; or otherwise.

353. Certainly, the plea of functus officio, does not apply in respect of the issues raised at the foot of the current application and hence I am unable to accede to the invitation by and on behalf of counsel for (sic) the Plaintiff and the 1st Defendant, respectively.

354. To buttress my position, it suffices to adopt the ratio decidendi in the case of Telkom K Ltd versus John Ochanda (suing for and on behalf of 996 former employees of Telcom K Ltd) (2014) eKLR, where the Court of Appeal observed as hereunder;

> " The Supreme Court in Raila Odinga v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the learned author stated;
>
> ..."The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."
>
> The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd Vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;
>
> "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties.
>
> Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are

finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

355. From the dictum, which I have cited in the preceding paragraph, it is evident that the concept of functus officio only bars a court for re-engaging with the merits of a case, which has hitherto been determined, but however does not apply when the question/issues at hand relates to, inter-alia, setting aside or review of the Judgment/order and/or expunction of (sic) documents/pleadings, which are alleged to have been illegally filed or otherwise.

356. Consequently and in the premises, I hold the humble opinion that the plea of functus officio; that has been adverted to by Learned Counsel for (sic) the Plaintiff and the 1ST Defendant, respectively, is also inapplicable and in any event, irrelevant.

Final Disposition:

357. Having analyzed the various issues, which were itemized in the body of the Ruling herein, it is evident and apparent that the court has come to various conclusion(s) pertaining to and concerning the Preliminary objections which were raised by and on behalf of (sic) the Plaintiff and the 1st Defendant, respectively.

358. Similarly, it is also worthy to underscore that the court has also come to a conclusion as pertains to the application which was filed by and on behalf of the Intended Co-Plaintiff/Applicant and wherein same had sought to be joined as a Co-Plaintiff.

359. In the premises, I am therefore minded to and Do hereby make the following orders;

i. The Preliminary Objections by and on behalf of (sic) the Plaintiff and the 1st Defendant and pertains to the application by the Applicant be and are hereby dismissed.

ii. The Preliminary Objection by (sic) the Plaintiff and the 1st Defendant as against the application by the Intended Co-Plaintiff/Applicant be and are hereby allowed.

iii. Consequently, the Application dated the 26th September 2023; and filed by the Intended Co-Plaintiff/Applicant be and is hereby struck out.

iv. Costs of the preliminary objection as pertains to the Application by the Applicant be and are hereby awarded to the Applicant and the Second Defendant to be agreed upon and/or in default; to be taxed by the Deputy Registrar.

v. Costs of the Preliminary objection as against the Intended Co-Plaintiff/Applicant be and are hereby awarded to (sic) the Plaintiff and the 1st Defendant, respectively; and same to be agreed upon and/or be taxed by the Deputy Registrar.

vi. Costs of the Application by the Intended Co-Plaintiff/Applicant be and are hereby awarded to (sic) the Plaintiff and the 1st Defendant only.

vii. The Application dated the 26th September 2023; by the Applicant (the Application filed by M/s Echesa & Bwire Advocates LLP) shall proceed for hearing and disposed of on merits.

360. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Kiragu Kimani [Sc] for the Plaintiff.

Mr. James Ochieng' Oduol and Ms Marysheilla Onyango for the First Defendant.

Mr. Allan Kamau and Ms Fatma Ali for the Second Defendant.

Mr. Miller Bwire for the Applicant.

Ms Sharon Maiga for the Intended Co-Plaintiff/ Applicant.